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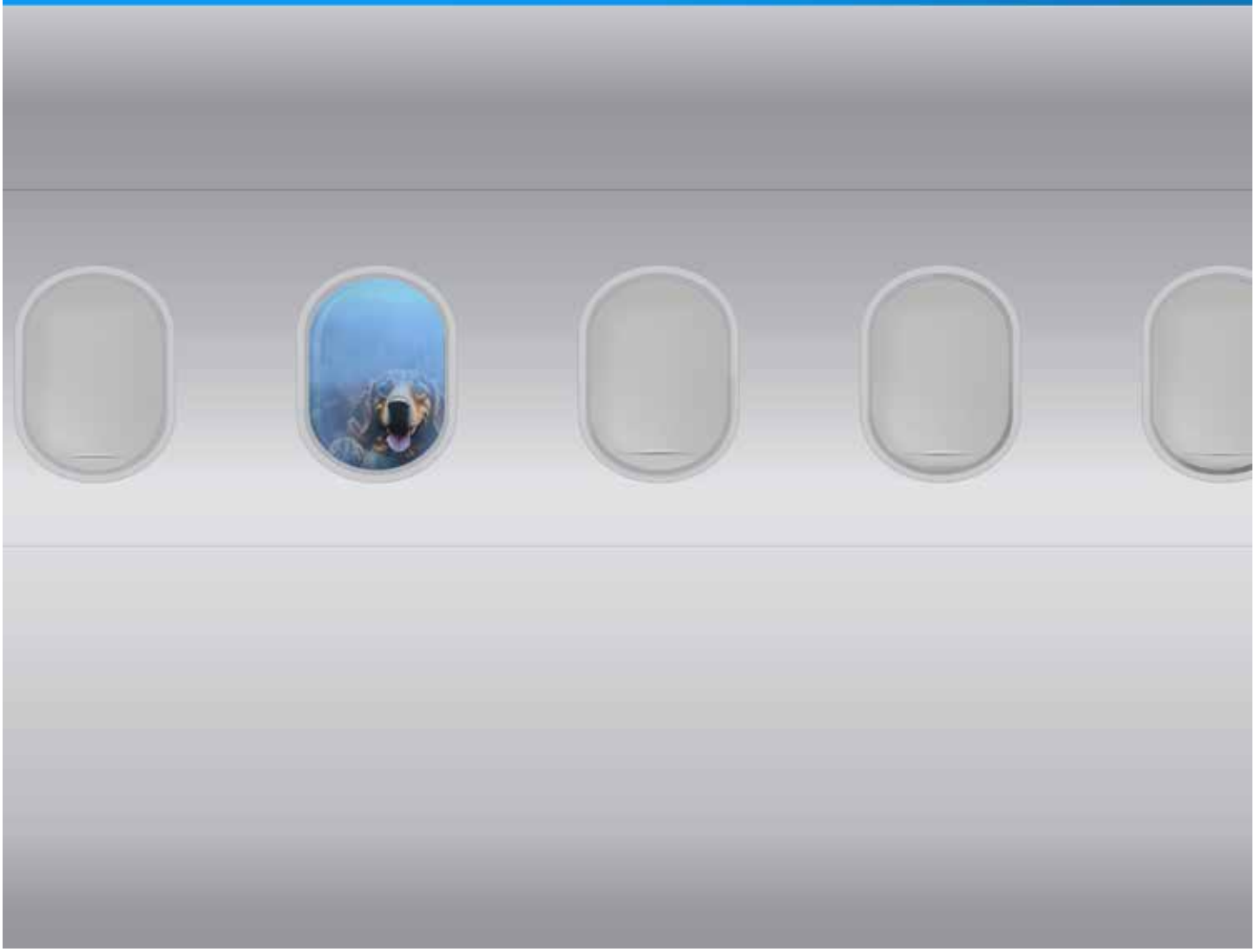
Flying With Fido: A Brief Survey of Federal Service Animal Law



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By: Michelle Villareal, Deputy City Attorney, League City, Texas

Every year it seems that more of us are relying on the benefits of "emotional support" creatures, bringing them into previously animal-free environments. While these companions, four-legged or otherwise, undoubtedly provide great benefits, many are not "service animals" for purposes of federal law. Our author explains the regulations governing animals on airlines and related statutory nuances.

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THE PREROGATIVE TO UNSEAT: REMOVING COUNCILMEMBERS FROM COUNCIL COMMITTEES

By: Stephen K. Postema, City Attorney Ret., Ann Arbor, Michigan and Jennifer A. Richards, Assistant City Attorney, Ann Arbor, Michigan

Most city councilmembers comport themselves in a productive and cooperative manner. Occasionally, however, the city or county attorney will be called upon to evaluate the prospects for redressing unprofessional or unethical behavior by a councilmember. One such action may be to remove the member from a committee post. A thorough understanding of the rules and ramifications is required.

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"WE'RE HIRING, WE JUST NEED YOUR SOCIAL MEDIA LOGINS AND PASSWORDS"

By: Laura S. Burton, Police Attorney, Gastonia, North Carolina

Checking a job applicant's social media activity can provide a wealth of information, potentially revealing troublesome behavior and helping to avoid future problems. But such an inquiry triggers statutory and even constitutional issues, and many jurisdictions prohibit searching through a job seeker's non-public online activity.

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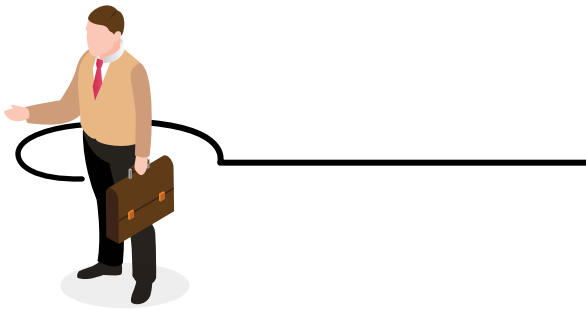

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EDITOR'S NOTE



BY: **ERICH EISELT**
IMLA Deputy General Counsel and Director of Legal Advocacy

The Times, They are A-Changin'

As most *Municipal Lawyer* readers will know, one of IMLA's significant benefits to members is our provision of amicus support. Primarily at the United States Supreme Court and the federal circuits, but also at state supreme courts and other appellate-level forums around the country, we file briefs articulating the interests of local government. That responsibility keeps us monitoring formative decisions and evaluating their potential impact on IMLA members.

This summer, on the last two days of its 2022-2023 Term, the Supreme Court issued a duo of landmark opinions whose consequences for local governments are still coming into focus. In one—*303 Creative*—the Court expanded the prerogative of business owners to decline providing services to would-be clients. While previous such assertions had been based on religious freedom, this case was brought with a much broader First Amendment free speech mission: to exempt expression itself from governmental interference. Thus, despite a public accommodation law to the contrary, website developer Lorie Smith need not produce a wedding site for a same-sex couple if she disagrees with such unions.

The implications of *303 Creative* are yet to be seen in state and local governments where decades of pro-civil rights measures have been enacted to assure equality in access to public accommodations. But the vector towards expansion seems clear. Commentators are already positing that, if web developers cannot be compelled to design websites conveying messages with which they disagree, why can't others whose services also involve "expression" similarly opt-out--and would objections to other types of union, such as interracial marriages, also be permissible grounds for refusing expressive services?

As consequential as *303 Creative* was, the Court's opinion a day earlier was similarly momentous. In *Students for Fair Admissions,* a pair of actions challenging race-based admissions policies at Harvard and the University of North Carolina, a now-familiar 6-3 majority held that affirmative action programs at higher education institutions violate the Fourteenth Amendment's Equal Protection Clause.

While its ultimate impact cannot yet be known, already evident is the prospect that *Students* could induce a tectonic shift in the way much of American society has operated for six decades. Whether in hiring, procurement, or basic workplace philosophies, the thinking that past race-based inequalities can be righted through racially sensitive remedial policies is already being challenged, and from many angles. Within weeks after *Students* was announced, a federal court applied analogous reasoning in scrutinizing the federal Small Business Administration's (SBA) 8(a) Program, which offers small disadvantaged businesses (SDBs) various benefits and federal contracting set-asides and sole-source awards. On July 19, 2023, the U.S. District Court for the Eastern District of Tennessee held, in *Ultima Services Corp. v. U.S. Department of Agriculture,* that the SBA's use of a "rebuttable presumption" of social disadvantage for certain minority groups could not survive strict scrutiny. As of August 23, 2023, the SBA had temporarily ceased accepting applications for the 8(a) Program.

Closer to home may be the litigation instituted in late August against two massive law firms – Perkins Coie and Morrison & Foerster– because they reserve certain "diversity fellowships" exclusively for minority lawyers. As the plaintiffs in *American Alliance for Equal Rights v. Perkins Coie LLP*, no. 23-01877 (Aug. 23, 2023 N.D. Tex.) put it:

> Perkins Coie has been racially discriminating against future lawyers for decades. The firm's "diversity fellowships" for 1Ls and 2Ls exclude certain applicants based on their skin color. These prestigious positions are six-figure jobs that include five-figure stipends. Yet applicants do not qualify unless they are "students of color," "students who identify as LGBTQ+," or "students with disabilities." . . .In case Perkins needed another reminder, [*Students*] reaffirms that "[e]liminating racial discrimination means eliminating all of it."

The Court's invalidation of affirmative action will also put pressure on DEI programs nationwide, in governments and the private sector. Companies with diversity programs such as Amazon, Mars, Nike, and Nordstrom are already the subject of controversy. And existing challenges to requirements by Nasdaq and the State of California that corporate boards exhibit diversity will only accelerate in the wake of *Students*.

The decisions are barely two months old, but IMLA has already hosted several member discussions to analyze their implications for local government. From all appearances, those conversations have only just begun.

We look forward to further dialogue on these topics and many more at our upcoming Annual Conference in La Quinta later this month.

Best regards-

Erich Eiselt

PRESIDENT'S LETTER



BY: LORI GRIGG BLUHM
City Attorney, Troy, Michigan
and IMLA President

Gratitude

I was fortunate to be exposed to IMLA early in my municipal law career, and I continue to proclaim the good news so that others will have the same advantages. A government law practice is very challenging, due to polarizing politics, the majority's lack of civics knowledge, the ramifications of the dwindling of news coverage, and the increasing dependency upon unvetted social media as a primary source for news and information for many. There is a seemingly unprecedented recent loss of life and property due to wildfires, floods, hurricanes, extreme heat, and other severe weather events. Governmental resources are diminishing at an alarming rate. Coupled with these challenges, there is also a loss of experienced local government law professionals, in what has been termed the "silver tsunami."

A robust IMLA membership enhances our IMLA experience, and we need all of you to spread the word to other attorneys that practice in this unique specialty, and who would benefit from active IMLA involvement. The IMLA website provides us with some good elevator speech material for our non-profit organization that was formed in 1935: It states: "Our mission is to serve local government lawyers and to advance the interests of local government law locally, nationally, and internationally." It aptly describes the challenging characteristics of our membership as follows:

Local governments interact with people in their daily lives more intimately than any other form of government. Attorneys representing local governments face unique challenges that lawyers in the private sector do not, and must stay informed about ever-changing and expanding legal problems. IMLA provides a set of tools for local government attorneys assisting them in formulating and applying municipal laws while anticipating and reacting to changes in federal and state law impacting local governments.

Our work has far reaching implications, and we should not be shy boasting about our membership's superior credentials. We are expected to have cutting edge solutions to constantly evolving problems. Municipal officials encourage us to be creative but also conservative, and one great avenue for resolving this ever- present dichotomy is to rely on IMLA and the knowledge and experiences of its members. Other professional organizations have demonstrated their respect and trust for IMLA, and have partnered with IMLA in the formulation of our new Local Government Legal Center coalition, where IMLA assumes responsibility for local government education and advocacy, and in exchange receives financial contributions from other founding members including the National Association of Counties, National League of Cities, and the Government Finance Officers Association. IMLA is constantly evolving, guided by the needs and interests of our membership, and your input and suggestions and volunteerism are is welcomed.

Since this is my last President' Letter, I want to thank all of you who make IMLA the premier organization that it is. Thank you to the fantastic IMLA Board Members, who are passionate about propelling IMLA forward to even higher levels. I am also so grateful for the IMLA Past Presidents and IMLA Board Members, whose tireless efforts have led to the current triumphs. Sincerest appreciation is extended to the other IMLA leaders, including the Regional Vice Presidents and State Chairs, who have achieved enviable success in recruitment and retention of members. It is impossible to express enough appreciation for our Sponsors, many of whom have provided support for years. Thank you to ALL of our Committee and Working Group Chairs and members, who selflessly offer their time and talents towards the betterment of IMLA members and the municipal law practice as a whole. Special thanks to all of the brilliant speakers at IMLA educational offerings and all of our wonderful writers, who constantly demonstrate the superior intellect inherent in government law practitioners. Extraordinary thanks are owed to the fabulous IMLA staff professionals- Executive Director Amanda Karras, Deputy General Counsel Erich Eiselt, Assistant General Counsel Deanna Shahnami, Associate Counsel Ravinder Arneja, Deputy Executive Director Jenny Ruhe, Marketing Director Caroline Storer, Of Counsel Chuck Thompson, Director of Event Information Trina Shropshire Paschal, and Membership Coordinator Carolina Moore, all unsung heroes who constantly demonstrate excellence in their respective fields, and inspire many of the organizational successes. I am so pleased that Wheeling West Virginia City Solicitor Rose Humway-Warmuth will assume the IMLA Presidency, since she has been a very valued member and frequent contributor. I would be remiss if I didn't thank my very supportive bosses, the City of Troy City Council members, all of which prioritize and epitomize civic and servant leadership. I am especially indebted to my stellar legal staff. I have been supported by my spectacular Michigan municipal law colleagues. I am also appreciative of the IMLA membership- past, present, and future. Many of you have provided insight, inspiration, commiseration, and friendship. The practice of government law is challenging but rewarding, and I'm grateful and humbled to be in the midst of such exemplary colleagues. ML

Flying with Fido: A Brief Survey of Federal Service Animal Law

By: MICHELLE VILLAREAL,
Deputy City Attorney, League City, Texas



Introduction

Service animals bring comfort and security to millions of Americans. As more of us rely on these creatures, they have increasingly become the subject of regulation. This article will explore how service animals are defined and regulated by the Americans with Disabilities Act,[1] the Fair Housing Act,[2] Section 504 of the Rehabilitation Act,[3] and the Air Carrier Access Act.[4] I analyze each law by determining how each defines "disability" and "service animal," how each applies in common situations and the general prohibitions addressed in each.

1. Service Animals under the ADA. Under the Americans with Disabilities Act ("ADA"), Congress granted protections to "qualified individuals with disabilities" so that they are not excluded from employment, public services, and/or public accommodations.[5] Under the ADA, a "disability" is defined a physical or mental impairment that substantially limits one or more major life activities of an individual, a record of such an impairment; or being regarded as having such an impairment.[6] The ADA's protections are divided into three sections: (1) Title I regulates employment activities;[7] (2) Title II regulates state and local governments (and their facilities);[8] and (3) Title III regulates private entities that provide public accommodations.[9]

Title II and Title III of the ADA define a "service animal" as a dog that is "individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."[10] Other species of animals (except miniature horses), whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition.[11] A service animal can be any breed and any size of dog regardless of whether a municipality bans certain dog breeds.[12] While not included in the definition of "service animal," the ADA also includes miniature horses in its regulations regarding service animals.[13] An animal in training, however, does not qualify as a service animal under the ADA.[14] In addition to the species limitation, a service animal must be under the control of its handler.[15] To be under "control," the service animal must be harnessed, leashed, or tethered, unless the individual's disability prevents using these devices or these devices interfere with the service animal's safe, effective performance of tasks.[16] In that case, the individual must maintain control of the animal through voice, signal, or other effective controls.[17]

Generally, ADA regulations related to service animals can be said to apply to places of public interactions and accommodations.[18] Under Title II specifically, individuals with disabilities may be accompanied by their service animals in all areas of a public entity's facilities where members of the public, participants in services, programs or activities, or invitees, as relevant, are allowed to go.[19] This applies to all public buildings of state and local governments; including administration buildings, meeting spaces, parks, schools, colleges, etc.

Under Title III specifically, individuals with disabilities are permitted to be accompanied by their service animals in all areas of a place of public accommodation where members of the public, program participants, clients, customers, patrons, or invitees, as relevant, are allowed to go.[20] This applies to stores, theaters, stadiums, groceries, shopping centers, museums, attorneys' and other professionals' offices, hospitals, bus and train depots, zoos, privately owned public transportation, recreational places, and similar locations that serve the public. People using a service animal may not be treated differently or charged a fee different from patrons without animals.[21] Regarding restaurants and bars, a service animal must generally be allowed in public areas even if state or local health codes prohibit animals on the premises.[22] That being said, seating, food, and drink are provided for customer use only and businesses are not required to allow an animal to sit or be fed at the table.[23] A

business is not also required to care for or supervise a service animal.[24]

Under the ADA, only two questions can be asked of an animal's handler by the public: (1) Is the animal required because of a disability; and (2) what specific work or task the animal has been trained to perform.[25] Examples of work or tasks include, but are not limited to, assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors.[26] A public entity (under Title II) or a public accommodation (under Title III) may not require proof that the animal has been trained.[27]

While the ADA provides for the inclusion of service animals in most public areas, there are instances where service animals may be excluded. A service animal could be excluded if its presence would "fundamentally alter" the nature of the goods, services, programs, or activities provided to the public.[28] Examples of a fundamental alteration due to a service animal include the presence of an animal in a restricted area of a boarding school dormitory reserved specifically for students with allergies to dog dander or at a zoo, where the animals on display would be agitated by the presence of a dog. But a single person's dog allergies or someone's fear of dogs is probably not sufficient to fundamentally alter an environment in such a way as to warrant expulsion.[29]

A service animal could also be excluded if the dog is not under the control of its handler. Part of the definition of a service animal is that it remains under the control of the person with the disability.[30] To be "under control", the service animal must be harnessed, leashed, or tethered while in public places (and not roam freely) unless these devices interfere with the service animal's work or the person's disability prevents use of these devices.[31] "Under control" also means that a service animal should not be allowed to bark repeatedly in a lecture hall, theater, library, or other quiet place.[32]

While public entities may not require that service animals be certified as service animals, a public entity can still enforce local animal control or public health requirements.[33] So, if a public entity has dog registration and vaccine requirements and the service animal is not compliant with such requirements, the service animal may be excluded until such time as there is compliance.

Under Title III (public accommodations) of the ADA, private clubs and religious entities may exclude service animals if they so wish.[34]

As mentioned above, the ADA allows the inclusion of miniature horses in certain instances.[35] The regulations set out four assessment factors to assist entities in determining whether miniature horses can be accommodated in their facility.[36] The assessment factors are (1) whether the miniature horse is housebroken; (2) whether the miniature horse is under the owner's control; (3) whether the facility can accommodate the miniature horse's type, size, and weight; and (4) whether the miniature horse's presence will not compromise legitimate safety requirements necessary for safe operation of the facility.[37]

2. Service Animals under FHA.

On April 11, 1968, President Lyndon Johnson signed the Civil Rights Act of 1968, which expanded on previous acts and prohibited discrimination concerning the sale, rental, and financing of housing based on race, religion, national origin, sex, (and as amended) handicap and family status.[38] Title VIII of the Act is also known as the Fair Housing Act of 1968 (FHA).[39] The FHA covers most housing.[40] In very limited circumstances, the Act exempts owner-occupied buildings with no more than four units, single-family houses sold or rented by the owner without the use of an agent, and housing operated by religious organizations and private clubs that limit occupancy to member.[41] The Fair Housing Act (FHA) makes it unlawful for a housing provider[42] to refuse to make a reasonable accommodation that a person with a handicap may need to enjoy and use a dwelling.[43] Under the FHA, we use the word "handicap" in place of "disability" but the terms have the same meaning.[44] A "handicap" is defined as a physical or mental impairment of a person which substantially limits one or more major life activities.[45] A reasonable accommodation under the FHA must include an assistance animal in certain circumstances.[46]

There are two types of assistance animals: (1) service animals; and (2) other trained or untrained animals that do work, perform tasks, provide assistance, and/or provide therapeutic emotional support for individuals with disabilities (sometimes referred to as a "support animal").[47] The definition of service animals under the FHA is the same as under the ADA and only includes trained dogs.[48] Support animals, however, have a broader definition and can include animals commonly kept in a household or unique animals.[49] Animals commonly kept in an household include dogs, cats, small birds, rabbits, hamsters, gerbils, other rodents, fishes, turtles, or other small, domesticated animals that are traditionally kept in the home for pleasure rather than for commercial purposes.[50] Reptiles (other than turtles), barnyard animals, monkeys, kangaroos, and other non-domesticated animals are not considered common household animals.[51] An individual requesting to keep a unique type of animal that is not commonly kept in households as described above, has the substantial burden of demonstrating a disability-related therapeutic need for the specific animal or the specific type of animal.[52]

Once an individual makes a request for a reasonable accommodation for an assistance animal, there are only certain questions that a housing provider is allowed to ask: (1) if the animal is required because of a disability; and (2) what work or task the animal has been trained to perform.[53] If the first question is ascertainable and answered in the affirmative and the requestor identifies a specific task, then the housing provider must allow

Continued on page 8

the reasonable accommodation. For support animals that are unique (not commonly kept in households), the requestor bears the substantial burden of demonstrating a disability-related therapeutic need for the animal.[54] If the requestor's disability is not readily observable or it is not clear that the animal does work to assist the requestor's disability, a housing provider is permitted to request information that supports that the requestor seeking the accommodation has a disability or that the animal does work with respect to the requestor's disability.[55] Such information could include a determination of disability from a government agency, receipt of disability benefits, a housing voucher received because of a disability, information from a licensed health care provider, etc.[56]

Once a requestor provides reasonable support of a disability and the need for the assistance animal relative to the disability, the housing provider must allow the reasonable accommodation. Once an assistance animal is allowed under the FHA, the housing provider must waive any pet deposit.[57] But while the pet deposit is waived, the requestor is still liable for any damage done by the assistance animal.[58] A housing provider may not limit the breed or size of the assistance animal, but it is not required to accommodate an animal that poses a threat to health or safety.[59] In addition, as this would be an assistance animal and not a pet, any pet rules would not apply to the animal.[60] As with the ADA, religious entities and private organizations are exempted from the requirements of the FHA.

3. Service Animals under the ACAA.
The Air Carrier Access Act (ACAA) prohibits discrimination by U.S. and foreign air carriers based on physical or mental disability.[61] The Department of Transportation, in interpreting and implementing the ACAA, has issued rules setting forth the standards of service which air carriers are expected to provide to disabled individuals, including rules related to service animals.[62]

Under the ACAA, a disability is defined as a physical or mental impairment that, on a permanent or temporary basis, substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[63] An airline must allow a service animal to accompany a passenger with a disability.[64] A service animal is defined as a dog, regardless of breed or type, that is individually trained to do work or perform tasks for the benefit of a qualified individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability.[65] Animal species other than dogs, emotional support animals, comfort animals, companionship animals, and service animals in training are not service animals under the ACAA.[66]

An airline may rely on three methods to determine if an animal qualifies as a service animal: (1) ask the passenger if the dog is accompanying the passenger due to a disability and what task the animal has been trained to perform; (2) observe the dog's behavior to see if it remains under the control of its handler like a typical trained dog; and (3) look for physical indicators, such as a harness or vest on the animal, to determine if the animal is identified as a service animal.[67]

Once an airline is aware that a passenger will bring a service animal, the AACA imposes various requirements on the airline. An airline may not require a passenger with a service dog to physically check in if there is an online check-in available to the public.[68] In certain circumstances, an airline may require 48 hours advance notice of the service animal and the completion of certain forms.[69] An airline must allow a service animal to sit on the disabled person's lap or foot space unless it would encroach on another passenger's space or would be inconsistent with FAA safety requirements.[70]

4. Service Animals under Section 504.
Section 504 of the Rehabilitation Act of 1973 (Section 504) is the federal law that protects the rights of people with disabilities to participate in Federal programs and services.[71] Federal agencies, such as the U.S. Department of Veterans Affairs, Social Security Administration and the IRS do not have to comply with the ADA but must comply with Section 504.[72] Section 504 also applies to certain housing providers that receive federal funding. Although Section 504 does not specifically address services animals, it, like the ADA, requires reasonable accommodations for qualified people with a disability.[73] HUD has indicated that a service animal is a reasonable accommodation.[74]

Ending Considerations.
When advising municipal clients, its important to understand the applicability and interplay of the ADA, FHA, AACA and Section 504 regarding service animals. Each set of laws has its own applicability and its own definition of disability and service animal. It is important to understand how to apply each set of rules in order to ensure compliance.

Notes

1. 42 U.S.C. § 12102.
2. 42 U.S.C. § 3601 *et seq*.
3. 29 U.S.C. § 794.
4. *See* 49 U.S.C. § 41705(a).
5. 42 U.S.C. § 12102.
6. 42 U.S.C. § 12102.
7. *Id.* § 12111 *et seq*; The regulations applying Title I are in 29 C.F.R Part 1630.
8. *Id.* § 12131 *et seq*; The regulations applying Title II are in 28 C.F.R Part 35.
9. *Id.* § 12181 *et seq*; The regulations applying Title III are in 28 C.F.R Part 3.
10. 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.
11. *Id.*
12. See https://www.ada.gov/resources/service-animals-faqs/.
13. 28 C.F.R. § 35.136(i); 28 C.F.R. § 36.302(c)(4).
14. Q6 at https://www.ada.gov/regs2010/service_animal_qa.html.
15. 28 C.F.R. § 35.136(d); 28 C.F.R. § 36.302(c)(9).
16. *Id.*
17. *Id.*
18. While we focus on Titles II and III of the ADA for service animals, a service animal might qualify as a reasonable accommodation under Title I of the ADA.
19. 28 C.F.R. § 35.136(g).

20. 28 C.F.R. § 36.302(c)(7).
21. 28 C.F.R. § 35.136(h); 28 C.R.F. § 36.302(c)(8).
22. *See* https://www.ada.gov/service_animals_2010.htm.
23. Q32 at https://www.ada.gov/resources/service-animals-faqs/.
24. 28 C.F.R. § 35.136(e); 28 C.R.F. § 36.302(c)(5).
25. 28 C.F.R. § 35.136(f); 28 C.R.F. § 36.302(6).
26. 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.
27. *Id*.
28. Q25 at https://www.ada.gov/resources/service-animals-faqs/.
29. See https://www.ada.gov/resources/service-animals-2010-requirements/.
30. 28 C.F.R. § 35.104; 28 C.F.R. § 36.104.
31. Q27 at https://www.ada.gov/resources/service-animals-faqs/.
32. *Id*.
33. Q18 at https://www.ada.gov/resources/service-animals-faqs/.
34. 28 C.F.R. § 36.102(e).
35. 28 C.F.R. § 35.136(i); 28 C.R.F. §. 36.302(c)(9).
36. *Id*.
37. *Id*.
38. *Id*.
39. 42 U.S.C. § 3601 *et seq*.
40. 42 U.S.C. § 3603(a); https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf.
41. 42 U.S.C. § 3603(b).
42. *See* https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf (footnote 3).
43. 42 U.S.C. § 3604(f)(3)(B); 24 C.F.R. § 100.204.
44. *See* Bragdon v. Abbott, 524 U.S. 624, 631 (1998) (noting that definition of "disability" in the Americans with Disabilities Act is drawn almost verbatim "from the definition of 'handicap' contained in the Fair Housing Amendments Act of 1988").
45. 24 C.F.R. § 100.201.
46. *See* https://www.hud.gov/sites/dfiles/PA/documents/HUDAsstAnimalNC1-28-2020.pdf .
47. *Id*.
48. *Id*.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*.
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id*.
58. *Id*.
59. *Id*.
60. *Id*.
61. 49 U.S.C. § 41705.
62. 14 CFR Part 382.
63. 14 C.F.R. § 382.3.
64. *Id* at § 382.72.
65. *Id*.
66. *Id*.
67. *Id* at § 382.73.
68. *Id* at § 382.76.
69. *Id* at § 382.75.
70. *Id* at § 382.77.
71. 29 U.S.C. § 794; 24 C.F.R. part 8.
72. Q36 at http://fclawlib.libguides.com/ld.php?content_id=22722486.
73. *See* 24 C.F.R. § 8.11.
74. *See* https://www.hud.gov/program_offices/fair_housing_equal_opp/disabilities/sect504faq.



The Prerogative to Unseat: Removing Councilmembers from Council Committees

By: STEPHEN K. POSTEMA, *City Attorney ret., Ann Arbor, Michigan and*
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Introduction

The great ideal of representative democracy ultimately depends on people to govern; and yet the human behavior of elected representatives can be deeply flawed. Improper, unethical, and sanctionable behavior of elected representatives is regularly in the news. This behavior ranges from disruption at local meetings, to behavior harmful to municipal employees or the municipal organization, to illegal or corrupt acts. In fact, a city attorney watching the local government landscape across their state or the country could easily conclude that there is an epidemic of elected representative bad behavior and could only wonder when she will have to deal with this issue in her municipality.

And while Thomas Jefferson said "The government you elect is the government you deserve," it is clear that elected representatives are not content to let elections be the only way to regulate their legislative bodies. From reprimands and censure, to removal from Council committees, to removal from office, municipal bodies regularly attempt to regulate the conduct of their members. City attorneys should be prepared in advance to address these issues, particularly because they come up quickly and legislative bodies will request immediate advice and action.

In 2021, a situation arose in our city, in which the City Council wanted to remove a Councilmember from committees for alleged statements and behavior that were considered inappropriate by the majority of the Council. Further, the City Council wanted the City Attorney's office to prepare a public memo outlining the legal issues involving such a removal, as well as a public memo concerning broader issues of Council self-regulation.

The public memo outlined that the City Council generally had such power. This power derived not only from our city's own Charter and Code but also was inherent under state law. This public memo further outlined that the due process requirements of both the federal and state constitutions were generally not applicable when there is a removal of a Council Member from a committee, board, or commission. In any case, adequate "procedural due process" protections were provided through removal by resolution at a City Council meeting. In addition, removal from such bodies would likely not amount to retaliation under the First Amendment. Finally, legislative immunity would likely protect the Councilmembers from any claim arising from removal from a Committee.

This article will outline[1] some of the relevant issues that would need to be considered when addressing this current and important topic.

Law and Analysis

I. Important Recent Supreme Court Case. After the release of the public memo, the United States Supreme Court issued an opinion on a related matter: the censure of a Board member of a public body. The opinion in *Houston Community College v. Wilson* unanimously upheld the public censure of a board member of a public body that operated community colleges for his violations of by-laws and other "reprehensible conduct."[2] While not involving a legislative body, the framework and principles set forth in the case will likely inform future cases that municipalities will face involving regulation of Councilmember conduct, including removal of Councilmembers from committees.

The Supreme Court found that throughout history, public bodies have used the power of censure. The Supreme Court further found no First Amendment violation because it involved a censure of one member of an elected body by the body itself and the Board's "censure spoke to the conduct of official business, and it was issued by individuals seeking to discharge their public duties."[3] The Court finally recognized that the case did not "involve expulsion, exclusion, or any other form of punishment."[4]

Whether removal of a councilmember from council committees would constitute an impermissible form of punishment is left for future determination

by the Supreme Court, although as set forth below, there is significant current legal authority upholding the right of a legislative body to take such action. Nevertheless, the framework of this First Amendment retaliation case should be kept in mind as the specific legal issues of removal from committees are discussed below.

II. General Removal Principles.
The first issue to be determined is what is the mechanism, if any, set forth by Charter, ordinance, or state law for removal from a Council committee. In other words, are the removal procedures clear? If so, follow them to the letter.

For example, in Ann Arbor, the City Charter and Code of Ordinances provide City Council with the authority to create certain boards and commissions, including the power to appoint members. Specifically, with respect to boards and commissions, City Code sets forth the various boards and commissions and their respective appointing authority which most commonly is the City Council and/or Mayor. The City Code provides that "[t]he appointing authority may remove any member of any board or commission for cause" which is a non-arbitrary reason not otherwise prohibited by law, i.e. not discrimination. This removal provision applies to "all boards and commissions of the City."

If your municipality does not have a specific removal procedure, but you have adopted Robert Rules of Order, there are applicable rules that set forth a process for the removal of "committee members" that likely applies to Council Committees and that likewise affirms the authority to remove a member from a committee.[5]

It is also important to examine whether a City has the inherent power to regulate the conduct of its own members under state law.[6] This inherent power may also include the power to remove individuals, including its own Councilmembers, from boards, commissions, and committees. Again, this power may be recognized by both state[7] and federal[8] law.

III. Due Process Issues.
A Councilmember may also claim due process concerns about their removal from a committee. "Due process violation" is an objection raised often to complain about a result that a councilmember or the public does not like. But

Whether removal of a councilmember from council committees would constitute an impermissible form of punishment is left for future determination by the Supreme Court, although as set forth below, there is significant current legal authority upholding the right of a legislative body to take such action.

removal from committees likely would not result in any due process issues under either the state or federal constitutions.[75] There are two components of due process to consider: (1) procedural due process and (2) substantive due process.

A. Procedural Due Process.
The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[10] "In order to establish a procedural due process claim, a person must show that (1) he had a life, liberty, or property interest protected by the due process clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest."[11]

1. There is Likely No Property or Liberty Interest in an Appointment to a Board, Commission, or Committee.
There is generally no protected property or liberty interest in a City Councilmember's appointment to a board, commission, or committee. "Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."[12] Similarly, "[a] liberty interest may arise from the Constitution itself, by reason of guarantees implicit in the word liberty, or it may arise from an expectation or interest created by state laws or policies."[13]

You should review your state law carefully. Michigan law, for example, *does not* confer a property interest in any public office which includes appointments to boards, commissions and committees. Indeed, the United States Sixth Circuit Court of Appeals (which governs Michigan) has held that a member of a city planning commission (who was removed for bad behavior) did not have a property interest in his position on the commission under Michigan law.[14] The court noted that courts have repeatedly held that there is no property interest at all in public office.[15] Accordingly, the court held, a City Councilmember's appointment to a board did not implicate any property interest.

Nor does an appointment to a board, commission or committee implicate a liberty interest. It is well established that an individual has no liberty interest in an elected office.[16]

B. Adequate Due Process Protections.
Even if the Due Process Clause applied to such a removal (which it does not), there is likely adequate due process protection if the removal is done by properly noticed resolution and any removal rules were followed. The basic due process requirement is "notice and an opportunity to be heard at a meaningful time and in a meaningful manner." On this basis, the basic removal by Council Resolution voted on at a public meeting provides adequate due process.[18]

C. Substantive Due Process.
Removal from the bodies discussed above also likely would not result in any substantive due process issues. The substantive component of due process "bar[s] certain government actions regardless of the fairness of the procedures used to implement them."[19] Accordingly, substantive due process claims are generally divided into two categories: (1) deprivations of a particular constitutional guarantee, and (2) actions that "shock the conscience."[20] Neither type of claim is implicated by removal from the boards, commissions, and committees discussed above.

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1. Removal Does Not Involve the Deprivation of a Fundamental Right.
The substantive due process component protects only "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed."[21] The list of fundamental rights and liberties is "short."[22] The right to an appointment to a commission, board, or committee is not among the "short list" of rights deeply rooted in this nation's history and tradition set forth above, and thus, such appointments and removal from them, do not implicate substantive due process concerns.

2. Removal Does not "Shock the Conscience."
The removal from such a committee appointment likely does not "shock the conscience" so as to violate the substantive due process component. Substantive due process protects against "arbitrary and capricious government action that shocks the conscience and violates the decencies of civilized conduct."[23] "[O]nly the most egregious official conduct can be said to be arbitrary in the constitutional sense."[24] In general, "shock the conscience" claims do not apply to cases that do not involve physical force.[25] Indeed, this standard "sets a high bar" and is difficult to meet.[26]

IV. First Amendment Retaliation.
A final argument that a Councilmember may try to make is that his removal is in retaliation for his exercise of his First Amendment rights. First Amendment violation is another constitutional claim that is bandied about without careful analysis. Importantly, the First Amendment does not necessarily protect against the consequences of speech or behavior. Removal from Council committees, even if in response to speech, would likely not amount to First Amendment retaliation. The *Houston Community College* case discussion above outlined the framework for such retaliation in the context of censure only. However, most federal courts have concluded that legislative

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bodies may take certain actions in response to member speech, so long as the action does not prevent the member from carrying out their *elected* duties.[27] This is because elected officials are required to endure more action taken in response to their speech than the ordinary citizen.[28]

The removal of elected officials from appointed positions would likely survive constitutional scrutiny, so long as the appointment is not part of the officials' *elected* duties.[29] Removal from commissions or committees would likely not prevent a Councilmember from carrying out their elected duties.[30]

For instance, the Fifth Circuit Court of Appeals found removal of a city council member from a planning organization due to her failure to support the city council's position did not violate the First Amendment.[31] Similarly, the Eleventh Circuit Court of Appeals found that a county commission could remove the plaintiff from an appointed unpaid position as a committee member without violating the First Amendment.[32] To illustrate further, in *Whitener v. McWatters*, a member of a county board of supervisors unsuccessfully sued other board members after they voted to censure him and strip him of his committee assignments in response to his use of abusive language and uncivil behavior toward two board members.[33]

On the other hand, an action that prevents an elected official from carrying out elected duties may violate the First Amendment rights of legislators. Indeed "[i]n order to compel the exercise or suppression of speech, the governmental measure must punish, or threaten to punish, protected speech by governmental action that is regulatory, proscriptive, or compulsory in nature."[34] Courts have found that legislative actions which prevent a legislator's ability to engage in governance or participate in decision-making violate the First Amendment. For example, a federal district court in Kentucky found that a department's vote to censure the plaintiff affected his ability to engage in the department's system of governance because it both denied him participation in departmental decision-making and affected his teaching assignments, thus supporting a retaliation claim.[35] Serving on any particular Council committee is not likely an elected duty, but a careful review of duties of Councilmembers is warranted.

V. Legislative Immunity.
You will also need to advise your Councilmembers about legislative immunity once a Councilmember removed from a committee by legislative action of the body begins to threaten legal action. Councilmembers would likely be entitled to legislative immunity for a resolution removing a Councilmember from a committee. The United States Supreme Court has held that "absolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity." This immunity extends to local legislators. "[W]hether an act is legislative turns on the nature of the act, rather than on the motive or intent of the official performing it."[38] The question is whether the activity is "an integral part of the deliberative and communicative process by which members participate in committee and those House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either house."[39] This includes "written reports presented in that body by its committees, to resolutions offered, which though in writing, must be reproduced in speech, and to the act of voting."[40]

This immunity likely applies to votes of censure or reprimand. For instance, in *Whitener v. McWatters*, as discussed above, a county board of supervisors disciplined one of its members for confronting other members with abusive language in expressing his opinion.[41] Specifically, the board voted to recommend that he "be formally censured for a period of [one year] and that the rules of order be changed to remove him from all standing committees of [the] Board as well as all assignments and appointments to outside committees, commissions, etc."[42] The court concluded that this disciplinary action against one of its members was legislative in nature and thus protected by absolute immunity.[43]

Legislative immunity could also apply to actions that prevent an elected official from carrying out their elected duties including removal from meetings or even removal of a member depending on the circumstances,[44] even though such action is claimed to be a violation of the First Amendment.

For instance, in a disciplinary context instead of a removal from Committee, *Mays v. Fields*, a federal district court in the Eastern District of Michigan applied legislative immunity to city councilmembers of Flint who were involved in the removal and exclusion of a fellow councilmember from various city council meetings.[45] Mays alleged First Amendment violations after he was removed or excluded from several city council meetings for various reasons. But the district court found that his claims were "plainly barred by legislative immunity."[46] The court reasoned that the plaintiff "was removed from council sessions and muted during the Zoom call as a disciplinary measure" and that transcripts of such sessions showed that the actions were "taken because plaintiff was being argumentative and disruptive."[47] The court noted that under the case law it cited, which concerned the legislative power to punish a body's own members and regulate itself, "plaintiff may not sue his fellow councilmembers or those allegedly working in concert with them or at their direction, for taking such disciplinary action against him."[48]

Conclusion

In the absence of a charter or ordinance provision or other law that expressly prescribes a procedure for removal of a Councilmember from a committee or other appointment, the decision to remove likely remains in a City Council's discretion as an inherent power of the Council. However, these issues will continue to play out in the courts as municipal bodies attempt to regulate Councilmember conduct, particularly the interplay between claims of First Amendment retaliation and legislative immunity.

And as a final practical matter, removing a Councilmember from a committee will often not prevent that Councilmember from actually attending the committee meeting. Most likely the Councilmember could still attend and comment at a public committee meeting as a member of the public even after he has been removed as a sitting member.



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This article reflects the authors' own views and not necessarily the views of the City of Ann Arbor.

Notes

1. While this article is focused largely on Sixth Circuit precedent, it also includes cases from all circuits on these topics.
2. 142 S.Ct. 1253 (2022)
3. *Id.* at 1264. *See also*, *Id.* at 1261 ("[W]e do not see how the Board's censure could qualify as a materially adverse action consistent with our case law. The censure at issue before us was a form of speech by elected representatives."
4. *Id.* at 1263.
5. Roberts Rules of Order, Section 50:13(a), (b), (c) (d), and (e) and Section 50:14
6. Whitener v. McWatters, 112 F.3d 740 at 744. (4th Cir. 1997) ("Americans at the founding and after understood the power to punish members as a legislative power inherent even in the humblest assembly of men. … This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve their institutional integrity without compromising the principle that citizens may choose their representatives").
7. Hawkins v. Common Council of City of Grand Rapids, 192 Mich. 276, 283; 158 N.W. 953 (1916) (A municipality's "power to remove their officers is, and was long before the adoption of our Constitution, inherent in municipal corporations." It is important to note that this case stands for the proposition that a city has the power to remove its elected officials from elected office under Michigan law. Thus, it can be inferred that removal from appointment to boards and commissions is a lesser, included inherent power of a city. In *Hawkins,* however, the Court voided the removal of an officer because other procedures were not followed.
8. *See* Blair v. Bethel School Dis*t*, 608 F.3d 540, 542-43 (9th Cir. 2010)(School board's removal of one of its members as their vice president in response to his criticism of superintendent was constitutional—the board had a right to replace the member with someone who they believed represented the majority view of the board); McKinley v. Kaplan, 262 F.3d 1146, 1151-52 (11th Cir. 2001)(county commission's removal of appointed and unpaid committee member was constitutional); Whitener v. McWatters, 112 F.3d at 740 (county board's vote to strip member of committee assignments in response to use of abusive language and uncivil behavior toward board members was within board's power and constitutional).
9. As is the case in many states: "Michigan's due process guarantee is construed no more broadly than the federal

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"We're Hiring, We Just Need your Social Media Logins and Passwords"

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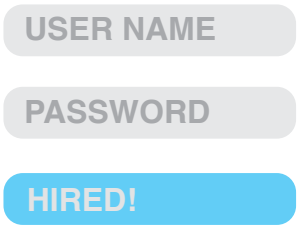

We all know that question—the one your client asks that causes you to cringe, frown and shake your head "no" before your client has even finished asking. That was my reaction when one of our recruiting sergeants asked me to review a form she had created that allows the city to ask law enforcement applicants for their logins and passwords for their social media accounts. No one is going to dispute the critical need to thoroughly evaluate a potential hire's background—for any government or private sector job. With law enforcement, the vetting of an applicant can be particularly important. But, combing through and investigating the non-public content of an applicant's social media? That just seems like it goes too far and is only going to open a can of worms even before considering any legal ramifications.

1. The Prevalence of Social Media Checks. I was surprised to learn in my home state of North Carolina that it is not outlawed by statute, despite attempts in prior legislative sessions to make it unlawful. At least one law enforcement agency in North Carolina, as a condition of employment, requires an applicant's social media information and mandates that the applicant provide access in the presence of a background investigator. The applicant signs a form that states that they understand that any information that is considered racist, sexist, or could bring discredit upon his or her candidacy for employment could disqualify him or her from further consideration with the agency. Another North Carolina agency, as part of its application procedure, has an applicant fill out a document listing each social media account he or she maintains or had in the past with a note that it is very important for the agency to be able to conduct a thorough background check as part of the hiring process. A Florida agency does not require passwords, but has an applicant sign a document listing any social media sites the applicant believes has content he or she posted and agrees to log on to those sites in the presence of a background investigator. According to the Florida agency's form, failure to disclose a site or not allowing an investigator to research the account may result in removal from the hiring process. A Georgia transit authority is similar—it mandates that sworn and non-sworn applicants for hire identify their social media accounts for the last three years and indicates that they will likely have to log on to their social media accounts in the presence of a background investigator.

Employment background checks are not new. They date back at least 100 years. They came to exist as negligent hiring and other legal claims developed when injured parties sought recourse from employers. The extent of a background check for a prospective employee varies greatly by sector and industry. With law enforcement officers at any level, it is often mandated by law and is intrusive. The federal government performs background checks on all permanent employees, the extent of which varies by position.[1] Most positions in finance, banking and healthcare are the same.

2. Risks of Litigation. Litigation surrounding background checks is also not new. After the federal government changed its policy, mandating that its contractor employees be subjected to a complete background check, the National Aeronautics and Space Administration (NASA) was challenged by those contractors. The government contractors argued that NASA's background check process violated a constitutional right to informational privacy.[2] The Supreme Court, in assuming a constitutional privacy interest was implicated, concluded that the federal government's questions were reasonable in light of the government interests at stake.[3] The Court noted that the federal government has had mandatory background checks in place for its federal civil-service applicants since 1953 and that any further disclosure of such personal information discovered in the background checks was shielded by federal statute.[4]

Unquestionably, there are many well-grounded reasons to conduct background checks—protecting an employer's reputation, ensuring the safety of the public and your workforce, endeavoring to predict reliability and dependability in an applicant, and attempting to minimize theft and other fraudulent or criminal activities are just a few reasons.[5] But, does a background check inquiring into an applicant's non-public social media cross the line? In *In re Ramirez,* an employer considered petitioner's discriminatory remarks on an old social media account when it chose to remove him from a 2020 eligibility list for police officers.[6] Two years earlier he had applied for the police department and at that time maintained the social media account.[7] He was removed from the eligibility list in 2018 as well.[8] In an administrative appeal, the Commission found that his racial and sexual comments evinced the lack of good judgment required for municipal law enforcement officers.[9] The opinion does not clarify whether the social media posts were public or non-public. Nonetheless, presumably, an employer would prefer not to hire a law enforcement officer who could be racist or sexist and who could increase its legal exposure.

3. Prohibitions Against Requiring Disclosure.

Currently, twenty-six states have laws specifically prohibiting an employer from requesting or requiring that an employee or applicant disclose login and password information or from otherwise gaining access to or viewing their non-public personal internet or social media accounts.[10] Some prohibit an employer from requiring an employee or applicant from divulging or disclosing any content from a social media account. There is no federal law specifically prohibiting employers from seeking login and password information of employees or prospective employees.[11] Despite general parallels as to what is off-limits to an employer, some statutes vary in what encompasses social media or a protected personal internet account and what is actually prohibited by an employer.[12] There are also significant variations among the states' exceptions to the prohibitions, meaning the instances when the employer can access the non-public personal account information. Almost every statute expressly permits employers to use what is publicly available about an employee or an applicant.[13] Most, if not all of these statutory schemes prohibit employers from using usernames and passwords if they were inadvertently acquired. Some of these workplace privacy statutory schemes apply to educational institutions and landlords.[14]

Maryland was the first state to make effective the Password Privacy Protection Act—prohibiting an employer from requesting or requiring that an employee or applicant disclose any user name and password or other means to access a personal account or service.[15] "Personal account" or "service" is not defined. Wisconsin passed a similar law two years later.[16] Wisconsin's statute applies to the state and its political subdivisions including local governments, and prohibits employers from requesting or requiring an employee or applicant, as a condition of employment, to disclose access information for their respective personal internet account or otherwise give the employer access to or allow observation of that account.[17] Personal internet account means an internet-based account created and used by an individual exclusively for purposes of personal communications,[18] suggesting that if an internet based account, such as a Facebook account, is used in any way for work-related communications, it is no longer restricted. Unlike other states, it is permissible in Wisconsin for an employer to require an employee, but not an applicant, to disclose a personal e-mail address, but not its password.[19] California defines social media as an electronic service or account or electronic content such as videos, still photographs, blogs, podcasts, instant and text messages, email, online services or accounts, or internet web site profiles.[20] Connecticut's definition of personal online account includes retail-based internet web sites, a broader definition than seen in most states, but also states that it is an account used exclusively for personal purposes. It includes electronic mail.[21] Colorado uses the term "personal account" and Washington uses the phrase "personal social networking account" but neither define it.[22] Illinois, on the other hand, states that a personal online account is one that is used by a person primarily for personal purposes.[23]

4. Loopholes in Prohibition.

From the first enacted statutes as noted above, the majority of states prohibit the employer from requesting or requiring an applicant or employee to share their social media usernames and passwords[24] and prohibit requiring that an applicant or employee access their social media accounts in the presence of the employer so the employer can observe same.[25] Other access "loopholes", however, needed to be closed. Later legislative social media privacy statutes included language prohibiting employers from mandating that an employee or applicant add the employer to his or her list of contacts or coercing an employee or applicant to change their settings for greater access to third parties.[26] Rhode Island prohibits requiring or coercing an employee or applicant from divulging any social media account information.[27] Maine, similarly, states that an employer may not require or coerce an employee or applicant to disclose any personal social media account information.[28] Montana further restricts an employer from requiring or requesting an employee or applicant to divulge any personal social media or information contained on personal social media.[29] Vermont states that an employer shall not require an employee or applicant to divulge or present any content from the respective social media account.[30] These provisions seem to place a prohibition on questions during an interview of an applicant such as "what social media accounts do you maintain," and "what would your social media tell us about you?" Although Hawaii prohibits an employer from requiring, coercing or requesting an employee to disclose the

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content of the protected personal online account, it surprisingly allows an employer to request that an employee add the employer to the set of persons to which the employee grants access to the content of the account if it is done without coercion and pursuant to a clear statement that acceptance is voluntary.[31]

Paralleling a common exception found in many statutes, Wisconsin employers can require an employee to grant access or allow observation of his or her social media account in conjunction with certain workplace investigations, but an employer cannot obtain the access information for those accounts.[32] These workplace investigations include inquiries into any alleged unauthorized transfer of the employer's proprietary or confidential information to the employee's personal internet account or any other alleged employment related misconduct, including violations of law, when the employer has reasonable cause to believe that activity on the personal internet account is related to that misconduct.[33] Tennessee mandates that an employee cooperate in an investigation but only requires the employee to share content in order to make a factual determination.[34] The employer must have specific information about the employee's unauthorized transfer of proprietary or confidential information or otherwise must have knowledge of specific information on the employee's personal internet account regarding compliance with laws or workplace rules.[35] Utah's provision is virtually identical.[36] West Virginia's statute does not have a specific information prerequisite before the employer can ask an employee to share content related to compliance with laws, regulations or other work place conduct rules.[37] Rhode Island provides an exception to employers allowing them to require or coerce an applicant or employee to divulge personal social media account information when it is reasonably believed to be relevant to a misconduct investigation. That information can be used to access social media to the extent necessary for the investigation.[38] On the other end of the spectrum, Montana allows an employer to demand user names and passwords to access social media when "an investigation" is under way and the information requested of the employee is necessary to make a factual determination in the investigation.[39]

Also a common exception, Wisconsin allows an employer to mandate access information if it is needed to gain access to or to operate an electronic communication device supplied or paid for by the employer or to gain access to an account or service provided by the employer.[40] Maine permits employers to promulgate polices that include a requirement that an employee disclose a user name or password or other necessary information to access employer-issued electronic devices or to access employer provided software or e-mail accounts.[41] Oklahoma ensures that employers are able to access their own computer system or information technology networks.[42] Oklahoma has a particularly noteworthy section in its statute about employer access to its own computer system and own electronic communication devices—Oklahoma's statute states "neither this section nor any other Oklahoma law shall prohibit an employer from *reviewing or accessing* personal online social media accounts that an employee *may choose to use while utilizing an employer's computer system, information technology network or an employer's electronic communication device*." At any point during the workday then, if an employee checks a personal social media account on a work computer or work phone, which, in Oklahoma, includes an employee's personal email account, Oklahoma employers are not prohibited from reviewing or accessing those accounts.[43]

5. Compliance with Law.

Many of the statutes include provisions that expressly state that the prohibitions from acquiring access to non-public personal internet account information do not prohibit employers from engaging in things required of them by law—some allowing access to social media content and some not. For example, Wisconsin's statute states that an employer is not prohibited from "complying with a duty to screen applicants for employment prior to hiring or a duty to monitor or retain employee communications that is established under state or federal laws, rules, or regulations or the rules of a self-regulatory organization, as defined in 15 U.S.C. 78c(a)(26)."[44] Wisconsin makes no reference here, however, to being able to access user names and passwords, unlike its section on workplace investigations. Nebraska is the same as Wisconsin.[45] Louisiana's statute is similar. It explains that an employer is not prohibited from complying with a duty to screen employees or applicants prior to hire or to monitor or retain employee communications pursuant to state or federal law, rules or regulations, case law, or rules of self-regulatory organizations, but makes no reference to accessing user names and passwords or obtaining specific social media content.[46] If complying with its legal and regulatory obligations, Vermont employers can request that an employee share specifically identified content.[47] West Virginia employers can request that an employee share specific content to ensure compliance with applicable laws or regulatory requirements.[48] Meanwhile, Montana employers can obtain user names and passwords to access personal social media when the employer is required to ensure compliance with federal laws or federal regulatory requirements or with the rules of self-regulatory organizations.[49]

6. Policies Specific to Law Enforcement.

Notably, Colorado, Connecticut and New Jersey specifically exclude law enforcement agencies from the definition of "employer" in their workplace privacy statutes.[50] New Mexico's law states that it does not apply to federal, state and local law enforcement agencies.[51] Colorado and New Jersey go even further and exclude the department of corrections and county corrections' departments, giving these employers the opportunity to search the private social media platforms of their applicants and employees.[52] Oregon's workplace privacy statute states that it does not apply to law enforcement units as defined by state law.[53] Connecticut only excludes state or municipal law enforcement agencies when conducting a pre-employment investigation of law enforcement personnel, thereby limiting permissible access to personal online accounts to the pre-employment hiring context.[54] Instead of excluding law enforcement from the definition of employer, Vermont specifically permits law enforcement agencies to require or request that an applicant provide access to his or her social media account as part of a screening for fitness during the hiring process.[55] Vermont law enforcement agencies can require the same of employees if in relation to a continued fitness determination or an investigation of employee misconduct.[56] None of these states seem to distinguish between sworn and non-sworn personnel. Washington actually requires that its background check for peace and corrections officers include a review of the applicant's social media account.[57] By stat-

ute, a peace officer or a correction officer must consent and facilitate the review of his or her social media account.[57] The employer is not allowed to obtain the login information.[59]

7. Constitutional and Statutory Protections.

Finally, many statutes contain specific provisions barring an employer from discharging, failing to hire, disciplining, threatening to discharge or discipline or otherwise retaliating or discriminating against an employee or applicant if they exercise their rights under these laws.[60] New Jersey and Nebraska further prohibit an agreement to waive those rights, expressing that it would be against public policy.[61] Vermont prohibits an agreement to waive without reference to public policy.[62] Oregon makes it an unlawful employment practice for an employer to require an employee or applicant to establish or maintain a personal social media account, a prohibition not seen in other states' statutes.[63] Montana has added a new subsection, effective October 2023, that prohibits an employer from discharging, disciplining or otherwise retaliating against an employee or job applicant for "legal expressions of free speech by the employee or job applicant, as protected in [Minnesota statute] 39-2-904, made on personal social media" in its workplace privacy law. Two exceptions apply; if the employee or applicant violates an employer's written policy or violates the terms or conditions of the employee's employment contract.[64]

Although there is no federal statute expressly prohibiting employers from requiring login credentials to peruse applicant and employees' social media accounts, prospective employees have sued employers alleging they violated federal employment anti-discrimination laws by using information gathered from internet and public social media searches in their hiring decision. In *Gaskell v. Univ. of Kentucky*, an applicant for a director position at the university observatory sued the school through Title VII[65] contending that he did not get selected because of his religious beliefs.[66] His religious beliefs were discovered when a hiring committee member conducted an internet search of him and discovered his personal web page that contained an article referencing religious topics combined with scientific theory.[67] The article was circulated to the search committee. In *Nieman v. Grange Mut. Cas. Co.*, a plaintiff successfully pleaded an Age Discrimination in Employment Act[76] (ADEA) claim and contended that the defendants were aware of his age through his LinkedIn profile and did not hire him.[69]

For the states that do not prohibit obtaining user names and passwords, these same federal employment laws (and likely many state laws) would apply to how information is used from employers' searches of employee or prospective employee's non-public social media in hiring decisions or other employment actions. Undeniably, various implicit biases, if factored into an employment decision, could violate Title VII, the ADEA, or the Americans with Disabilities Act.[70] Medical information, religious affiliation or disabilities could be discovered that an employer should not be privy to. We will inevitably see more lawsuits like *Gaskell* or *Nieman* and eventually the parameters of a constitutional right to informational privacy may be defined.

Conclusion

It seems a lot simpler if the employer does not review non-public social media content. These types of searches could require significant resources. How is the employer going to train its background investigators to evaluate the non-public social media content of prospective employees? Consistency will be critical as hiring decisions should be based on skills and qualifications for the positions, yet many lifestyle choices or conduct unrelated to skills and qualifications would be discovered. Moreover, is it just once that an employer would review the social media accounts or does it become an ongoing employment practice to monitor all employees' accounts? Although allowed in many states, accessing an employee or applicant's non-public social media seems precarious. For the time being at my North Carolina agency, there will be no review and no evaluation of an applicant's non-public social media content, preserving what is left, if anything, of the work-life home-life divide.

Notes

1. https://governmentworkerfi.com/background-checks-for-federal-employees/
2. NASA v. Nelson, 562 U.S. 134, 131 S. Ct. 746 (2011).
3. *See id.*
4. *See id.*
5. *See id.*
6. In re Ramirez, 2022 N.J. Super. Unpub. LEXIS 1857 (2022).
7. *See id.* at *2-3.
8. *See id.* at *2-3.
9. *See id.* at *7.
10. For example, Neb. Code Ann. §48-3503, 40 Okl. Stat. Ann. tit. 40, §173.2 and Cal. Lab. Code. §980. New Mexico's law only applies to prospective employees. N.M. Stat. §50-4-34.
11. The Stored Communications Act and the Computer Fraud and Abuse Act have proven unworkable in protecting employees and applicants from employers seeking access to their non-public social media or personal internet accounts. Carter, Ralph, Note and Comment, *Too Much Information!: The Need For Stronger Privacy Protection For the Online Activities of Employees and Applicants*, 28 J. Civ. Rts. & Econ. Dev. 291, 299-305 (2016).
12. As of September 2022, the states included: Arkansas, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Louisiana, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.
13. *See for example* Wis. Stat. §995.55(2)(b)(6). Montana's workplace privacy law does not include specific language permitting an employer to use what is publicly available regarding an applicant.
14. Wis. Stat. §995.55(3) and (4). Michigan's Internet Privacy Protection Act, one of the forerunners of this kind of legislation, also applies to educational institutions. Mich. Comp. Laws §37.274. Delaware has a section that applies to academic institutions and Rhode Island includes unlawful practices for educational institutions. Del. Code Ann. tit.14, §8103 and R.I. Gen. Laws §16-103.1 *et seq*. Louisiana also has a section that applies to educational institutions, La. Rev. Stat. Ann. §51:1954, as does Hawaii. Haw. Rev. Stat.§487G-4.
15. Md. Code Ann. Lab & Empl. §3-712. The effective date was October 1, 2012.
16. Wis. Stat. §995.55 (2013) (amended 2017).
17. Wis. Stat. §995.55(2)(a)(1)(2) and (3).
18. Wis. Stat. 995.55(1)(d). New Jersey also contains this exclusivity language. N.J. Stat. Ann. §34:6B-5.
19. Wis. Stat. §995.55(2)(b)(7). Louisiana does not prohibit an employer from requiring an employee to provide a personal email address, but only to facilitate communica-

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EMPLOYMENT

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Marital Secrets: Spousal Privilege in Administrative Employment Proceedings

INTRODUCTION

Chad has been employed with the city for six years as an electrician, which requires him to travel around town to different facilities. He is married to Susan, who works as an account manager in the finance department. A few weeks ago, Chad's department head receives an anonymous report that Chad is not working the hours he puts on his time sheets. Instead, he is rushing through his work and then going home, napping, or running personal errands. The report alleges that Susan is aware of this behavior because Chad texts her about it. During the investigation interview, Chad denies the allegations and points to various electrician reports to prove he has been working. The investigator pulls door access records and emails, interviews other employees, and reviews Chad's reports. None are conclusive one way or the other as to whether Chad has been working the hours he reports. The investigator notifies Susan that she wants to interview her. Susan objects to the interview, citing the spousal privilege. Chad also objects to Susan being interviewed, again based on the spousal privilege. The investigator wants to push for the interview, but the department head is concerned about violating Susan's or Chad's rights.

This article examines the application of the spousal privilege in a non-testimonial, non- court proceeding, such as an administrative investigation.

I. The History of the Spousal Privilege.
The spousal privilege, also known as the marital privilege, protects the confidentiality of communications between spouses. It generally allows one spouse to refuse to testify against their spouse in court proceedings and prevents one spouse from being compelled to disclose private conversations or other confidential information shared between spouses. The concept of spousal privilege has a long history that can be traced back to English common law. The origins can be found in the notion that a wife's legal existence was suspended when she married and she became part of a single legal entity with her husband. This was known as "coverture."[1] Under the principle of coverture, a married woman's legal rights were subsumed by her husband's authority. As a result, a wife was generally considered incompetent to testify either for or against her husband in legal proceedings.[2] Over time, this principle evolved into the modern concept of spousal privilege, which recognizes the right of one spouse to refuse to testify against the other.[3] The rationale behind spousal privilege shifted from the idea of marital unity to notions of protecting marital privacy, fostering open communication, and preventing the erosion of trust within the marital relationship.[4] "Like the physician-patient and clergy-penitent privileges, the marital communications privilege recognizes that society has an enormously strong interest in preserving a particular social institution—here, the institution of marriage."[5] The recognition and scope of spousal privilege have been the subject of ongoing debate. Some argue that spousal privilege should be abolished or limited in certain circumstances, while others contend that it remains an important protection for marital privacy and communication.[6] These debates continue to shape the interpretation and application of spousal privilege in contemporary legal systems.

II. Legal Framework.
The spousal privilege can be different in federal court than in state court. In criminal and civil cases based on federal questions, federal privilege law applies.[7] In diversity cases where the parties are in federal court to address a state question and the "state law supplies the rule of decision," state law governs privilege.[8] If there is a conflict about the same piece of evidence, "the rule favoring reception of the evidence should be applied."[9] In criminal and civil cases in state court, state law applies.

A. Federal Law
The spousal privilege is an evidentiary privilege which "enables parties and potential witnesses in legal proceedings to refuse to disclose relevant and material evidence, both at trial and during the court of pretrial discovery."[10] There are two types of spousal privilege. The first is the adverse spousal testimonial privilege. This privilege prevents one spouse from being compelled to testify against the other.[11] Under the privilege against adverse spousal testimony, "the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying."[12] Previously, one spouse could not testify against the other unless both consented.[13] Now, it is only the witness-spouse that has the privilege to refuse to testify. In establishing the current rule in *Trammel v. United States,* the Supreme Court noted that the original concept of the husband and wife

being one legal entity had no current relevance.[14] The modern justification for the privilege is "its perceived role in fostering the harmony and sanctity of the marriage relationship."[15] However, the Court in *Trammel* found that this modern justification was unpersuasive when one spouse is *willing* to testify against the other.[16] Therefore, the Court held that the privilege vests only in the testifying spouse, noting that this holding would further "the important public interest in marital harmony without unduly burdening legitimate law enforcement needs."[17] In federal cases governed by federal law, the spousal testimonial privilege is available only in criminal proceedings or in proceedings where one spouse may testify to another's crime, such as grand jury or criminal forfeiture proceedings.[18] It is not applicable to civil proceedings.[19] There are exceptions to the spousal testimonial privilege including when the communications were for the purpose of committing a crime and both spouses knew that fact,[20] for statements relating to a crime where a spouse or a spouse's children are the victims,[21] when there is a sham marriage,[22] and nontestimonial acts such as handwriting and fingerprint exemplars.[23]

The second type of spousal privilege is the confidential marital communications privilege.[24] This privilege is distinct from the privilege against adverse spousal testimony.[25] It protects the content of conversations or communications between spouses.[26] "Communications between the spouses, privately made, are generally assumed to have been intended to be confidential, and hence they are privileged."[27] Both spouses retain the privilege to foreclose testimony regarding confidential marital communications, and can do so even after the marriage ends.[28] To successfully assert the confidential marital communications privilege, three requirements must be met: (1) at the time of the communication there must have been a marriage recognized as valid by state law; (2) the privilege applies only to utterances or expressions intended by one spouse to convey a message to the other; and (3) the communication must be made in confidence.[29] The marital communications privilege applies in both criminal and in civil proceedings.[30]

B. State Law

Every state recognizes one or both types of spousal privileges. Many states have statutes identifying the privilege(s) and when it may be invoked.[31] However, there are differences between states. Consider New Mexico, which abolished the state's spousal communications privilege in 2019,[32] as compared with North Dakota, which protects the confidentiality of communication made private between spouses by evidentiary rule.[33] Colorado's privilege statute is contained within the title on *Courts and Court Procedure* and article on *Witnesses*, and includes the spousal privilege, attorney-client privilege, clergy privilege, and physician privilege, among others.[34]

The Colorado statute recognizes the spousal testimonial privilege and the spousal communications privilege. It first provides for a spousal testimonial privilege, and states that a "husband shall not be examined for or against his wife without her consent nor a wife for or against her husband without his consent."[35] (Despite the outdated language in Colorado's statute, the privilege applies to individuals who are lawfully married, which includes same-sex couples.)[36] The testimony privilege recognized by Colorado's statute is not focused on *adverse* testimony. Rather, the key is consent and, without it, a spouse cannot be examined "for or against" the other.[37] Then, the statute recognizes the spousal communication privilege, and states "nor during the marriage or afterward shall either be examined without the consent of the other as to any communications made by one to the other during the marriage."[38] There are exceptions. The statutory privilege does not apply in child custody proceedings, "a civil action or proceeding by one against the other, a criminal action or proceeding for a crime committed by one against the other, or a criminal action or proceeding against one or both spouses when the alleged offense occurred prior to the date of the parties' marriage."[39] Additionally, the spousal communication privilege does not apply in felony cases, except for class 4 felonies, and does not apply to level 1 or 2 drug felonies.[40] However, the spousal adverse testimonial privilege will apply if the testifying spouse consents.[41]

III. Does the Spousal Privilege Apply in Internal Administrative Interviews?

Returning to the situation involving Chad and Susan, can they invoke the spousal privilege so that Susan will not be compelled to answer questions about Chad's work habits? The privilege is an evidentiary rule. Therefore, the threshold inquiry is whether the administrative investigations are proceedings within the contemplation of the federal case law on spousal privilege and the state statutes applicable to each jurisdiction. Next is whether there is a confidentiality rule that would protected the information no matter the proceeding. Under federal law, the adverse spousal testimonial privilege would not apply because this internal investigation, even if considered a "legal proceeding," is civil, and the testimonial privilege does not apply in civil matters. The application of the spousal communication privilege under federal law is not as clear. On one hand, the privilege could apply, particularly if the rules governing the investigation recognize "lawful privileges." In such a case, the protection of the spousal communication privilege can be asserted so long as there is a valid marriage, there is a communication between spouses, and the spouses intended the communication to be confidential.[42]

There is no limitation on the type of "proceeding," and the marital communications privilege has been held to apply in both criminal and in civil proceedings.[43] Arguably, this is not only an evidentiary privilege, but it is a confidentiality rule. "The confidential communications privilege . . . provides assurance that all private statements between spouses — aptly called the 'best solace of human existence,' — will be forever free from public exposure."[44] The confidences between spouses are privileged under the independent rule protecting confidential marital communications.[45] On the other hand, the federal rule is an evidentiary privilege to be used in legal proceedings. Although an internal employment

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investigation may result in a legal claim or cause of action in the future regarding any resulting discipline, it is not a legal proceeding governing by the rules and evidentiary principles that govern federal cases.

Under state law, using Colorado's statute, the privilege set forth in Colo. Rev. Stat. § 13- 90-107 applies to "testimony" and is a rule found in Title 13, *Courts and Court Procedure*, applicable to witnesses.[46] Arguably, based on the plain language of the statute, Colorado's rule is only applicable to *witnesses* who are being examined in a *court proceeding*. An internal investigation is not a court proceeding and is not governed by Title 13. Therefore, the statutory spousal privilege, to include the confidentiality communication privilege, does not apply outside of court proceedings. There are no Colorado cases examining this question. However, a similar conclusion was made in a case out of Riverside, California, where the California Court of Appeals held that a police officer could not invoke the marital privilege in an administrative investigation into her police officer husband's acts and avoid discipline.[47] In that case, the court focused on the definition of "proceeding" in California's Evidence Code, finding that it did not include administrative investigations. This ruling is specific to police officers' internal investigations. Additionally, given the differences between states on the statutory spousal privilege, the analysis may be different depending on the state and the specific wording of the statutory spousal privilege.

For Susan, she cannot rely on the spousal testimonial privilege to avoid being interviewed at all. She also cannot rely on the spousal communication privilege to withhold communications that were not with Chad or were with Chad but not confidential (such as a conversation where a third party is present). The more complicated question involves her ability to withhold, based on the spousal privilege, truly confidential communications with Chad. An employer could, based on the limited applicability of evidentiary privilege, assert that the privilege does not apply for the purpose of the interview during the investigation and that the public purpose for the privilege (protecting marital privacy, fostering open communication, and preventing the erosion of trust within the marital relationship) do not outweigh the need for the employer to conduct the investigation in their workplace.

Conclusion

The goal of an employee administrative investigation is to find out the facts to understand whether or not a policy has been violated. Prudent investigators work hard to ensure that those being interviewed, as well as those that are the subject of the interview, are treated with respect and afforded the rights due to them. When spousal privilege is asserted, applicable state statutory and common law should be reviewed to see if the spousal privilege applies in the administrative investigation. Although it may seem axiomatic that it should apply, practitioners should remember that the spousal privilege is an evidentiary privilege that applies in civil and criminal cases, and its use could be rejected in an administrative investigative interview.

Notes

1. Merriam-Webster. (n.d.). "Coverture". In Merriam-Webster.com dictionary. Retrieved June 25, 2023, from https://www.merriam-webster.com/dictionary/coverture.
2. Steven N. Gofman, *Honey the Judge Says We're History: Abrogating the Marital Privileges via Modern Doctrines of Marital Worthiness*, 77 Corn L. Rev. §5.31 (1992).
3. *Id.; see also* Funk v. United States. 290 U.S. 371 (1933) (abolished the doctrine of spousal incompetency, but preserving the spousal testimonial privilege).
4. Todd Butler, *Milton, Deliberative Liberty, and the Law of Spousal Privileges*, 59 Milton Studies. 231, 231-258 (2017); *see also* Hawkins v. United States, 358 U.S. 74, 77 (1978) (basic reason for refusing "to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well").
5. United States v. Fomichev, 899 F.3d 766, 772 (9th Cir. 2018).
6. Edward J. Imwinkelried, *State v. Gutierrez Abolishing the Spousal Communications Privilege: An Opinion Raising Profound Questions About the Future of Evidentiary Privileges in the United States Future of Evidentiary Privileges in the United States*, 53 N.M. L. Rev. 71, 71-99.
7. Fed. R. Evid. 501 (2011).
8. *Id.*
9. *Id.* at Notes of Committee on the Judiciary, Senate Report No. 93-1277.
10. Michael D. Moberly, *Extending a Qualified Evidentiary Privilege to Confidential Communications Between Employees and Their Union Representatives*, 5 Nev. L.J. 508, 508 (2005) (footnotes omitted).
11. United States v. Ammar, 714 F.2d 238, 258 (3d Cir. 1983).
12. Trammel v. United States, 445 U.S. 40, 53 (1980).
13. Hawkins v. United States, 358 U.S. 74, 78 (1958).
14. *Id.* at 44.
15. *Id.* at 44.
16. *Id.* at 52.
17. *Id.* at 53.
18. *See* United States v. Yerardi, 192 F.3d 14, 19 (1st Cir. 1999) ("The privilege is almost always invoked only in criminal proceedings in which one spouse is called to testify against the other, and understandably so since criminal jeopardy is the threat with which the privilege is concerned. And some formulations of the privilege, and dicta in some of the cases, assume that the privilege could never be asserted in a civil case."); S.E.C. v. Lavin, 111 F.3d 921, 925 (D.C. Cir. 1997) ("The [privilege against adverse spousal testimony] allows a spouse called as a witness against his or her spouse in a criminal proceeding to refuse to testify."); United States v. Premises Known as 281 Syosset Woodbury Rd., 71 F.3d 1067, 1070 (2d Cir. 1995) ("The adverse spousal testimony privilege has traditionally been limited to criminal cases."); In re Grand Jury Matter, 673 F.2d 688, 692-692 (3d Cir. 1982) *cert. denied,* 459 U.S. 1015 (1982).
19. *Lavin*, 111 F.3d at 925.
20. United States v. Estes, 793 F.2d 465, 467 (2d Cir. 1986)
21. United States v. Banks, 556 F.3d 967, 974 (9th Cir. 2009)
22. In re Grand Jury Proceedings *(84-5)*, 777 F.2d 508, 509 (9th Cir. 1985) (considering applicability of sham marriage exception because couple married on the eve of trial); United States v. Apodaca, 522 F.2d 568, 571 (10th Cir. 1975) (holding the spousal testimonial privilege could not be invoked by a witness-spouse because she and the defendant "were married only three days before trial").
23. In re Grand Jury, 666 F. Supp. 196, 200 (D. Colo. 1987).
24. Wolfle v. United States, 291 U.S. 7, 14 (1924); Blau v. United States, 340 U.S. 332, 333-34 (1951).
25. *Trammel,* 445 U.S., at 51.
26. Mark S. Brodin, 3 Weinstein's Federal

Evidence § 505.09 (2d ed. 2016).
27. *Wolfle*, 291 U.S. at 12.
28. *Id.*
29. *Id.* at 14.
30. *Lavin*, 111 F.3d at 925.
31. e.g. Mich. Comp. Law, § 600.2162; Or. Rev. Stat. § 40.255; Fla. Sta. § 90.504; Va. Code Ann. § 8.01-398 (2005) (civil) and § 19.3-271.2 (2020) (criminal)
32. State v, Guttierez, 142 N.M. 1 (2007).
33. N.D.R. Evid. 504
34. Colo. Rev. Stat. § 13-90-107 (2023).
35. *Id.* at (a)(I).
36. Obergefell v. Hodges, 135 S. Ct. 2584 (2015); *See* In re Hogsett, 478 P.3d 713 (refining test for establishing common law marriage first articulated in *People v. Lucero* to reflect changed circumstances since that decision, including the recognition of same-sex marriage); In re LaFleur, 479 P.3d 869 (recognizing same-sex common law marriages predating Colorado's recognition of formal same-sex marriages).
37 Colo. Rev. Stat. § 13-90-107 (2023).
38. *Id.*
39. *Id.*
40. *Id.* at (a)(II).
41. *Id.*
42. *Id.* at 14.
43. *Lavin*, 111 F.3d at 925.
44. In re Witness Before Grand Jury, 791 F.2d 234, 237 (2d Cir. 1986) (quoting *Trammel*, 445 U.S. at 51) (internal quotations omitted).
45. *Blau*, 340 U.S. at 333.
46. Colo. Rev. Stat. § 13-90-107 (2023) (reference Article 90 (Court and Court Procedures) and Title 13 ("Witnesses"))
47. Riverside Cnty. Sheriff's Dep't v. Zigman, 169 Cal. App. 4th 763 (Cal. Ct. App. 2008).

We're Hiring *cont'd from page 17*

tion if the employer's email system fails. La. Rev. Stat. §51:1953(F).
20. Cal. Lab. Code §980(a).
21. Conn. Gen. Stat. §31-40x(a)(5).
22. Colo. Rev. Stat. §8-2-127; Wash. Code. Ann. §49.44.200. West Virginia also uses "personal account" and it means an account, service or profile on a social networking website that is used by an employee or potential employee exclusively for personal communications unrelated to any business purposes of the employer. W. Va. Code §21-5H-1.
23. 820 Ill. Comp. Stat. 55/10(b)(6)(B).
24. Md. Code Ann. Lab & Empl. §3-712.
25. Mich. Comp. Laws Serv. §37.273(a), effective December 28, 2012.
26. As examples: Or. Rev. Stat. §659A.330(1)(c), effective January 1, 2014; Del. Code Ann. tit. 19, §709A(b)(5) and (6), effective August 7, 2015; Neb. Rev. Stat. §48-3503, effective July 21, 2016; Vt. Stat. Ann tit. 21, §495l(b)(4) and (c), effective January 1, 2018.
27. R.I. Gen. Laws §28-56-2(3).
28. Me. Rev. Stat. Ann. tit. 26, §616(3).
29. Mont. Code. Ann. §39-2-307(1)(c).
30. Vt. Stat. Ann tit. 21, §495l(b)(3).
31. Haw. Rev. Stat. §487G-3(a)(1)(B).
32. Wis. Stat. §995.55(2)(b)(3). Virginia merely allows an employer to *request* the username and password for an investigation if the employer reasonably believes the employee's social media account information is relevant. Va. Code. Ann. §40.1-28.7:5(F)(2) (emphasis added).
33. Wis. Stat. §995.55(2)(b)(3).
34. Tenn. Code Ann. §50-1-1003(c).
35. Tenn. Code Ann. §50-1-1003(b)(3)(A) and (B).
36. Utah Code Ann. §34-48-201(2).
37. W. Va. Code Ann. §21-5H-1(b)(6). W. Va. Code Ann. §21-5H-1(b)(4) states that an employer can require an employee to cooperate in an investigation.
38. R.I. Gen. Laws §28-56-2(3).
39. Mont. Code Ann. §39-2-307(2)(b).
40. Wis. Stat. §995.55(2)(b)(1). Additional examples: Del. Code Ann. tit. 19, §709A(d) and Tenn. Code Ann. §50-1-1003(b)(1).
41. Me. Rev. Stat. Ann. tit. 26, §618.
42. Okla. Stat. Ann. tit. 40, §173.2 (F).
43. Okla. Stat. Ann. tit. 40 §173.2 (F) and (H)(2) (emphasis added).
44. Wis. Stat. §995.55(2)(b)(5).
45. Neb. Rev. Stat. §48-3507(8).
46. La. Rev. Stat. Ann. §51:1953(D). Virginia is similar, stating that an employer is not prevented from complying with the requirements of federal, state, or local laws, rules, or regulations or the rules or regulations of self-regulatory organizations. Va. Code. Ann. §40.1-28.7:5(F).
47. Vt. Stat. Ann. tit. 21, §495l(e)(1)(A).
48. W. Va. Code. §21-5H-1(b)(6).
49. Mont. Code. Ann. §39-2-307(2)(a)(iii).
50. Colo. Rev. Stat. §8-2-127(1)(c) and Conn. Gen. Stat. §31-40x(a)(3).
51. N.M. Stat. Ann. §50-4-34(D).
52. Colo. Rev. Stat. §8-2-127(1)(c); N.J. Stat. Ann. §34:6B-5 and §34:6B-6. New Jersey also excludes the State Parole Board.
53. Or. Rev. Stat. §659A.330.
54. Conn. Gen. Stat. §31-40x(a)(3).
55. Vt. Stat. Ann. tit. 21, §495l(e)(2).
56. Vt. Stat. Ann. tit. 21, §495l(e)(2).
57. Wash. Rev. Code Ann. §43.101.095(2)(b)(iv).
58. Wash. Rev. Code Ann. §43.101.095(4).
59. Wash. Rev. Code Ann. §49.44.200(3)(e).
60. Wisconsin prohibits an employer from discharging or otherwise discriminating against an employee for exercising their rights under the law and prohibits an employer from refusing to hire an applicant because the applicant refused to disclose access information, grant access or allow observation of the account. Wis. Stat. §995.55(2)(a) (2) and (3). *See for further example* 820 Ill. Comp. Stat. Ann. 55/10(b)(E) and (F) and Me. Rev. Stat. Ann. tit. 26 §616.
61. N.J. Stat. Ann. §34:6B-7; Neb. Rev. Stat. Ann. §48-3504. New Mexico contains neither provision. N.M. Stat. Ann. §50-4-34.
62. Vt. Stat. Ann. tit. 21, §495l(d).
63. Or. Rev. Stat. §659A.330(1)(a). Oregon also prohibits an employer from requiring an employee or applicant to allow the employer to advertise on their social media account. Or. Rev. Stat. §659A.330(1)(b).
64. Mont. Code Ann. §39-02-307(4)(b) and (5).
65.Title VII of the Civil Rights Act of 1964 prohibits employers from failing or refusing to hire or discharging any individual, or otherwise discriminating against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a)(1).
66. Gaskell v. Univ. of Kentucky, 2010 U.S. Dist. LEXIS 124572 (E.D. Ky. 2010).
67. *See id.* at *10.
68. The Age Discrimination in Employment Act of 1967 prohibits age discrimination in employment. 29 U.S.C. §623.
69. Nieman v. Grange Mut. Cas. Co., 2012 U.S. Dist. LEXIS 59180, *4 (C.D. Ill. 2012).
70. The Americans with Disabilities Act of 1990 prohibits discrimination against individuals with disabilities in daily life. 42 U.S.C. §12101 *et seq.*

PRACTICE TIPS

By: KAREN L. HORNER,
City Attorney, Friendswood, Texas

New Councilmembers: Things They Wish They Knew Before Running for Office

INTRODUCTION

Each year, many of us have the possibility of training new members of the city council, who have volunteered to serve. The new members may have anticipated the long council meetings, the phone calls from constituents at all hours of the day and night, and the criticisms from those needing to be more informed. However, did they realize that with such noble volunteerism, they also signed up for potential criminal penalties? Yes, that is right, as city attorneys, we have the distinct privilege not only to welcome the new members but also to inform them of the various traps of which they need to be aware. The following are some of these traps, of which new councilmembers should become aware.

1. Open Meetings Act.
The Texas Open Meetings Act (zOMA) ensures government is transparent, open, and accountable to its citizens by requiring every regular, special, or called meeting of the city council be open to the public.[1] The definition of "meeting" is also broadly defined as:

(A) deliberation between a quorum of a governing body, or between a quorum of governing body and another person, during which public business or policy is discussed or considered or acted upon; or
(B) except as otherwise provided by this subdivision, a gathering:
(i) that is conducted by the governing body or for which the governmental body is responsible;
(ii) at which a quorum of members of the governmental body is present;
(iii) that has been called by the governmental body; and
(iv) at which the members receive information from, give information to, ask questions of, or receive questions from any third person about the public business or policy over which the governmental body has supervision or control.[2]

The OMA, however, does not prohibit a councilmember from attending social gatherings, conventions, workshops, ceremonial events, or candidate forums if there is no formal action of the city council and any discussion of public business incidental to the event.[3] Additionally, there are a few limited exceptions to the requirement that all meetings must be open to the public, which are known as executive sessions and include consultations with attorneys as well as deliberations regarding real property, personnel matters, security devices, and disasters.[4]

Pursuant to the OMA, the city must post notice of the date, time, place, and subject of each meeting with sufficient detail to alert the public what will be discussed.[5] Notice of each meeting must be posted at least 72 hours[6] before the meeting on the city's website, in a place readily accessible to the general public in city hall.[7] The public must be afforded the opportunity to speak on an item on the agenda before or during the city council's consideration of the item.[8] The OMA allows councilmembers to make reports about items of community interest[9] without the necessity of posting such items on the agenda.[10] Violations of the OMA could result in civil and/or criminal penalties, including fines and/or onfinement, and including those in the table below:[11]

2. Public Information Act.
The policy behind the Texas Public Information Act ("PIA") is that "each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees."[12] The definition of "public information" is also broad and includes any information collected, assembled, or maintained by or for a governmental body, regardless of its format. It includes information that is maintained in paper, tape, microfilm, video, electronic data held in computer memory, as well as other mediums specified under the PIA.[13] Similarly, the definition of "governmental body" is very broad so as to encompass not only the city council but also the boards and commissions of the city.[14] As such, the city council and its boards and commissions are subject to the PIA and must comply with its provisions.

The PIA is only activated by a written request for public information.[15] While the city has developed a form for the public to use to request public information, the city cannot require that requestors use such form. The PIA requires that the public direct its open records requests to the "applicable officer," who is the city secretary or a person designated by the

Violation	Fine	Confinement
Engaging in a prohibited series of communications	$100 – $500	1 month – 6 months
Participating in an unauthorized closed meeting	$100 -- $500	1 month – 6 months
Participating in a closed meeting without a certified agenda or a recording	Up to $500	N/A
Disclosure of certified agenda or recording	Up to $2,000	Up to 180 days

city secretary.[16] Additionally, the city cannot ask the requestor for the purpose of or motive behind the request but may only ask the requestor for proper identification and clarification of the type of information being requested.[17] Cities are not required to, and, in fact, most do not honor standing requests for information. Once a request is received, there are specific time frames to which the city must adhere, including when to provide the information, give notice of when the information will be available, and request an Attorney General opinion if the city seeks to withhold some of the requested information.[18] These deadlines are essential and must be followed in order for the city to be able to preserve privileged information. If an Attorney General opinion is requested, the Attorney General has 45 business days from the date the request was received from the governmental body to render an opinion unless the Attorney General gives notice that an additional ten-day period will be necessary.[19]

In providing the requested information, for inspection, by copy, or by referral to the exact internet location or URL address maintained on the city's website, the city is not generally required to create records that do not exist at the time of the request. Furthermore, if copies are requested, the city may charge for the copies made pursuant to a schedule adopted by the city, which schedule is in conformance with the rules governing the PIA.[20]

Violations of the PIA could result in civil and/or criminal penalties. The failure to give access to public information or the release of confidential information is punishable by a fine of up to $1,000, a possible six- month jail term, or both.[21] Illegal destruction, removal, or alteration of public information is punishable by a fine between $25 and $4,000, three days to three months of jail time, or both.[22]

3. Conflicts of Interest.

Chapter 171 of the Local Government Code provides the statutory authority which regulates conflicts of interest of local public officials who exercise responsibilities beyond those that are merely advisory in nature.[23] Such authority applies to members of the city council and governs the extent members of the council may participate in decisions on matters in which a member may have a special interest.[24]

A conflict under Chapter 171 is measured by the interest a public official or certain relatives of the public official[25] ("covered relatives") have in a business entity or in real property. Such an interest must be substantial. A substantial interest pertaining to a business entity exists if a public official or a covered relative of a public official:

(1) owns 10 percent or more of the voting stock or shares of a business entity;
(2) owns 10 percent or more of the fair market value of a business entity;
(3) owns $15,000 or more of the fair market value of a business entity; or
(4) receives funds from a business entity, which exceed 10 percent of the person's gross income received in the previous year.[26]

Likewise, a public official or his covered relative has a substantial interest in real property "if the interest is an equitable or legal ownership with a fair market value of $2,500 or more."[27]

If a substantial interest exists, the public official shall not only "file [with the city secretary], before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest" but also abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity, the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or
(1) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.[28]

However, if a public official files an affidavit and if a majority of the public officials of the city council likewise files affidavits of similar interests on the same matter, none of the public officials are required to abstain from further participation.[29] On the other hand, it is a class A misdemeanor if an official fails to file an affidavit or fails to refrain from participating in the discussion of matter in which the official has filed an affidavit.[30]

In summary, once a public official becomes aware that he has a conflict of interest, the official should immediately[31] file an affidavit and abstain from any discussion, deliberation, decision, and vote on the matter since there are criminal penalties associated with knowingly violating the provisions of Chapter 171.[32]

4. Conflicts Disclosure.

Chapter 176 of the Texas Local Government Code creates a filing requirement for local government officers, including the members of the city council, and certain persons, who enter or seek to enter into a contract with a city or other local government entity[33] ("vendor").[34] Under this law, a councilmember must file a conflicts disclosure statement if:

(1) a vendor enters into a contract with the city or the city is considering entering into a contract with a vendor; and
(2) during the 12-month period preceding the date that the councilmember becomes aware of such a contract or possible contract,
  (A) such vendor has an employment or other business relationship with a councilmember or a family member of the councilmember[35] that results in the councilmember or family member receiving taxable income, other than investment income, that exceeds $2,500;
  (B) such vendor has given to the councilmember or their family member one or more gifts that have an aggregate value of more than $100[36]; or
  (C) such vendor has a family relationship[37] with the councilmember.[38]

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Karen Horner joined the City of Friendswood, Texas, as its City Attorney in 2022. Previously, she was the City Attorney of the City of Baytown, where she started her municipal career over 30 years ago as an Assistant City Attorney. She is a member of the International Municipal Lawyers Association and a member and past president of the Texas City Attorneys Association (TCAA). She has a Merit Certification in Municipal Law from TCAA and is a member of the College of the State Bar of Texas. In her practice, she advises the City Council, the City Manager, and City boards and departments on the various aspects of municipal law.

The conflicts disclosure statement, which has been adopted by the Texas Ethics Commission, requires disclosure of the above-referenced business relationships and gifts together with an acknowledgment that the disclosure applies to the councilmember's family and the statement covers the 12-month period described hereinabove.[39] The form must be signed and filed with the city secretary not later than 5:00 p.m. on the seventh business day after the date the councilmember either (i) becomes aware of the facts that require the filing of a conflicts disclosure statement or (ii) receives notice from the city of the alleged violation.[40] Failure to complete and file a statement when required is a criminal offense.[41] An offense is a Class C misdemeanor if the contract amount is less than $1,000,000; a Class B misdemeanor if the contract amount is more than $1,000,000 but less than $5,000,000; and a Class A misdemeanor if the contract amount is at least $5,000,000.[42]

Additionally, vendors must complete and file with the city secretary conflict of interest questionnaires developed by the Texas Ethics Commission and attached hereto, to disclose the above-referenced business relationships and gifts.[43] These questionnaires must be timely filed and updated not later than seven business days after the date of an event that would make a statement in the questionnaire incomplete or inaccurate.[44] Criminal penalties can also be assessed against these vendors.[45]

Summary

While these laws and their penalties may be daunting for new councilmembers, the provisions are overwhelmingly important: they ensure that city councils--a form of government closest to the people--remain transparent and accountable to their constituents

Notes

1. Tex. Gov't Code Ann. § 551.002.
2. Id. § 551.001.
3. *Id.*
4. *Id.* §§ 551.071, *et seq.*
5. *Id.* § 551.041.
6. Emergency meetings must be posted and given to the news media at least one hour before the meeting is convened. *Id.* § 551.0415.
7. *Id.* § 551.050.
8. *Id.* § 551.007.
9. Items of community interest are limited to the following:
   1. Expressions of thanks congratulations or condolences;
   2. Information regarding holiday schedules;
   3. An honorary recognition of a public official, employee or citizen;
   4. A reminder about an upcoming city event;
   5. Information regarding a social, ceremonial or community event that was or is scheduled to be attended by a councilmember; and
   6. Announcements involving an imminent threat to the public health and safety of the citizens.

   Id. § 551.0415.
10. *Id.* § 551.0415.
11. *Id.* §§ 551.143 – 551.146.
12. Tex. Gov't Code Ann. §552.001.
13. *Id.* §552.002.
14. *Id.* § 552.003.
15. *Id.* § 552.301.
16. *Id.* § 552.234.
17. *Id.* § 552.222.
18. *Id.* §§ 552.301, *et seq.*
19. *Id.* § 552.306.
20. *Id.* §§ 552.261, *et. seq.*
21. *Id.* §§ 552.352, 552.353.
22. *Id.* §552.351.
23. Tex. Loc. Gov't Code Ann. §171.001(1).
24. *Id.* § 171.004.
25. Only those relatives who are related within the first degree of consanguinity or affinity can cause a public official to have a conflict of interest under Chapter 171 of the Texas Local Government Code. Such persons include, in general, a spouse, parent, child, parent-in-law, daughter-in-law, and son-in-law. *Id.* § 171.002 (c).
26. *Id.* §171.002 (a).
27. *Id.* §171.002 (b).
28. *Id.* §171.004(a), (b).
29. *Id.* 171.004(c).
30. *Id.* 171.003.
31. While no statutory or case law exists regarding the timing of the filing of an affidavit, it is the position of both the Texas Municipal League and the Texas Attorney General's Office that an affidavit should be filed immediately once the public official becomes aware of a conflict, or else risk criminal prosecution.
32. An offense for violating the statute is punishable by a fine not to exceed $4,000, confinement in jail for a term not to exceed one year; or both such fine and confinement. *Id.* §171.003(b); Tex. Penal Code §12.21.
33. Tex. Loc. Gov't Code Ann. § 176.003.
34. Note that if a vendor is the state, a political subdivision of the state, or the federal or a foreign government, neither such government nor its employees, when acting in their official capacities, are subject to the disclosure requirements. Tex. Loc. Gov't Code Ann. § 176.002 (b).
35. A "family member" includes a father, mother, son, daughter, spouse, father-in-law, mother-in-law, son-in-law, and daughter-in-law. *Id.* §176.001(2). Also, please note that an ex-spouse is also considered a family member as long as a child of the marriage is living. Tex. Gov't Code Ann. § 573.024(b).
36. Note that conflicts disclosure statements are not required for gifts that are given (i) as a political contribution, or (ii) as food, lodging, transportation or entertainment accepted as a guest of a vendor. Tex. Loc. Gov't Code Ann. § 176.003 (a-1). Similarly, conflict disclosure statements are not required if the vendor is an administrative agency. *Id.* § 176.003 (a-2).
37. A "family relationship" includes a "family member" as well as a grandfather, brother, sister, grandson, granddaughter, grandmother, uncle, niece, nephew, great-grandson, great-granddaughter, great-grandfather, great-grandmother, spouse's grandfather, spouse's granddaughter, brother-in-law, sister-in-law, spouse's grandson, and spouse's grandmother. *Id.* § 176.001.
38. *Id.* § 176.003 (a).
39. *Id.*, § 176.003 (e).
40. *Id.* § 176.003 (b).
41. *Id.* § 176.013.
42. Tex. Loc. Gov't Code Ann. §176.013 (c).
43. *Id.* § 176.006 (a).
44. *Id.* §176.006 (d).
45. *Id.* § 176.013.

Councilmember Removal *cont'd from page 13*

guarantee." Syntex Laboratories v. Dep't of Treasury, 233 Mich. App. 286, 292; 590 N.W.2d 612 (1998).
10. U.S. Const. amend. XIV, § 1.
11. Women's Med. Prof'l Corp. v. Baird, 438 F.3d 595, 611 (6th Cir. 2006).
12. *Id.*
13. Wilkinson v. Austin, 545 U.S. 209, 221 (2005).
14. Kulak v. City of Birmingham, 139 Fed. Appx. 694, 696-97 (6th Cir. 2005).
15. It should also be noted that the Sixth Circuit Court of Appeals specifically rejected the Plaintiff's claim that the Home Rule City Act, MCL 117.5(1)(d) created a property interest in public office *Id.*
16. Taylor v. Becham, 178 U.S. 548, 577-78 (1900*);* Snowden v. Hughes, 321 U.S. 1, 7 (1944); Burks v. Perk, 470 F.2d 163, 165 (1972).
17. Garcia v. Fed. Nat'l Mortg. *Ass'n*, 782 F.2d 736, 741 (6th Cir. 2015).
18. Relatedly, removal of a Councilmember from a committee would not amount to an improper Bill of Attainder. Bills of Attainder are prohibited by Article I, §10 of the Constitution. A Bill of Attainder is a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protection of a judicial trial. Zillich v. Longo, 34 F.3d 359, 362 (6th Cir. 1994). The Bill of Attainder clause is a "safeguard against legislative exercise of the judicial function, or more simply—trial by legislature." There are three essential elements to a Bill of Attainder: "specificity, punishment, and a lack of a judicial trial." *Id.* at 363. But "[t]he Bill of Attainder clause does not outlaw legislative action against a specific legislator. Legislative bodies may censure, suspend, or otherwise discipline a member. They have done so under English and American law for centuries." *Id.*
9. Guertin v. Michigan, 912 F.3d 907, 918 (6th Cir. 2019)
20. Pusey v. City of Youngstown, 11 F.3d 652, 656 (6th Cir. 1993).
21. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).
22. Seal v. Morgan, 299 F.3d 567, 574-75 (6th Cir. 2000).
23. *Guertin*, 912 F.3d at 918.
24. County of Sacramento v. Lewis, 523 U.S. 833, 846 (1998).
25. *See* Cassady v. Tackett, 938 F.2d 693, 698 (6th Cir. 1991).
26. Range v. Douglas, 763 F.3d 573, 589 (6th Cir. 2014).
27. *See for example* King v. City of New York, 581 F. Supp. 3d 559, 569-571 (2022).
28.Mattox v. City of Forest Park, 183 F.3d 515, 522 (6th Cir. 1999).
29. Rash-Aldridge v. Ramirez, 96 F.3d 117, 119 (5th Cir. 1996); McKinley v. Kaplan, 262 F.3d 1146, 1151-52 (11th Cir. 2001); Whitener v. McWatters, 112 F.3d at 741.
30. A recent case applying *Houston Community College,* in contrast, found that a legislator plausibly stated that he was subject to a "materially adverse action" due to a requirement that he had to provide 12-hour notice of his

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Dewitt F. "Mac" McCarley Local Government Law Scholarships —2023 Recipients

As part of its commitment to building generational involvement in local government law, IMLA created the McCarley Scholarships, named in honor of Dewitt F. "Mac" McCarley. Mac has practiced municipal law for more than 45 years, having served as the Charlotte, North Carolina City Attorney from 1994 to 2011 and continuing as a partner at Parker Poe where he focuses on local government matters, including service as the town attorney for Southern Pines. Mac was an IMLA President, a recipient of the Charles S. Rhyne Lifetime Achievement award and was instrumental in creating IMLA's Institute for Local Government Lawyers (ILGL). Offered each year at the IMLA Annual Conference, ILGL is a one-day boot camp providing an interactive and experiential program for attorneys new to local government law (or for those that seeking a refresher). Mac, who has been a member of the ILGL faculty since its inception, exemplifies giving back to IMLA. It is in that spirit that the McCarley Scholarships were created.

We are pleased to announce the winners of the 2023 McCarley Scholarships: Megan Luptowski, Assistant City Attorney, Grand Rapids, Michigan and Chase Ames, Assistant City Attorney, West Jordan, Utah. IMLA is publishing their articles in this issue of *Municipal Lawyer* and we look forward to meeting Megan and Chase in person as they join us for IMLA's upcoming Annual Conference in La Quinta, California!



$2,500 Award
Megan Luptowski, Assistant City Attorney, Grand Rapids, Michigan



$2,500 Award
Chase B. Ames, Assistant City Attorney, West Jordan, Utah

CITY PLANNING

By: CHASE B. AMES,
Assistant City Attorney,
West Jordan, Utah

Stub Streets: At the Corner of Essential Nexus and Rough Proportionality

INTRODUCTION

Municipalities commonly require developers to include stub streets (or stub-outs), a dead-ended street extension to an abutting undeveloped property, to provide for the efficient flow between future neighborhoods. While stub streets constitute only a small portion of a proposed development, and provide obvious community planning benefits, they are not free from constitutional inquiry. While developers have rarely challenged stub streets that are a condition precedent to approval of a development, courts have routinely struck such requirements down under the takings clause of the Fifth Amendment (as applied to municipalities pursuant to the Fourteenth Amendment). To avoid such rulings, municipalities must carefully examine each proposed development and relate the stub street to the burdens the proposed development will concurrently impose on the community at large.

1. Exaction Overview.
A. Stub Streets as Exactions.
A stub street constitutes an exaction when it is a condition of approval of a proposed development. Development exactions are "contributions to a government entity imposed as a condition precedent to approving the developer's project." This explicitly includes circumstances where there is a "mandatory dedication of land for roads, schools or parks, as a condition to plat approval[.]"[1] Thus, in any case where a city refuses to approve a proposed development without the dedication of a stub street, there is a developmental exaction.

B. When Exactions are Constitutional.
Exactions are constitutional if: (a) there is an essential link to a legitimate government interest; and (b) the exaction is roughly proportionate to the impact of the proposed development. While development exactions are framed "in the parlance of takings clause jurisprudence," development exactions are not unconstitutional per se.[2] The United States Supreme Court adopted "essential nexus" and "rough proportionality" tests in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) as the method for determining whether a development exaction passes constitutional muster.

The scope of *Nollan* and *Dolan*'s application has resulted in a split among courts. State courts in Alabama, Arizona, California, Connecticut, Oregon, and Washington have held that the *Nollan/Dolan* test does not apply to exactions imposed by municipalities pursuant to generally applicable regulations.[3] These courts have relied on language from the *Dolan* decision in which the court reaffirmed that, "in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights" and the court's application of the rough proportionality test was limited to "an adjudicative decision to condition petitioner's application for a building permit on an individual parcel."[4]

The Sixth Circuit and other state courts including North Carolina, Texas, Ohio, Maine, and Illinois have held that the *Nollan/Dolan* test "applies just as much to legislatively compelled permit conditions as it does to administratively imposed ones."[5] The Sixth Circuit interpreted the *Dolan* court's response to Justice Stevens quoted above to mean that the arbitrariness standard applies when governmental entities place conditions on the *use* of private property but rough proportionality is the proper test when a condition requires the *dedication* a property interest.[6] The United States Supreme Court is yet to conclusively address this split in interpretation.

Some states have avoided the split altogether by adopting statutes which apply the *Nollan/Dolan* test across the board. For example, the Utah legislature codified its own version of these tests in Utah Code § 10-9a-508:

> (1) A municipality may impose an exaction or exactions on development proposed in a land use application, including, subject to Subsection (3), an exaction for a water interest, if:
> (a)An essential link exists between a legitimate governmental interest and each exaction; and
> (b)Each exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development.[7]

By its plain language, in adopting the above statute, "the legislature intended to apply the rough proportionality test to all exactions, irrespective of source[.]"[8]

II. Applying the Tests.
A. Essential Link.
A stub street shares an essential link to a legitimate government interest when there is a direct correlation to the impact of the development on the community.

Under the first prong of the *Nollan/Dolan* test, a government entity must establish that "[a]n essential link exists between a legitimate governmental interest and each exaction." Utah Code § 10-9a-508(1)(a). Generally, a governmental interest is legitimate when it is "cognizable," within the government's

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Stub Streets *cont'd from page 27*

"authority to implement," and rises above "a bare desire to harm a politically unpopular group."[9] While the United States Supreme court has "not elaborated on the standards for determining what constitutes a 'legitimate state interest[,]'" it has "made clear, however, that a broad range of governmental purposes and regulations" satisfy that definition.[10] "Under federal constitutional caselaw, a governmental entity may establish an essential nexus if there is a connection between a legitimate state interest and a permit condition. This is not an onerous requirement, and it may be satisfied if there is merely a logical connection between the legitimate state interest and the exaction of a dedication or fee."[11]

In *Nollan*, a property owner applied for a permit to demolish a bungalow and replace it with a three-bedroom home.[12] The California Coastal Commission (CCC) approved the application under the condition that the owner grant the public a lateral easement connecting two beaches across a portion of the property.[13] The United States Supreme Court agreed that the CCC had a legitimate interest in providing the public visible access to the beach.[14] However, the Court ruled there was no essential link between this interest and the easement because travelers did not need to traverse the owner's property.[15] The Court opined that an exaction would be constitutional if the CCC had simply required that the property owner "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere."[16]

With stub streets, the most obvious governmental interest is in allowing for the efficient flow of traffic between abutting developments. Courts have regularly conceded that "the flow of traffic is a legitimate concern of a municipal legislative body[.]"[17] However, as in *Nollan*, courts routinely reject stub streets which only provide a future benefit because such a condition precedent only acts as "a shorter cut than the constitutional way of paying for the change."[18]

In *Burton v. Clark Cty.*, 958 P.2d 343 (Wash. App. 1998), a county made a stub street a condition of approving a proposed development.[19] The county argued that the proposed development would exacerbate three issues: (1) "pocket neighborhoods" lacking access to adjoining neighborhoods; (2) traffic congestion; and (3) restricting emergency vehicle access into the development.[20] The court agreed that the development added to these public issues, "to at least a slight degree[,]" and that connection between the stub road and other travel ways would "tend to alleviate the identified public problems."[21] However, the court found that there was no evidence that the stub street would ever actually connect to a future road on the abutting property and was, at present, a "road to nowhere[.]"[22] The court ruled there was no essential link between the county's proffered interests and the stub street and ruled that the condition resulted in an unconstitutional taking.[23]

Stub streets are naturally focused on potential future development but municipalities must show that the stub street has a present-day use relating to a legitimate governmental interest to successfully defend against a takings claim. Examples of viable present-day use of stub streets could include controlling the flow of storm and irrigation water or providing additional street parking so fire apparatus have minimum proximity to buildings within the development. However, municipalities will need to closely evaluate proposed developments on a case-by-case basis to determine which use best connects the stub street to a legitimate governmental interest.

B. Rough Proportionality.

The cost to the municipality in the absence of a stub street must be roughly proportionate to the value of the dedicated property. Under the second prong of the *Nollan/Dolan* test, municipalities must establish that the "exaction is roughly proportionate, both in nature and extent, to the impact of the proposed development."[24] "No precise mathematical calculation is required, but the city must make some sort of individualized determination" with respect to the exaction.[25] "[T]he nature component has been satisfied" when an exaction addresses a problem caused by the development."[26] The "extent" component is satisfied when the "exaction and the impact [are] measured in the same manner, or using the same standard. The most appropriate measure is cost— specifically, the cost of the exaction and the impact to the developer and the municipality, respectively."[27] In short, "[t]he *Dolan* analysis, properly applied, asks whether the imposition on the community of a proposed development is roughly equal to the cost being extracted to offset it."[28] The proper measurement is the impact to the community as a whole, not just the impact on the entity requesting the stub road.[29] ("In embracing costs to 'the community' we were squarely resolving to encompass costs beyond those borne directly" by the government entity requesting the dedication).

The rough proportionality test was applied to a stub street in *Luxembourg Grp. v. Snohomish Cty.*, 887 P.2d 446 (Wash. App. 1995). There, a developer applied to develop land abutting a buildable but undeveloped property.[30] The owner originally proposed providing access to the undeveloped land via a stub street but removed the stub street after its attempt to purchase the abutting property failed.[31] The city denied the application, asserting that the development would landlock the buildable portion of the abutting property.[32] On appeal, the county asserted that the stub street advanced its interest in "convenient travel by the public on streets and highways;" "proper ingress and egress;" and meeting "the housing and commercial needs of the citizens[.]"[33] The Washington Court of Appeals found that because the buildable portion of the abutting property "has always been isolated from the county roads, their need for access is not a result of the proposed subdivision."[34] Consequently, the court ruled that the county's denial of the application was



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an unconstitutional taking.[35]

The "nature" component of the rough proportionality test is similar to the "essential nexus" analysis in that a stub street cannot be tied solely to a potential future development. However, this step in the analysis goes a step further in requiring municipalities to establish that the proposed development negatively impacts the proffered government interest and that the stub street alleviates that impact. For example, if a municipality claimed that the stub street was linked to the legitimate governmental interest in controlling the flow of storm or irrigation water, the municipality would be required to show that the development increased or diverted water in a way that negatively impacted the community and that the stub street allowed the city to mitigate that impact by providing additional storm drains.

The example of minimum proximity of fire apparatus may be easier to argue for a municipality. A development increases the risk of fire both in the development and surrounding areas which increases demands on the local fire authority. Under National Fire Protection Association 1, *Fire Code*, fire apparatus must be able to get within at least 50 ft. of structures without a fire suppression system or 150 ft. of structures with a fire suppression system. Developments, particularly in high density areas, will have increased demand for street parking which will limit room for fire apparatus to maneuver and park. A stub street could alleviate the demand for parking increasing fire apparatus' ability to reach minimum proximity to structures within the development.

Municipalities can satisfy the "extent" component of the rough proportionality analysis if it quantifies the development's impact on the community in same manner it quantifies the value of the dedicated property, and the values are roughly proportional. For example, in *B.A.M. III*, the plaintiff sought a development permit for property abutting a state highway.[36] The developer proposed a 40 ft. wide right of way in favor of the Utah Department of Transportation pursuant to the county's road-width ordinance.[37] "The county's engineering and development staff approved this application."[38] The developer challenged the requirement, and after multiple trials and appeals, the trial court ruled that the county met its burden of proof under *Nollan/Dolan*.[39] On appeal, the Utah Supreme Court found that the cost of the road expansion attributable to proposed development was $337,500 and the value of the additional 13 ft. of easement was only $83,997.29.[40] The court found that where easement cost the owner "roughly 25% of the impact . . . imposed on the community[,]" the expanded easement "withstands rough proportionality review regardless of the degree of specificity or equivalency that the rough-proportionality test requires."[41]

While quantifying the monetary value of real property can be relatively easy, it can be extremely challenging to quantify the impact of the development on the community. Municipalities must determine difference in the accumulated costs the development would impart on the community, including and all impacted individuals and entities, with and without a stump street. If the difference is roughly proportional to the value of the dedicated land, the municipality should be able to safely satisfy the "extent" component of the rough proportionality test.

Notes

1. *Id*., at ¶ 34.
2. *Id*., at ¶ 4.
3. *See* St. Clair Cnty. Home Builders Ass'n v. City of Pell City, 61 So. 3d 992, 1007-08 (Ala. 2010) (per curiam); Am. Furniture Warehouse Co. v. Town of Gilbert, 425 P.3d 1099, 1103-06 (Ariz. Ct. App. 2018); San Remo Hotel L.P. v. City & Cnty. of San Francisco, 41 P.3d 87, 101-06 (Cal. 2002); Dunham v. Planning Comm'n, No. CV010085538, 2002 Conn. Super. LEXIS 2761, at *22-23 (Super. Ct. Aug. 20, 2002); Dudek v. Umatilla Cty., 69 P.3d 751, 755 (Or. App. 2003); City of Olympia v. Drebick, 126 P.3d 802, 807-09 (Wash. 2006).
4. 512 U.S. at 391 n.8.
5. Knight v. Metro. Gov't of Nashville & Davidson Cty., 2023 U.S. App. LEXIS 11453, *27, 67 F.4th 816 (6th Cir. 2023) (citing Anderson Creek Partners, L.P. v. County of Harnett, 876 S.E.2d 476, 496-503 (N.C. 2022); Town of Flower Mound v. Stafford Ests. Ltd. P'ship, 135 S.W.3d 620, 640-42 (Tex. 2004); Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000); Curtis v. Town of S. Thomaston, 708 A.2d 657, 658-60 (Me. 1998); N. Ill. Home Builders Ass'n, Inc. v. County of Du Page, 649 N.E.2d 384, 388-90 (Ill. 1995)).
6. 2023 U.S. App. LEXIS 11453, *39-40.
7. *Id*. (Formerly codified as Utah Code § 17-27a-507).
8. B.A.M. I, ¶ 46 (*emphasis added*).
9. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 441, 446-48 (1985) (*internal quotation omitted*).
10. *Nollan*, 483 U.S. at 834.
11. Puce v. City of Burnsville, 971 N.W.2d 285, 295-96 (Minn. Ct. App. 2022) (*internal citations omitted*).
12. *Id*. at 828.
13. *Id*.
14. *Id*. at 835.
15. *Id*. at 836-37.
16. *Id*. at 836.
17. Smith Inv. Co. v. Sandy City, 958 P.2d 245, 255 (Utah Ct. App. 1998).
18. *Dolan*, 512 U.S. at 396 (*internal quotation omitted*).
19. *Id.at* 348-49.
20. *Id*. at 356.
21. *Id*. at 357.
22. *Id*.
23. *Id*.
24. Utah Code § 10-9a-508(1)(a).
25. *Dolan*, 512 U.S. at 391.
26. B.A.M. Dev. L.L.C. v. Salt Lake Cty. (B.A.M. II), 2008 UT 74, ¶ 10.
27. *Id*. ¶ 11.
28. *Id*. ¶ 14.
29. *See* B.A.M. Dev., L.L.C. v. Salt Lake Cty. (B.A.M. III), 2012 UT 26, ¶ 24.
30. *Id*. at 447.
31. *Id*.
32. *Id*. at 448.
33, *Id*.
34. *Id*.
35. *Id*. 448-49.
36. *Id*. ¶ 3.
37. *Id*.
38. *Id*. at ¶ 4.
39. *Id*. at ¶ 6.
40. *Id*. at ¶ 35.
41. *Id*.

SUPREME COURT

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Revisiting the Intersection of Public Accommodations Law, the Freedom of Speech, and the Freedom of Religion

INTRODUCTION

During its most recent Term, the United States Supreme Court had the opportunity to revisit issues it left open in 2018, due to a particularly peculiar set of facts in *Masterpiece Cakeshop Ltd, et al v. Colorado Civil Rights Commission et al*. In one of its last opinions of the 2022 Term, the Supreme Court held (6-3) in *303 Creative LLC et al v. Elenis et al* that the First Amendment prohibits Colorado, pursuant to the Colorado Anti-Discrimination Act, from forcing a website designer to create expressive designs speaking messages with which the designer disagrees based on her own religious beliefs. With this decision, the Court has made a major shift in public accommodations law in the name of staunchly defending the freedom of speech and implicitly the freedom of religion. This shift leaves states and local governments in a precarious position when deciding when to enforce their public accommodations laws.

A. Background on Public Accommodations Laws.

Laws guaranteeing every person the full and equal enjoyment of places of public accommodation without unjust discrimination are features of all levels of government.[1] As explained by a group of local governments and mayors who filed an amicus brief in support of the Colorado public accommodations law in *303 Creative*:

> These laws, which are features of cities, counties, and towns throughout the country, reflect a democratically determined commitment to equality and inclusion in the public sphere. They are informed by local experience and are designed to meet local needs. They are a crucial tool to ensure that all members of our communities—regardless of their religious beliefs, sexual orientation, or other characteristics—have the right to go to public establishments without worrying they will be turned away, given inferior service, or humiliated based on their identity.[2]

Such laws have been an important part of civil rights movements throughout our nation's history and have helped to fulfill the promise of our nation's founding—that all men are created equal.

Legal challenges to public accommodations laws and individuals seeking exemptions from them based on First Amendment rights are not new.[3] Justice Sotomayor's dissent in *303 Creative* gives a thorough history of challenges against public accommodations laws and civil rights in general in the U.S., so I will not go into too much detail here. Instead, I will highlight a few key examples. In *Heart of Atlanta Motel*, a motel owner attacked the constitutionality of Title II of the Civil Rights Act of 1964, which provides that "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation. . . without discrimination or segregation on the ground of race, color, religion, or national origin."[4] The motel owner argued that requiring him to serve African Americans would deprive him of liberty or property without due process of law and take his property without just compensation.[5] The Court, as it had done in prior cases, "rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty."[6] The Court would reject a similar challenge in *Newman v Piggie Park Enterprises*.[7] There, the owner of several eating establishments asserted that requiring him to "contribut[e]" to racial integration would violate his religious liberty. The Court found that challenge "patently frivolous."[8] In short, the Court has historically refused to recognize a right to discriminate in public accommodations.

History tends to repeat itself; as the LGBTQ community has made strides in securing the rights intended to be enjoyed by all citizens of the United States, they have been met with backlash just like other minorities have in the not-too-distant past. As public accommodations laws have been expanded to include more businesses and protect more people, like the LGBTQ community, concerns about how this rec-

ognition impacts the right of others have been raised. In 2015, the Supreme Court recognized the right to marry as a fundamental liberty that could not be denied to same-sex couples.[9] Justice Thomas, in dissent in that case, forebodingly stated that recognizing the right of same-sex couples to marry would inevitably lead to conflict between the rights of LGBTQ individuals and religious liberty "as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples."[10] Thus, we reach the modern challenges to public accommodations laws in *Masterpiece Cakeshop* and *303 Creative*.

B. ***Masterpiece Cakeshop.***

In 2018, the Court considered the intersection of public accommodations law, the freedom of speech, and the freedom of religion in *Masterpiece Cakeshop*. The question presented was whether the application of Colorado's Anti-Discrimination Act to effectively compel a cake maker to design and make a cake that violates his sincerely held religious beliefs about same-sex marriage violates the Free Speech or Free Exercise Clauses of the First Amendment.[11]

There, a same-sex couple looking to order a cake for their wedding reception was denied service and told by the owner of a bakery that he would not create a cake for their wedding because of his religious opposition to same-sex marriage.[12] While the same-sex couple viewed this as a violation of Colorado's public accommodations law by a business open to the public selling goods and services, the baker argued his cakes were a form of expressive speech and that to require him to bake and decorate a cake in celebration of a same-sex wedding would violate his religious beliefs.[13]

The Court deftly sidestepped the stickier constitutional questions. To do so, the Court found the Colorado Civil Rights Commission had been expressly hostile to religion based on comments during the public hearings that the Court viewed as disparaging of the baker's religion.[14] The Court also highlighted the difference in treatment between that baker's case and other bakers who had objected to requests for cakes based on the messages they would convey. The baker who refused to bake a cake for a same-sex wedding was found to have violated the Colorado law, whereas the other bakers who refused to bake cakes with decorations that demeaned gay persons or gay marriage were found to have appropriately declined to create those messages.[15]

Avoiding the underlying major issues, the Court held (7-2) with Justice Kennedy writing for the majority, that "[w]hatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality."[16] Thus, the Court did not determine whether baking a wedding cake is speech under the First Amendment, what the difference between status discrimination and message discrimination is, or whether religious beliefs can entitle someone to an exception to generally applicable public accommodations laws. *Masterpiece Cakeshop*, although presenting the possibility of substantial change, did not make waves in public accommodations laws.

C. ***303 Creative.***

Five years later, these same issues were back before a very different Court with a somewhat better vehicle, and an entirely different outcome. In *303 Creative*, website designer Lorie Smith, through her graphic design business, 303 Creative LLC, sought an injunction against the State of Colorado to prevent enforcement of the Colorado Anti-Discrimination Act against her.[17] Ms. Smith wanted to expand her business to the creation of wedding websites. However, she worried that if she refused to create wedding websites for same-sex couples based on her religious beliefs, she would be penalized under Colorado law.[18] The Colorado Anti-Discrimination Act—the same law at issue in *Masterpiece Cakeshop*—prohibits all "public accommodations" from denying "the full and equal enjoyment" of their goods and services to any customer based on race, creed, disability, sexual orientation, or other statutorily enumerated trait.[19]

While the language of the Colorado Anti-Discrimination Act has not significantly changed since the Court decided *Masterpiece Cakeshop*, the composition of the Court has. Since the Court's decision in *Masterpiece Cakeshop*, three new justices have been appointed to the United States Supreme Court: Justice Kavanaugh, Justice Barrett, and Justice Jackson. Conversely, the Court has lost both Justice Kennedy (who wrote the majority opinions in *Obergefell v. Hodges* and *Masterpiece Cakeshop*, and is often touted for his legacy of being a voice for LGBTQ rights on the Court) and Justice Ginsberg (who worked at the ACLU Women's Rights Project prior to joining the Court and dissented in *Masterpiece Cakeshop*). As Justice Sotomayor has noted in some of her recent dissents, "What a difference five years makes."[20]

The majority opinion in *303 Creative*, written by Justice Gorsuch, holds that the First Amendment prohibits Colorado, pursuant to the Colorado Anti-Discrimination Act, from forcing a website designer to create expressive designs speaking messages with which the designer disagrees based on her own religious beliefs.[21] Although recognizing that public accommodations laws "vindicate the deprivation of personal dignity that surely accompanies denials of equal access to public establishments", the majority finds that "public accommodations statutes can sweep too broadly when deployed to compel speech."[22] Where *Masterpiece Cakeshop* left room to dispute whether baking and decorating a wedding cake was speech, here there is no wiggle room. The majority focuses on the stipulation of the parties that Ms. Smith's wedding websites "will be expressive in nature, using text, graphics, and in some cases videos to celebrate and promote the couple's wedding and unique love story."[23] Thus, the Court concludes that by attempting to compel Ms. Smith to create a wedding website for same-sex couples, "Colorado seeks to force an individual to speak in ways that align with its views but defy her conscience about a matter of major significance."[24] The case involves what the majority calls "pure speech," and therefore the burdens on speech cannot be viewed as incidental. The Court asserts that this aligns with prior cases such as *Hurley v. Irish-American Gay, Lesbian*

Continued on page 32



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Public Accommodations *cont'd from page 31*

and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000), and *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943). The Court in *303 Creative* does not broadly strike down public accommodations laws. Rather, it stated, "When a state public accommodations law and the Constitution collide, there can be no question which must prevail."[25]

Justice Sotomayor, who joined the dissent in *Masterpiece Cakeshop*, now writes the dissent in *303 Creative* joined by Justice Kagan and Justice Jackson. Unlike the focus on the freedom of speech in the majority, the dissent's focus is on public accommodations law. She discusses the two core purposes of public accommodations law: to ensure equal access and equal dignity. Illustrating the importance of equal dignity, she cites to the concurring opinion of Justice Goldberg in *Heart of Atlanta Motel*:

> Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his [social identity]. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment.[26]

To the dissent, the Colorado Anti-Discrimination Act's Accommodation Clause is a valid regulation of conduct, not speech;[27] this seems to be the critical point of contention between the majority and the dissent. According to the dissent, "it is well settled that a public accommodations law like the Accommodation Clause does not 'target speech or discriminate on the basis of its content.'"[28] When a business chooses to open itself up to the public, it assumes a duty to serve the public without unjust discrimination.[29] This reading of the Court's precedents did not carry the day, and so the dissent notes: "Today, the Court, for the first time in its history, grants a business open to the public a constitutional right to refuse to serve members of a protected class."[30]

D. Conclusion and Implications for Local Governments.

Given that so many local governments and states have public accommodations laws, there will certainly be litigation and questions going forward following the Court's decision in *303 Creative*. On the freedom of speech front, what can be considered "expressive" enough to warrant First Amendment protections and entitle businesses to an exemption from public accommodations law will no doubt engender creative arguments. Local governments will have to grapple with fact intensive assessments when making enforcement decisions. The Court's decision to view the Colorado law as an attempt to compel speech, rather than an attempt to regulate conduct, may have implications outside of the public accommodations context. As the majority opinion emphasized the Freedom of Speech, there is also still a question regarding how religious liberty interacts with public accommodations laws. While underlying *303 Creative* was the idea that Ms. Smith did not want to convey messages in support of same-sex weddings because it went against her belief that marriage should be reserved to unions between one man and one woman, religious liberty does not appear to have factored into the Court's decision. As often seems to be the case, the Court's decision may have upended what seemed to be a fairly settled area of law and left us with more questions than answers.

Notes

1. *See*, e.g., Allentown, Pa., Code § 27-6 (2022); Austin, Tex., Code of Ordinances § 50201 *et seq*. (2022); Brookhaven, Ga., Code of Ordinances § 15-595 (2022); Chi., Ill., Mun. Code § 2-160-070 (2022); Driggs, Idaho, Code of Ordinances § 5-5-3.B (2022); Iowa City, Iowa, Code of Ordinances § 2-3-2 (2022); Ketchikan, Alaska, Mun. Code § 9.08.020 (2022); L.A., Cal., Mun. Code § 51.03.A (2022); Omaha, Neb., Code of Ordinances § 13-84 (2022); N.Y.C., N.Y., Admin. Code § 8-107.4 (2022); S.F., Cal., Police Code § 3305 (2022); Shreveport, La., Code of Ordinances § 39-2 (2022); South Bend, Ind., Code of Ordinances § 2-127.1(a) (2021); Grand Rapids, Mich., Code of Ordinances § 176-9.960 (2022). Traverse City, Mich., Code of Ordinances § 605.04 (2022); Tucson, Ariz., Code of Ordinances § 17-12(h) (2022); Whitefish, Mont., City Code § 1-10- 4 (2022).
2. Brief of Local Governments and Mayors as Amicus Curiae, p. 3, 303 Creative LLC, et al v Aubrey Elenis, et al. __ U.S. ___ (2023).
3. *See e.g.,* Heart of Atlanta Motel, Inc. v United States, 379 U.S. 241 (1964); Katzenback v McClung, 379 U.S. 294 (1964); Newman v Piggie Park Enterprises, Inc., 390 U.S. 400 (1968) (*per curiam*); Roberts v United States Jaycees, 468 U.S. 609 (1984); Hishon v King & Spalding, 467 U.S. 69 (1984).
4. 42 U.S.C. § 2000a
5. Heart of Atlanta Motel, 379 U.S. at 244
6. *Id.* at 260-61 (citing District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953).
7. 390 U.S. 400 (1968) (*per curiam*).
8. *Id.*
9. Obergefell v. Hodges, 576 U.S. 644 (2015).
10. *Id.* at 734 (Thomas, J., dissenting); see also *Masterpiece Cakeshop*, 584 U.S. ___; 138 S.Ct. 1719 (2018) (Thomas, J., concurring).
11. *Masterpiece Cakeshop,* 584 U.S. ___; 138 S. Ct. 1719, 1720 (2018).
12. *Id.* at 1724.
13. *Id.* at 1725-26.
14. *Id.* at 1729-30.
15. *Id.* at 1728.
16. *Id.* at 1723.
17. *303 Creative*, 600 U.S. ___ (2023) (slip op., at 3).
18. *Id.* at 2.
19. Colo. Rev. Stat. §24–34–601(2)(a).
20. Carson v Makin, 593 U.S. ___; 142 S.Ct. 1987 (2022) (Sotomayor, J., dissenting); *303 Creative*, 593 U.S. ___ (2023) (Sotomayor, J., dissenting).
21. *303 Creative*, 600 U.S. ___ (2023) (slip op., at 2).
22. *Id.* at 12-14 (citing *Heart of Atlanta Motel*, 379 U.S. at 250.)
23. *Id.* at 2.
24. *Id.* at 25.
25. *Id.* at 14.
26. *Id.* at 5 (Sotomayor, J., dissenting).
27. *Id.* at 26 (Sotomayor, J., dissenting).
28. *Id.* (Sotomayor, J., dissenting) (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557, 572 (1968)).
29. *Id.* at 7 (Sotomayor, J., dissenting) (citing J. Singer, No Right To Exclude: Public Accommodations and Private Property, 90 Nw. U. L. Rev. 1283, 1298 (1996) (Singer)).
30. *Id.* at 1 (Sotomayor, J., dissenting).

intent to enter the state capitol under his theory of First Amendment retaliation. *See* Boquist v. Courtney, 32 F.4th 764, 782-83 (9th Cir. 2022).
31. Rash-Aldridge v. Ramirez, *supra* at 119.
32. McKinley v. Kaplan, 262 F.3d 1146, 1151-52 (11th Cir. 2001)
33. Whitener v. McWatters, 112 F.3d 740 (4th Cir. 1997). The Fourth Circuit Court of Appeals, after an extensive historical analysis, affirmed the district court's dismissal of the complaint stating:

> Americans at the founding and after understood the power to punish members as a legislative power inherent even in the humblest assembly of men. This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve their institutional integrity without compromising the principle that citizens may choose their representatives. Further, because citizens may not sue legislators for their legislative acts, legislative bodies are left to police their own members. Absent truly exceptional circumstances, it would be strange to hold that such self-policing itself is actionable in a court. *Id.* at 744.

34. Phelan v. Laramie County Community College Bd. of Trustees, 235 F.3d 1243, 1247 (10th Cir. 2000)(quoting Laird v. Tatum, 408 U.S. 1, 11 (1972)).
35. Booher v. Bd. of Regents of N. Kentucky Univ., No. 2:96-cv, 1998 WL 35867183 at *12 (E.D. Ky. July, 1998).
36. Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998).
37. *Id.* at 49; Smith v. Jefferson Cty. Bd. of Sch. Comm'rs, 641 F.3d 197, 218 (6th Cir. 2011).
38. Canary v. Osborn, 211 F.3d 324, 329 (6th Cir. 2000).
39. Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 504 (1975).
40. Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).
41. 112 F.3d 740, 741 (4th Cir. 1997).
42. *Id.*
43. *Id.* at 744-45.
44. In Gamrat v. McBroom, 822 Fed. Appx. 331, 334-335 (6th Cir. 2020), the Sixth Circuit affirmed the district court's dismissal of due process claims by a former member of the Michigan House of Representatives who was removed on the basis that those who were involved in her removal were entitled to legislative immunity. Significantly, this case did not involve Gamrat's speech and instead was based on her conduct while in office. Gamrat did not assert First Amendment violations. The Court reasoned that "[t]he House's expulsion of Gamrat was legislative activity, regardless of any bad faith, and Gamrat cannot sue the House Defendants for participating in that process." On this basis, removal, if carried out legislatively, could be entitled to absolute legislative immunity.
45. Mays v. Fields, No. 20-cv-12504, 2021 WL 5713693 (E.D. Mich. March 5, 2021) at *1-3.
46. *Id.* at *3
47. *Id.*
48. *Id.*

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Expanding Borders, Solicitor-Client Privilege, Roadway Spills, and More

Expanding Borders Due to High Population Growth
White City (Town) v Edenwold (Rural Municipality), 2023 SKCA 61 https://canlii.ca/t/jxb5t
The Town of White City ("White City") and the Rural Municipality of Edenwold ("RM") are bordering municipalities experiencing a high rate of population growth. This prompted White City to apply to the Municipal Boundary Committee ("Committee") for an order approving an alteration of the boundaries, ultimately annexing some of RM's land. The Committee dismissed the application, holding that White City did not demonstrate a need for land for future residential growth. White City seeks leave to appeal pursuant to the *Municipal Boards Act*, SS 1988-89, c M-23.2 ("*MBA*").

HELD: Leave to appeal is granted.

DISCUSSION: White City sought leave to appeal on over twenty grounds, noting that the three most important errors of law by the Committee were: first, lack of reasons, second, failure to articulate proper legal tests; and third, failure to address certain evidence. RM submits that the Court does not have jurisdiction to grant leave to appeal. The Court disagrees finding that although the MBA is silent on an appellate role for the Committee, the Court has jurisdiction under s.33.1 to hear a leave application. The test for granting leave is outlined in *Town N Country Mall Inc. v. Moose Jaw (City),* 2022, SKCA 10, asking the Court to consider if White City has proposed a question of sufficient merit or important to warrant the attention for the Court of Appeal. In reviewing the twenty grounds proposed by White City, the Court is satisfied that if collapsed into four questions of law, removing any direct challenges to finding of fact, White City satisfies the test. Not only are the questions not vexatious, and not destined to fail, but a boundary dispute is of fundamental significance to both parties and their residents. Leave to appeal is granted.

Lawyer Properly Refused to Answer Questions: Legal Instruction is Subject to Solicitor-Client Privilege
Raufi v. Toronto (City), 2023 ONSC 4594 https://canlii.ca/t/jzfk2
The Plaintiff was injured during a slip and fall on a City of Toronto ("City") sidewalk during the winter months. The City had contracted winter maintenance to a third-party corporation ("corporation"), and the Plaintiff sought to amend the claim to add the corporation as a Defendant to the action. During cross-examination the Plaintiff's lawyer refused to answer questions posed by the corporation. The corporation brought a motion to compel the Plaintiff's lawyer to answer four specific questions.

HELD: Motion dismissed.

DISCUSSION: The Plaintiff's lawyer refused to answer four specific questions, on the basis of solicitor-client privilege:

1. When the lawyer consented to the Third-Party Claim on November 17, 2019, he had instructions to do so, correct?
2. It wasn't until after the lawyer received the corporation's defense to the Third Party Claim, that he obtained instructions to bring the motion to amend the Statement of Claim, correct?
3. Were instructions obtained, at any point before the corporations defense to the TP claim, not to amend the Statement of Claim to add the corporation?
4. When the Plaintiff consented to the issuance of the Third Party Claim, the lawyer was aware that the corporation had the ability to either respond to the Third Party Claim or plead into the main action under Rule 29, correct?

The Court reviewed the motion and the questions posed by the corporation, finding that they all related to legal instructions provided by the lawyer from his client. Questions regarding lawyer's instructions, and information related to timing and content between a plaintiff and his lawyer, are subject to solicitor-client privilege. The solicitor-client relationship is confidential at common law, and anything that is discussed in seeking or providing legal advice is subject to solicitor-client privilege as recognized by the Supreme Court of Canada as a principle of fundamental justice and has gained constitutional protection under s. 7 of the *Charter of Rights and Freedoms*. The Court held that the four questions were property refused by the lawyer, and not needed to be answered. Motion dismissed.

Does a Spill on a Roadway Trigger a City's Duty of Care?
Cockburn v. City of Richmond, 2023 BCCRT 669 https://canlii.ca/t/jzjzq
While driving her vehicle in the City of Richmond ("City"), the Applicant drove over wet paint on the roadway causing paint to be transferred onto her vehicle wheels and wheel wells. The Applicant brought a claim against the City, claiming negligence for failing to warn drivers about the paint or remove it from the roadway. The City

denies negligence, indicating it was only made aware of the spill from the applicant's complaint.

HELD: Claim dismissed.

DISCUSSION: The onus is on the applicant to prove negligence on a balance of probabilities. To prove negligence the applicant must demonstrate that the City owned her a duty of care, that the City breached the standard of care, that she sustained a loss, and the City's breach caused that loss, *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27. It is well established that the City does not owe a duty of care to public users of property where its actions were based on a policy decision. The exception is if the City's policy decision was made in bad faith. Since spills are sporadic and unpredictable throughout the City, the City relies on a complaint-based Road Maintenance Policy ("Policy"). When the City received the Applicant's complaint, it responded and inspected the City. It was the City's position that its actions were reasonable as it followed its Policy. The Court was satisfied with the City's submission supported by the Policy, internal emails, and information available on the City's website that outlined the complaint process. The Court held that the City did not owe the applicant a duty of care because its actions were in keeping with its Policy, which excludes regular inspections of its roads. The Applicant failed to make submissions that the City's policy was irrational, unreasonable or in bad faith. Claim dismissed.

Timelines are Timelines: Inadequate Medical Evidence to Demonstrate a Disability

Bissonnette v. City of Greater Sudbury, 2023 HRTO 1162 https://canlii.ca/t/jzl8b

The Applicant alleged that the City of Greater Sudbury ("City") failed to accommodate his disability with respect to housing contrary to the *Human Rights Code,* R.S.O. 1990, c. H. 19 ("*Code*"). The City responded that it did not discriminate against the applicant when it required the Applicant complete an annual rental review package in order to continue to receive a rent subsidy at his residence.

HELD: Application dismissed.

DISCUSSION: The Applicant submitted that he is disabled, suffers from major depressive disorder, and as a result of his disability he failed to complete an annual rental review package on time as required by the City. The City discontinued his rental subsidy. The Applicant sought an internal City staff review of the decision, and the City committed to giving him a decision by December 7, 2018. In the application, the Applicant provided that the date of his last incident of discrimination by the City was December 7, 2018, however the application was not filed until January 13, 2020. Section 34 of the *Code*, provides that the Human Rights Tribunal ("Tribunal") has no jurisdiction to deal with allegations in an ap-

Continued on page 36

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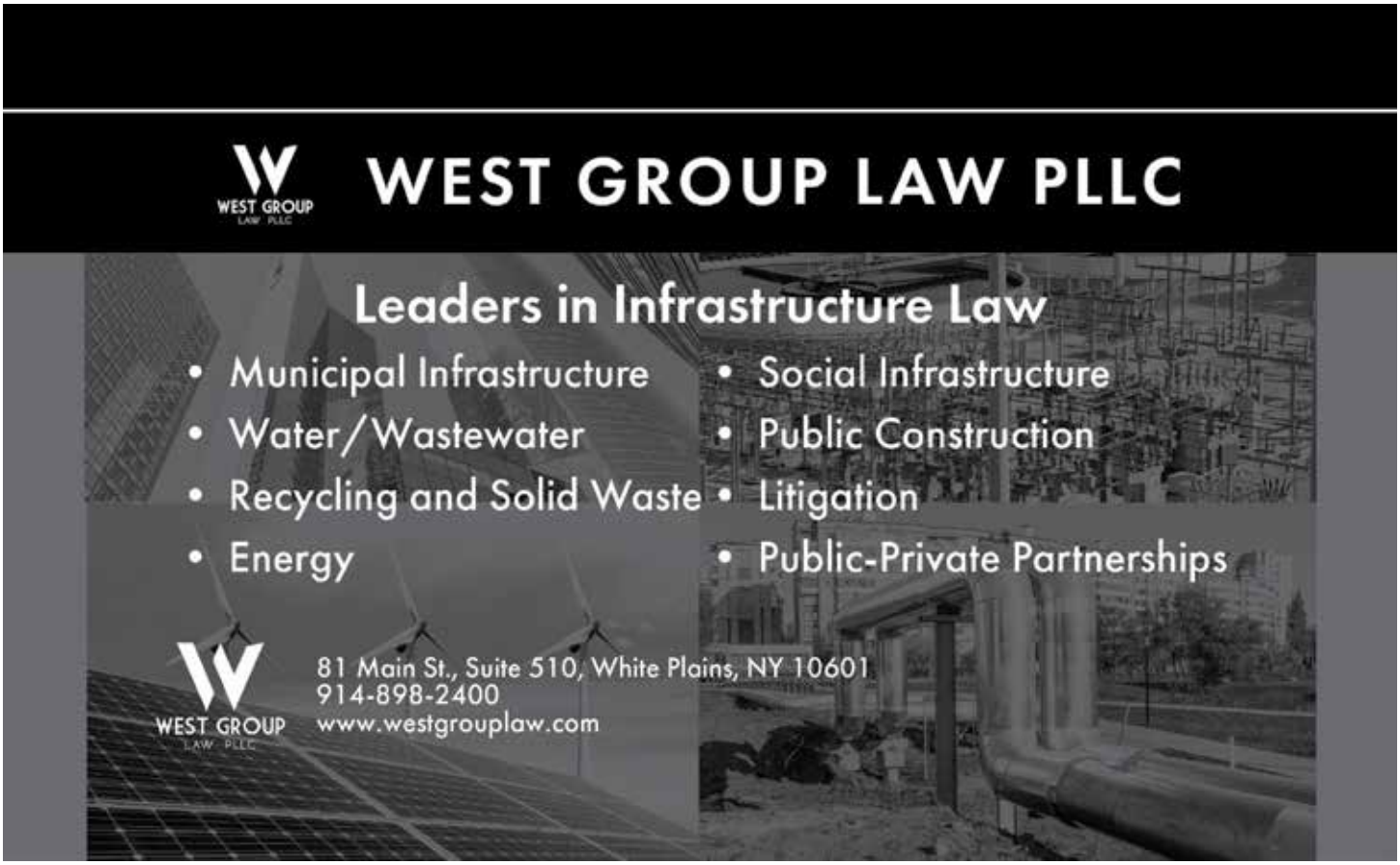
plication that relate to incidents that occurred more than one year prior to filing the application. The exception is if the Applicant can demonstrate that the delay was incurred in good faith and that there will be no substantial prejudice to any party by the delay, *Klein v. Toronto Zionist Council*, 2009 HRTO 241. The Applicant submitted that as a result of his disabilities, he required more time to file the application. The Tribunal, while sympathetic to the applicant, has held that absent medical evidence demonstrating that a disability is so debilitating that it prevents an applicant form pursuing their legal rights under the *Code*, timelines must be met. The Applicant did not provide any medical evidence to support his submission that his disabilities were so debilitating as to prevent him from filing an application with the Tribunal. Application dismissed on the basis that the allegations of discrimination are untimely.

Important Considerations for a Class Action and Settlement Agreement
Steele v. Leduc (City), 2023 ABKB 460 https://canlii.ca/t/jzh3d
The Defendants in this application sought to certify their claim as a class action against the City of Leduc ("City"), and approval of a settlement agreement. The settlement agreement between the parties recognized that gender discrimination, sexual harassment, sexual misconduct and sexual assault (collectively, "sexual misconduct") took place at the City's Fire Department and agreed to provide compensation to those who suffered sexual misconduct.

HELD: Claim certified as class action, and settlement agreement approved.

DISCUSSION: Even though both parties jointly consented to a class action conversation, it must have still satisfied the court that the claim may be appropriately advanced as a class action. In reviewing the submissions, the Court was satisfied that the matter should be certified as a class action proceeding, as there is an identifiable and defined class being, all female current and former employees at the City's Fire Department, the class members raises a common issue being, sexual misconduct, and proceeding by a class action would aid in court efficiency. The parties also jointly sought approval of the settlement agreement. The settlement agreement was modelled after a matter with similar allegations, outlined in *Heyder v. Canada (Attorney General)*, 2019 FC 1477. Similar to *Heyder* the settlement agreement was intended to prevent any retraumatizing of the class members who experienced sexual misconduct through oral testimony. It also outlined the process for a claim for compensation for class members and avoided a potentially lengthy litigation. The Court was satisfied that the settlement agreement was fair, reasonable and in the best interest of the class members. The Court approved the Defendant's claim for a certified class action and settlement agreement.



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LISTSERV

By: BRAD CUNNINGHAM,
Municipal Attorney, Lexington, South Carolina

The Parallel Universe

We have discussed so many different topics on the listserv that one cannot even begin to count them. Whoever said "Variety is the spice of life" might very well have been a municipal attorney. The last few weeks have proven this to be true in my municipal circle.

It seems my city has had another round of battles with so-called "sovereign citizens," a group discussed in the July-August 2023 *Municipal Lawyer*. (I have now learned that many of them prefer NOT to be called "sovereign citizens" anymore). Our most recent encounter came following a speeding citation issued by one of our officers. A few days later, our Clerk our of Court received the following letter:

I hope you're doing well today. I am writing to inform you I am in possession of an offer to contract with the Town of Lexington via a presentment in the form of an "UNIFORM TRAFFIC TICKET" made by officer ……., rank PATROLMEN, officer number …… on the morning of August 14th, 2023. While I do love the Town of Lexington and all that the Town provides, I am kindly returning this presentment as I do not wish to contract with the Town of Lexington in this matter. Below is a statement of facts concerning the alleged incident. You may direct this correspondence to anyone within the court system that may need a copy of it.

The letter then recited a variety of definitions from Black's Law Dictionary:

Ticket : *In contracts, a slip of paper containing a certificate that the person to whom it is issued, or the holder, is entitled to some right or privilege therein mentioned or described. (Black's Law, 6th ed)*

Motor carrier *means a for-hire motor carrier or a private motor carrier. The* ***term includes a motor carrier's agents, officers and representatives*** *as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B, this definition includes the terms employer, and exempt motor carrier. (49 CFR § 390.5)*

Private motor carrier of passengers (non-business) *means private motor carrier involved in the interstate transportation of passengers that does not otherwise meet the definition of a private motor carrier of passengers (business). (49 CFR 390.5)*

Motor vehicle: *The term "motor vehicle" means every description of carriage or other contrivance propelled or drawn by mechanical power and used for commercial purposes on the highways in the transportation of passengers, passengers and property, or property or cargo. (18 U.S.C. § 31 (6))*

Used for commercial purposes*. The term "used for commercial purposes" means the carriage of persons or property for any fare, fee, rate, charge or other consideration, or directly or indirectly in connection with any business, or other undertaking intended for profit. (18 U.S.C. § 31 (10))*

Driver *means any person who operates any commercial motor vehicle. (49 CFR §390.5)*

Commercial motor vehicle *means any self-propelled or towed motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle -*
(1) Has a gross vehicle weight ratio or gross combination weight rating, or gross vehicle weight or gross combination weight, of 4,536 kg ***(10,001 pounds) or more****, whichever is greater; or*
(2) Is designed or used to transport more than 8 passengers (including the driver) for compensation; or
(3) Is designed or used to transport more than 15 passengers, including the driver, and is not used to transport passengers for compensation; (49 CFR §390.5)

The, a short statement of facts followed:

I, {NAME}, a living man, was travelling in my private capacity with my two children on the morning of August 14, 2023.

{NAME} is a private motor carrier for passengers (non-business) operating with a USDOT #4070052.

- {NAME} is not a driver.
- *SECTION 56-3-110 (SC Code of Laws). Vehicles required to be registered and licensed* states:
  - *Every* ***motor vehicle****, trailer, semi-trailer, pole trailer and special mobile equipment vehicle driven, operated or moved upon a highway in this State shall be registered and licensed in accordance with the provisions of this chapter. It shall be a misdemeanor for any person to drive, operate or move upon a highway or for the owner knowingly to permit to be driven, operated or moved upon a highway any such vehicle which is not registered and licensed and the required fee paid as provided for in this chapter.*
- The 2019 Ford F150 is not a motor vehicle or a commercial motor vehicle.
- Patrolman {NAME} turned on his blue lights behind me on the morning of August 14th, 2023.
- Assuming the police vehicle behind me had an emergency and needed my assistance, I pulled over to render any aid they might need.
- Patrolman {NAME} approached my motor carrier and immediately demanded to see my license, registration and insurance.
- I {NAME} tried to explain my posi-

tion to him that I was operating under a USDOT number (clearly visible on the rear of my vehicle), but Patrolman {NAME}kept interrupting me with his demands while radioing in various codes and labeling me " a sovereign citizen" despite me never having made such a ridiculous and oxymoronic claim.

- Patrolman {NAME} stated "I can't look up a DOT number", admitting that he had no jurisdiction to stop my private motor carrier.

- As a private motor carrier for passengers (non-business), the Town of Lexington, its police department, and any other underlying agencies and sub-corporations do not have jurisdiction over myself or my private motor carriers.

- Due to his comments such as "C'mon, you have two kids in the car…" and his derisive labeling and threatening tone, eventually, under threat and duress, Patrolman {NAME} bullied me to presenting my license.

- This presentment of my license in no way is meant to convey that I gave Patrolman {NAME} any jurisdiction over myself or my principal, {NAME}.

- Supervising officers responded and engaged with me with decorum and civility.

- Despite having no jurisdiction, Patrolman {NAME} eventually issued me ticket #.... for an alleged violation of Title 56 of the South Carolina Code of Laws, which do not apply to private motor carriers of passengers (non-business).

- This affidavit, along with the returned "ticket", both, independently of one another, serve as a notice of refusal to contract and a recission of any and all signatures, either given or implied by the presentment, under duress, of my driver's license, in all matters related to this aforementioned ticket and incident.

- Per the 10 Maxims of Commercial Law, the following are held to be true in regard to this aforementioned matter:

○ A workman is worthy of his hire.
○ All are equal under the law.
○ In commerce, truth is sovereign.
○ Truth is expressed in an affidavit.
○ An unrebutted affidavit stands as truth in commerce.
○ An unrebutted affidavit becomes judgment in commerce.
○ A matter must be expressed to be resolved.
○ Silence can be equated to consent.
○ He who fails to assert his rights has none.
○ He who leaves the battlefield first loses by default.

I appreciate your time and attention in this matter. If I don't receive, in writing, an affidavit with a wet-ink signature from {NAME} Janice Marshall rebutting the aforementioned facts, within 5 calendar days of this notice, I will consider this matter settled.

* I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on August 14th, 2023.

I have an idea where this gentleman was going, albeit I am in total disagreement. Earlier in that same week, this occurred in our traffic court:

Judge: "Are you {NAME}?"
Man: I don't answer questions."
Judge: "I will ask again are you"
Man: "I don't answer questions.
What language do you use in this court?"
Judge: "The one in which we have been speaking." Answer me sir, "Are you {NAME}?"
Man: "I don't answer questions."
Judge: "One last time, and you either answer or I'll hold you in contempt of court. Are you {NAME}?
Man: " I don't answer questions."
Judge: "I declare you in contempt of court and sentence you to thirty days in jail. Take him into custody!"
Man: (As he is being cuffed) "Don't I get a chance to say anything?"

A little FBI background on these groups: Sovereign citizens believe that even though they physically reside in this country, they are separate from the United States, and don't have to answer to any government authority, including courts, taxing entities, or police. They cause problems far beyond ignoring traffic tickets. Many don't pay their taxes. They hold illegal courts that issue warrants for judges and police officers. They clog up the courts with frivolous lawsuits and file liens against public officials to harass them. They use fake money orders, personal checks, and the like at government agencies, banks, and businesses.

And that's just the beginning. Not every action taken in the name of the sovereign citizen ideology is a crime, but the illegal acts by these groups, cells, and individuals are extensive (and puts them squarely on our radar). Beyond the acts above, sovereign citizens:

○ Commit murder and physical assault;
○ Threaten judges, law enforcement professionals, and government personnel;
○ Impersonate police and diplomats;
○ Use fake currency, passports, license plates, and driver's licenses; and
○ Engineer various white-collar scams, including mortgage fraud and so-called "redemption" schemes.

The Southern Poverty Law Center tracks sovereign citizens and related groups, which include these monikers: American Common Law Academy, American States Assembly, America's Remedy, Constitutional Law Group, Embassy of Heaven, The Foundation, Life Force Network, March to Exodus, National Liberty Alliance, People's Bureau of Investigation and the Statewide Common Law Grand Jury.

As noted before, some of them disdain the tern "sovereign citizen." One defendant in our court who our prosecutor referred to as a "sovereign citizen" became very irate. "What did you call me?" he said. "Don't you ever call me that again!" However, he proceeded to use every technique sovereign citizens employ.

The FBI urges us to be cautious in this regard " First, "be crime smart"—don't fall for the bogus claims and scams of sovereign citizens. And second, if you have information on any suspicious activities or crimes, please contact us."

One of our local sovereign citizens even attempted to intimidate our local Judge, showing up at his house at night, and then showing up in the daytime and taking pictures. This person was convicted and spent jail time for her efforts.

• • • • • •

The prosecution rests, your honor…

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