International Municipal Lawyers Association

2023 Mid-Year Seminar

Washington, DC

Session Date: April 22, 2023



Session:

- ***Legal Consequences of, and Responses to, Councilmember Bad Behavior***

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Legal Consequences of, and Responses to, **Councilmember Bad Behavior**



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Ann Arbor, MI

Overview



Why this Topic

Why This Topic Will Persist

The Range of Bad Behaviors

The Range of Responses

The Role of City Attorneys

Related Legal Issues

Why Analyze Councilmember Bad Behavior?



- **Legal Liability**
- Interference Impacts **Employee Morale**
- Disruption **Thwarts Governance**
- Harms City **Reputation and Residents**

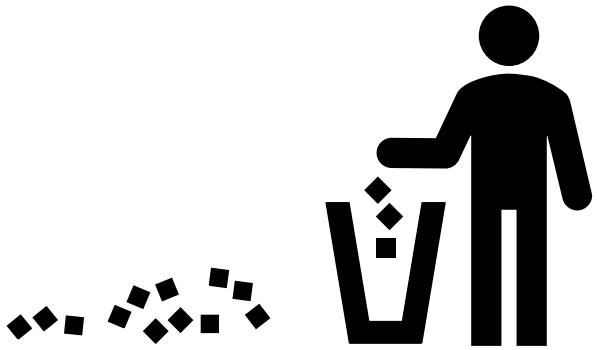
Why Does This Topic Create Unease?

Political Bodies have difficulty regulating themselves.



Why Does This Topic Create Unease?

Municipal Governance can be **messy.**



City Attorneys must often help clean up the mess.

Why Does This Topic Create Unease?

Bad reactions to City Attorney involvement from *badly behaved councilmembers.*



Universal Unease? The Dark Side of Representative Democracy

ANOTHER GALAXY LONG AGO

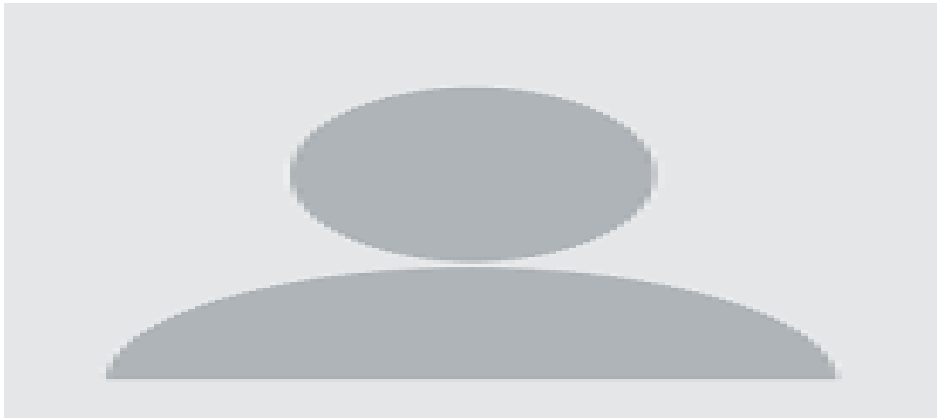


Photo added at presentation

MORE RECENT HISTORY

*“ ‘The council is **human**’: Durham council responds to concerns after screaming match caught on camera”*

Durham, NC, 3/24/2023

Why are City Attorneys Involved?

CHARTER DUTY

- Advisor and Counsel to the City
- Institutional Client

PROFESSIONAL DUTY

Model Rule of Prof. Conduct 1.13(b)

"If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, … then the lawyer shall proceed as is reasonably necessary in the best interest of the organization."

Why are City Attorneys Involved?

ISSUES

Charter Interpretation

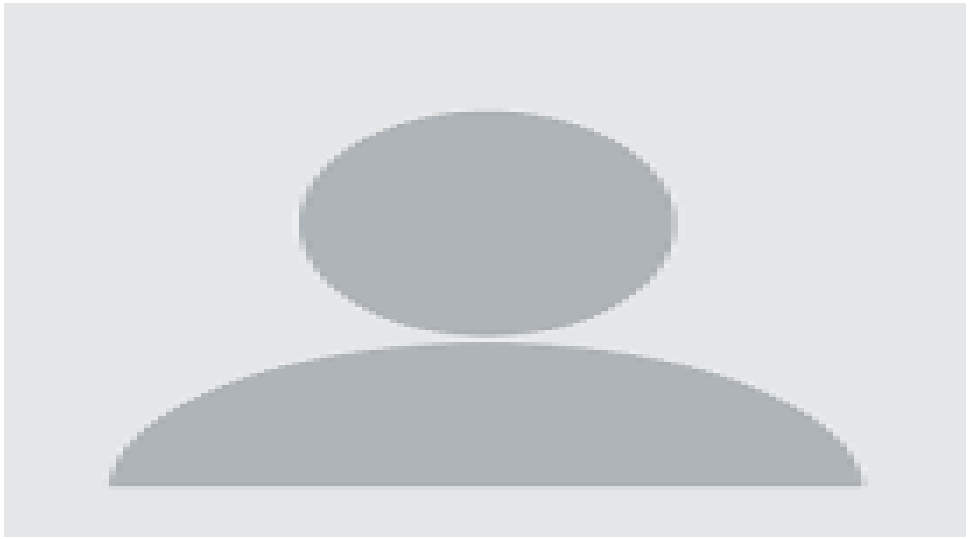
Limits of Power

Rules

Procedural Issues

Legal Consequences

SKILLS



News Photo added at presentation

What Is Councilmember Bad Behavior?

Councilmember Action or Speech that can Bring About Negative Legal or Other Consequences for the Municipality or the Councilmember.

Improper Behavior Can Cause Liability



FROM THE HEADLINES

"Two Montclair employees sue Council Member for sexual harassment"

Montclair, NJ 3/09/2022

"Flint officials file bullying, harassment complaints against City Council."

Flint, MI 8/4/2022

Councilmembers Can Disrupt City Operations / Employee Morale



FROM THE HEADLINES

“City Manager Files Complaint Accusing Councilmember of Creating Hostile Environment”

Ypsilanti, MI 2/22/2023

“City Manager Addresses Council’s Treatment of City Employees”

Evanston, Ill. 2/23/2023

Disruptive Councilmembers Can Thwart Governance



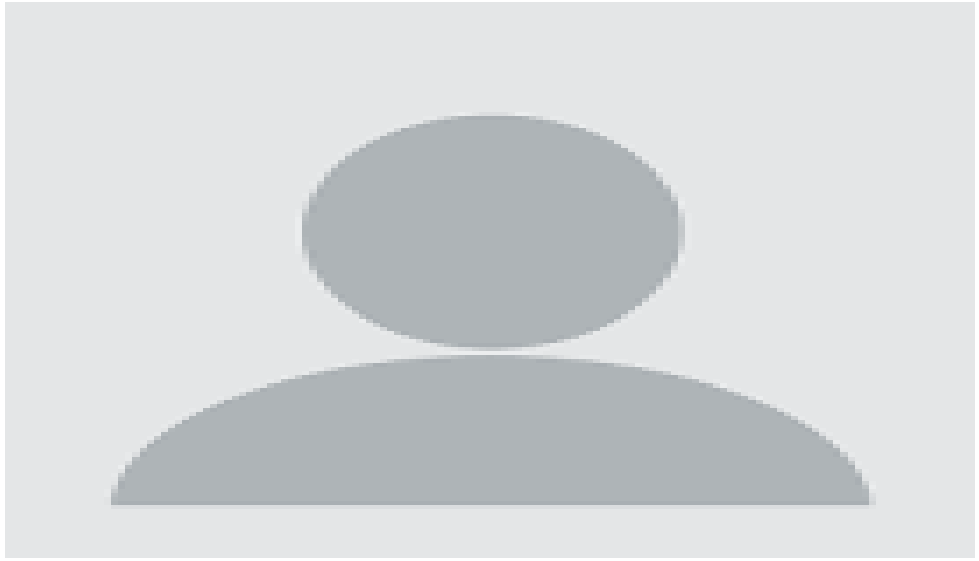
News photo added at presentation

FROM THE HEADLINES

“Flint Councilman Thrown out of Meeting after Unleashing a Slew of Racist slurs.”

Flint, MI 4/26/2022

Actions Harm City Reputation and Residents



FROM THE HEADLINES

"Ann Arbor Councilman's use and defense of n-word sends a chilling message, Black Residents say."

Ann Arbor, MI 8/15/21

Role of City Attorney

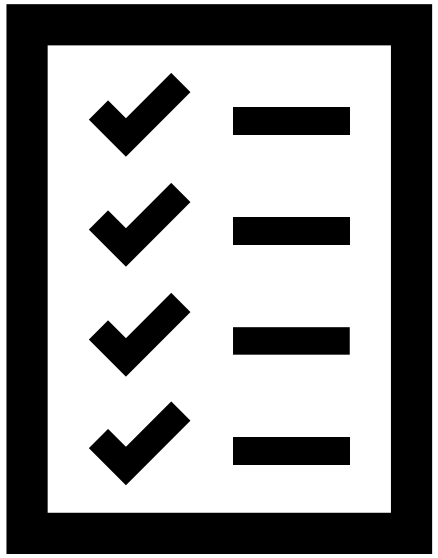
EDUCATION AND ADVICE



THE STRAIGHT AND NARROW
(WITH LANES)



Council Rules Covering Behavior at Meetings



Council may regulate the **time, place, and manner** of councilmember speech during public meetings, but it **cannot discriminate based on viewpoint.**

State and Local Council Ethics Rules

Conflicts of Interest

Improper Use of Position

Gifts

Confidential Information

Improper Representations

Political Solicitation

Undue Influence

Limits of Contact with City Employees

Why?

Not the role of an individual Councilmember to direct staff.

Why?

Interferes with the City Manager's ability to manage employees.

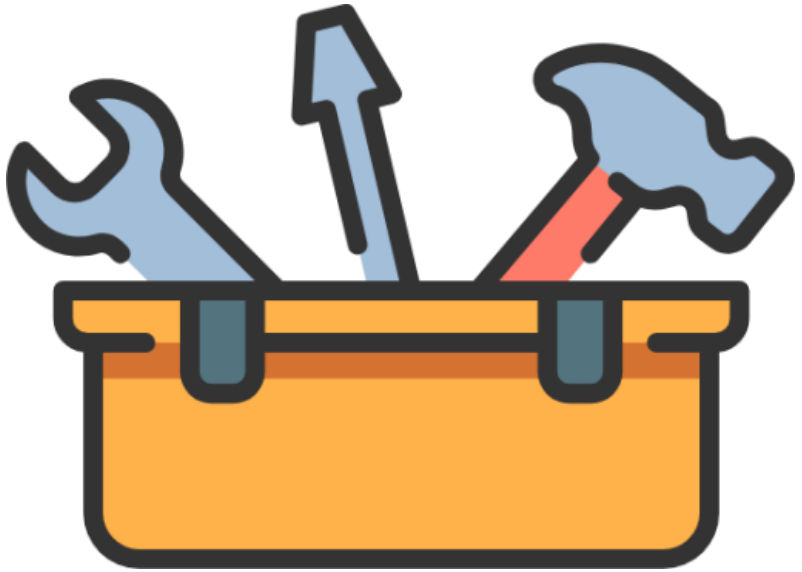
Clear Process for Investigating Complaints



Use Outside Counsel

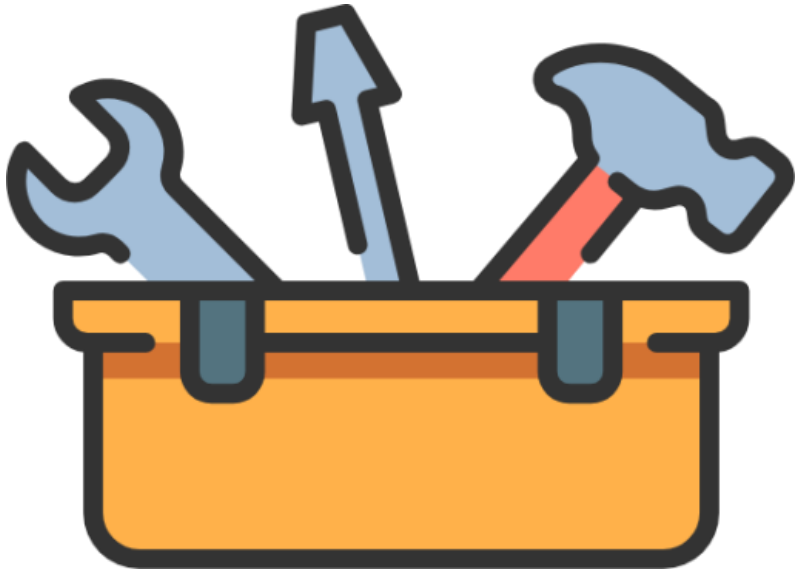
Practical Tips - Education

- New Council Orientation/Office Hours
- Strategic Use of Closed Sessions
- Provide News of Bad Behavior Consequences in other Local Governments
- Use of Municipal League Training



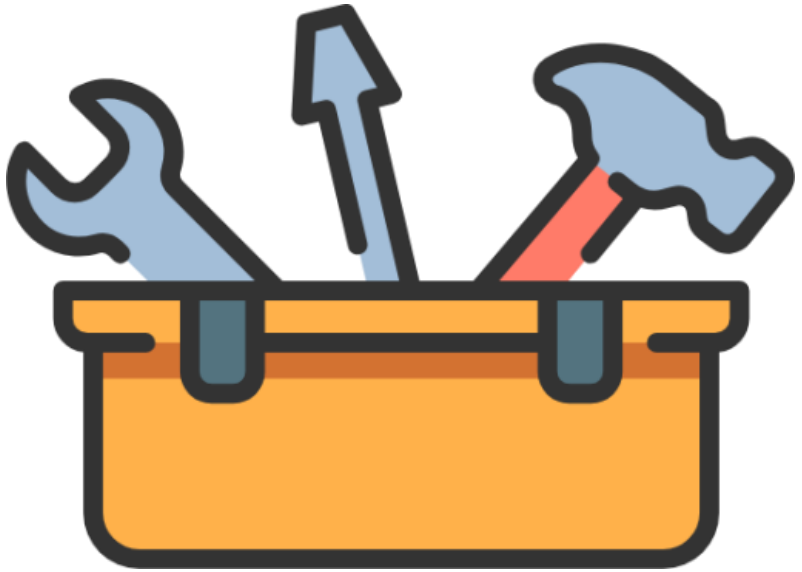
Practical Tips – Pushback to Protect City Attorney Integrity

- Pick Your Battles
- Guard Office Neutrality
- Strategic Use of Outside Legal Opinions
- Strategic Use of City Attorney Comment Time



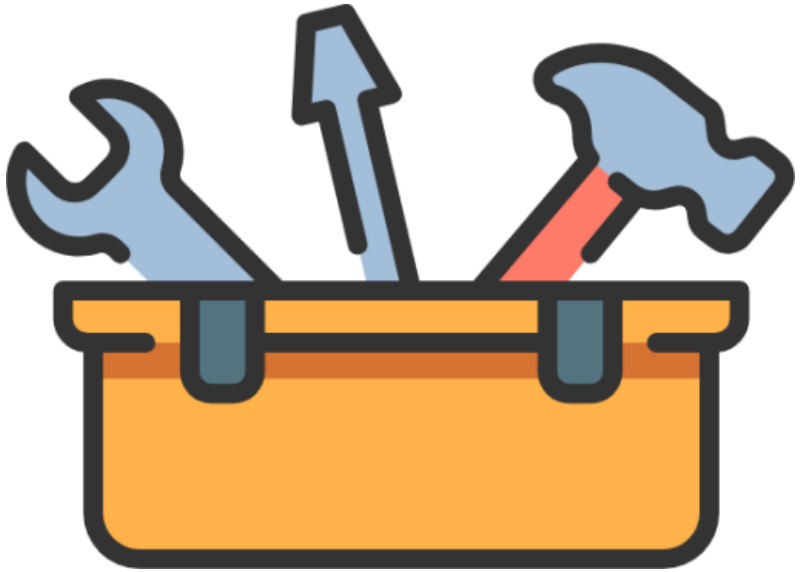
Practical Tips – Pushback Against Council Behavior to Employees

- Work with City Manager
- Involve Ethics Committee
- Involve the “Administration Committee”



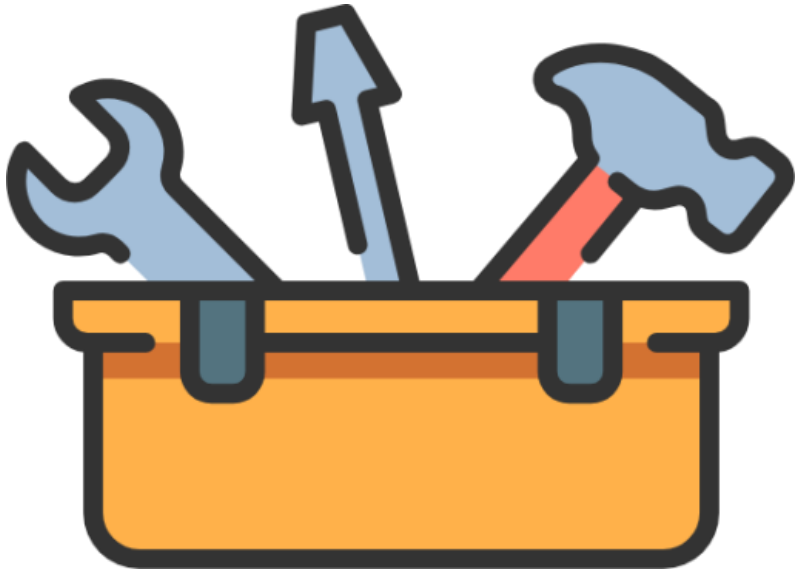
Practical Tips - Miscellaneous

- Is the Behavior an Outlier?
- Is the Behavior Part of Factional Disagreements?
- Do you have a Runaway Council?



Practical Issues

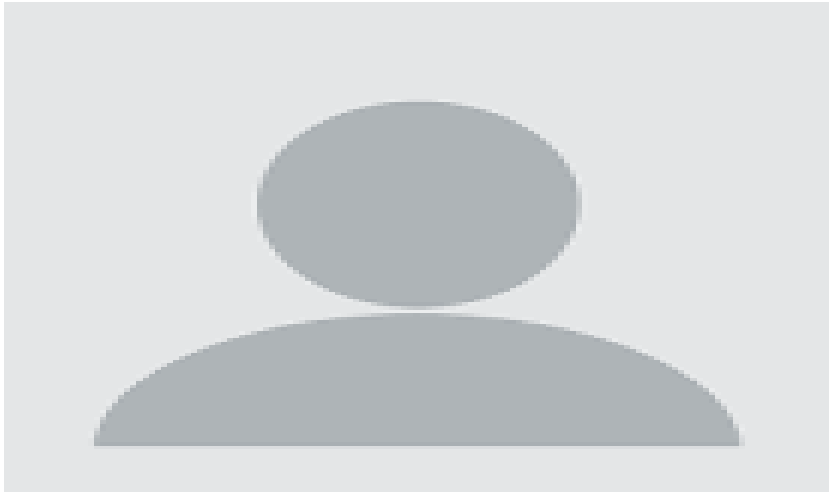
- Breach of Confidential Information
- Breach of Closed Session
- Interference with Employees
- Interference with Investigations
- Lawsuit by Councilmembers



Council Self Regulation



Reprimand



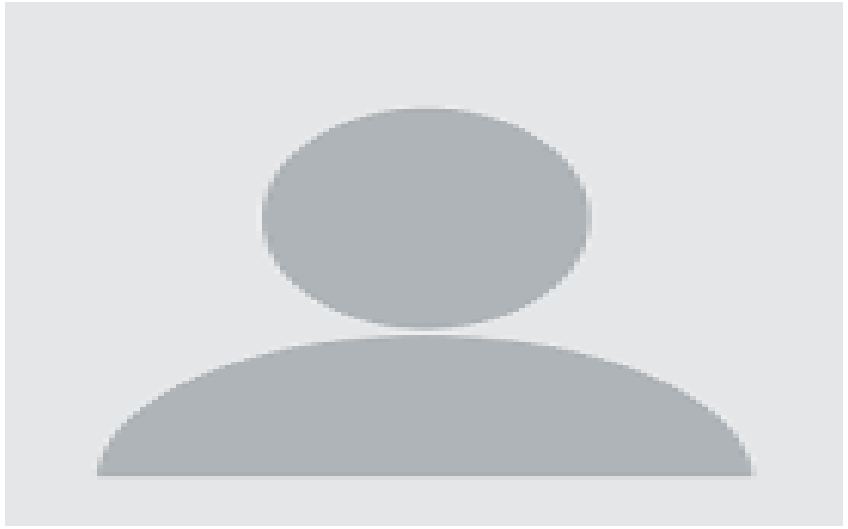
News Photo added at presentation

FROM THE HEADLINES

"Ann Arbor City Council passes resolution to reprimand Councilmember for use of racist language."

Ann Arbor, MI 8/5/21

Censure



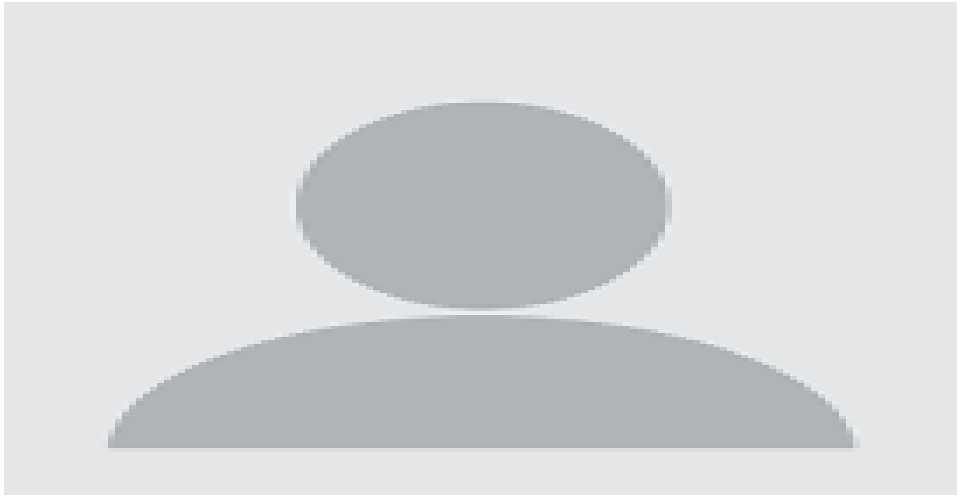
News Photo Added at Presentation

FROM THE HEADLINES

“Los Angeles City Council Censures Members for Racist Statements.”

Los Angeles, CA 10/26/2022

Removal from Committees



News Photo Added at Presentation

FROM THE HEADLINES

"King County [Seattle] Councilmember stripped of committee chairmanships after offensive mailer"

Seattle, WA 10/12/2021

Removal From Office



Is this allowed under State Law?



Is this allowed under City Charter?

Due Process for Removal

- ✓ Notice
- ✓ Hearing
- ✓ Public Vote



Removal by Amotion Procedure

Some states have this procedure under common law

"Inherent" power of a municipal body to remove an elected official for reasonable and just case due to misconduct or unfitness to hold office.

FROM THE HEADLINES

"Monroe city leaders remove councilwoman after series of incidents in 2021"

Durham, NC 3/7/2022

Removal by Governor

Does your state have a provision for removal of Local Officials by the Governor?



Recall



FROM THE HEADLINES

“Councilmember faces recall from Ann Arbor City Council for homophobic slur”

Ann Arbor, MI 3/26/2021

Be Prepared for Further Litigation



FROM THE HEADLINES

"Former Monroe council member files lawsuit over removal from office"

Monroe, NC 3/26/2022

No “First Amendment Retaliation”



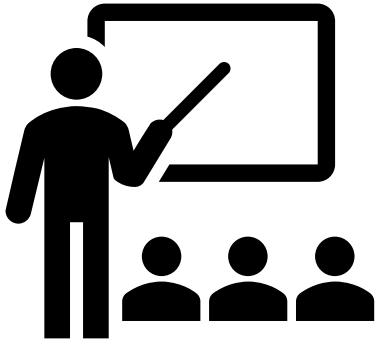
U.S. Supreme Court **Unanimously** Rules in Favor of Censure

Houston Community College v. Wilson , 142 S. Ct. 1253 (2022)

Note: Not a Local Government Case – a Board Case

Warning: Wilson Ruling Narrow

Watch For The Future Application of This Case



- Court held "it was not ruling on expulsion, exclusion, or any form of punishment."
- Court noted that the censure only spoke to the "conduct of an official," and it was issued by individuals seeking to discharge their duties.
- **Will Supreme Court view "Punishment" cases differently?**

No “First Amendment Retaliation” Claim for Removal of Member from a Council Committee



Whitener v. McWatters

112 F. 3d. 740
(4th. Cir. 1997)

“Americans from the founding and after understood the power to punish members as a legislative power inherent even in the humblest assembly… This power, rather than the power to exclude those elected, is the primary power by which legislative bodies preserve the institutional integrity…”

“First Amendment Retaliation” in “Punishment” Cases?



King v. City of New York

581 F. Supp. 3d 559 (2022)

<u>Summarizing law in Second Circuit:</u>

“Elected officials enjoy no First Amendment protection from retaliation for political speech unless that retaliation **strips them of their office, or their fundamental ability to function in that office.”**

Legislative Immunity – General

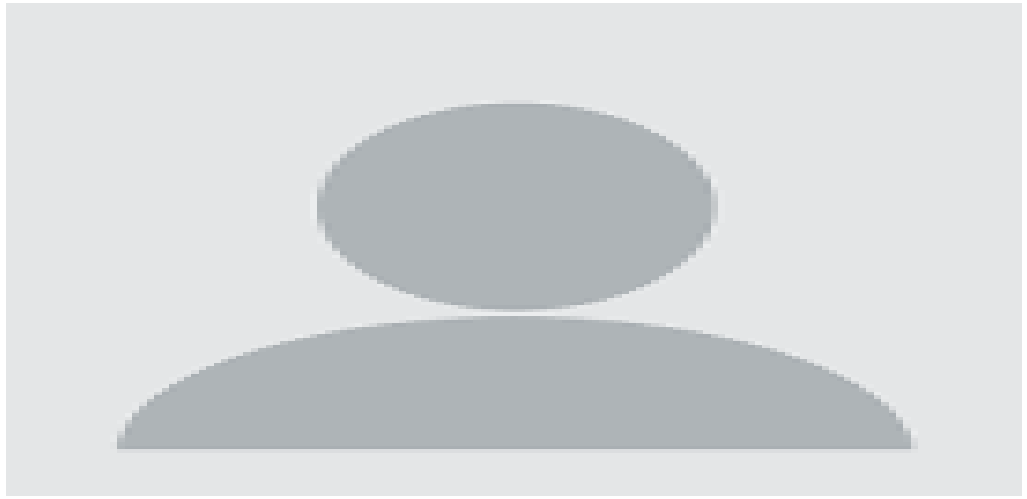


Bogan v. Scott-Harris,

523 U.S. 44 (1988)

"Regardless of the level of government, the exercise of legislative discretion should not be inhibited by judicial interference or distorted by the fear of personal liability."

Legislative Immunity



News photo added at presentation.

Mays v. Field, 2021 WL 5713693, U.S.D.C., E.D. MI (2021)

"Plaintiff may not sue his fellow council members (or those allegedly working in concert with them or at their directions … for taking such disciplinary action against him."

Role of the City Attorney in Responses

1. Advise Council about claims of “First Amendment Retaliation.”
2. Advise whether a “punishment” impacts elected duties.
3. Review that due process is met with hearing proceeding.
4. Ensure that disciplinary/hearing rules are **strictly** followed.
5. Defend against post-discipline lawsuits.
6. Advise on Legislative Immunity

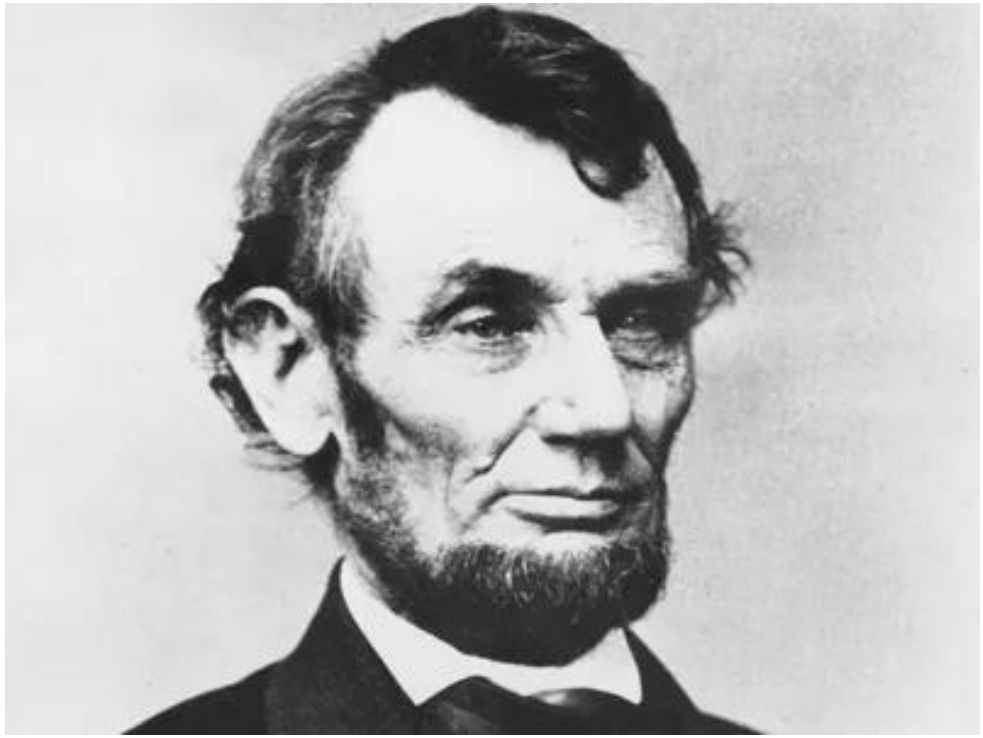
More Practical Tips

1. Attorney Office Must Remain Neutral
2. Educate the Public About the **Process**
3. Recognize Impact of Council Factions

BOTTOM LINE

Many Councilmembers engaged in Bad Behavior will not accept *any* response to their behavior.

Final Thoughts



"***And this too, shall pass away.***"

President Lincoln

Questions?

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