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EDITOR'S NOTE



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

Orchestra Section, Center

Five thousand two hundred and eighty. That figure will no doubt sound familiar, being the well-remembered answer to a grade school question about the number of feet in a mile. Correct. Advanced Placement credit will be given for the response that $5,280 is also the current resale price, as of late December 2023, for a premium seat at Taylor Swift's *Eras* tour in Miami next fall (October 18, 2024, at the Hard Rock Stadium, Field A14, Row 6).

Regrettably, this introduction does not segue to *Time* magazine's Person of the Year. It leads instead to an analogy about optimal vantage points. Symphony enthusiasts will tell us that, whether the locale is Nashville's Schermerhorn, Kansas City's Kaufmann Center, the Orpheum in Phoenix, Carnegie Hall, or any other American grand orchestral venue, the best tickets are in the front section center, and a few rows back.

The proposition advanced here is that, in some ways, our seating as municipal lawyers imparts that experience. For the long-running production titled "*United States Constitution*," few spots offer the unparalleled combination of sight lines and sound quality as those afforded local government attorneys. After countless hours spent practicing various of the subparts, and having themselves composed and conducted many pieces, this audience has a heightened familiarity with the score. Admittedly, this metaphor may be a challenging departure from the conventional, Schoenberg-like, but hear the opus to conclusion: what other profession offers such appreciation of the themes running through the whole, whether Amendments-One, Two, Four, Five, Eleven and more--or dozens of equally foundational passages.

On that note, this first *Municipal Lawyer* of 2024 endeavors to continue providing you with useful and interesting compositions, some leaning generic, some more *sui generis*. We offer lengthier discourses: employment law, affirmative litigation, and data centers; provide works on ethics, retaliatory arrest, and Canadian caselaw; add an Italian conversation; and move to a solo distilling forty years of performance in local government law. We hope you find the pieces worthwhile.

Returning to the opening stanza, *ML* would be remiss if we did not promote IMLA's many upcoming productions in 2024. Some, like our outstanding webinar series and work group calls, are virtual. Others, most notably IMLA's *Mid Year Seminar* (Washington DC, opening April 18), IMLA's *Annual Conference* (Orlando Florida, opening September 25), and IMLA's *Comparative Law Conference* (debuts October 16, Lake Como, Italy), are in-person performances. Great seats are still available, orchestra section, center.

We thank you for your participation in IMLA's mission during 2023 and look forward to an even more productive 2024 together. Happy New Year.

Best wishes,

Erich Eiselt

PRESIDENT'S LETTER



BY: **ROSE HUMWAY-WARMUTH,**
City Solicitor, Wheeling, West Virginia and IMLA President

A Vision of the Future

During this time, as one year comes to a close and another begins, I always harken back to what my grandparents and mother taught me regarding setting ones' future goals. Of course, as with many teenagers, these goals were set yearly and usually on my birthday. As I grew older the "five-year plan" materialized-a yearly evaluation of what has occurred in the past, what's happening currently and where is the future leading. This has made me think of what the plan is for IMLA.

Many of you know that in the past IMLA has constituted Committees for the future planning of the organization, doing goal setting and evaluation. The Past Presidents, the Board of Directors, the Executive Director and also the staff of IMLA have an ongoing challenge to do the same type of goal setting and evaluations of the outcome of efforts toward achieving such. It is amazing to me how far this organization has progressed since I first became a member more than two decades ago. Recall if you will, the rarity in those early days of a female or a person of color being among those holding a leadership position in the organization. Fondly I think of Past President Susan Rocha, whom I considered and continue to consider a true mentor, as she literally campaigned to achieve bylaw changes that reshaped the future of the organization…in my opinion much for the better. Within five years after her presidency the IMLA Board evaluated the past status of the organization, worked to implement the goals for the organization in the form of bylaw changes passed by the vote of the members-and set future goals to be achieved.

Today, one can see so many of those goals that have come to fruition. We need only to look at the inclusive and diverse program planning that IMLA provides its members, as well as the various Committees that have been constituted to help foster and stimulate the goals of the organization in providing premiere assistance and educational opportunities to advance the professionalism of a municipal law practitioner.

IMLA needs and welcomes from its members more input and thoughts as to what the organization currently provides and what members would like to see in the future. Since each and every day is the future, there is no time like the present to continue the conversation and work together to craft our Five, Ten, and even Twenty-year plan for IMLA.

Just as an individual may take account of personal goals, IMLA needs to evaluate yearly what has been accomplished in the past, what's occurring in the present and what is needed to achieve positive and beneficial future outcomes! Actually, after being honored to be a member of the IMLA Board of Directors for several years, I believe that the organization does this type of goal evaluation and future goal projection innately. Somehow, maybe it's a "lawyer thing" but that involves sitting down, concentrating, and creating a list to include… "What has IMLA previously provided to the members that perhaps can be improved upon or modified?" …. "What direction would I like to see IMLA progress toward?" … "What areas or experiences should IMLA concentrate upon to further enhance the goals of the membership?"

Currently I am compiling my five-year goal assessment of our organization. I can say that IMLA has steadily improved each and every year in providing excellent assistance and opportunities to local law practitioners. Our Executive Director is fearless! IMLA staff is dedicated beyond belief and what it achieves is quite mighty. And the Board of Directors and Past Presidents are committed to accomplishing the longstanding goals of the organization, with a keen understanding of the need for goal setting to assure a vital future.

In 2024 I look forward to talking with you during one of our upcoming IMLA events and hope to get some of your thoughts on a five-year goal evaluation and future plans. Together, we can accomplish not just good things-but great things. Thank you for your continued membership in IMLA and may 2024 bring each and every one of you health and happiness.

Sincerely,
Rose Humway-Warmuth

ML

Significant Employment Law Changes in 2023 and Signs of Future Trends

By: LAWRENCE LEE, *Shareholder, and*
BENJAMIN MOSES BROWN, *Associate, Jones & Keller, P.C., Denver, Colorado*



2023 brought unprecedented changes in labor and employment laws across the country through state legislative bills and two groundbreaking decisions issued by the U.S. Supreme Court. Employers should be aware of the many legal shifts in employment law to ensure compliance and avoid potential liability. If not already considered, decision-makers with hiring and firing authority should also work with employment counsel to update workplace policies, managerial practices, and training methods. Below, we we highlight significant legal developments in 2023 taking place across the United States.

2023 State Employment Law Changes[1]

Expansion of Anti-Discrimination and Pay Disclosure Laws

In 2023, Michigan, Nevada, and Pennsylvania amended their laws governing employment discrimination, clarifying the statuses of sexual orientation, gender expression, and gender identity as protected classes.[2] Minnesota may soon follow.[3] Arizona, Arkansas Minnesota, Michigan, Pennsylvania, and Texas joined more than a dozen states (including Colorado) that have already passed CROWN acts, which prevent employers from discriminating on the basis of natural and cultural hairstyling practices. An attempt to pass similar legislation on a federal level was cut short by the Senate in 2022. Both Minnesota and New York modified workplace requirements related to breastfeeding employees, with the former strengthening employee rights to lactation breaks and the latter requiring many employers to provide on-site pumping areas for nursing mothers. In order to combat age-discrimination, employers in Colorado will soon be prohibited from asking age-related questions to applicants on their initial application.[4] California added new restrictions on when and how employers can inquire into an applicant's criminal history before making a conditional job offer. The new law also mandates employers to complete an individualized assessment when a job applicant's criminal record is discovered before making a final decision not to hire an applicant.[5]

In 2023, a number of states introduced measures in the hopes of increasing pay transparency. Beginning January 1, 2024, Colorado employers have amended disclosure requirements for job postings by requiring employers to publicize information on openings to current employees, including the salary and benefits of the position as well as basic information about the position and how it will be filled.[6] Illinois adopted an amendment requiring midsize and larger employers to include the corresponding pay scale and benefits for all job openings and notify current employees about promotion opportunities.[7] Minnesota now prohibits employers from considering an applicant's past salary when determining future compensation or benefits.[8] We expect other states to follow with adoptions or amendments to pay and disclosure laws in 2024.

Public Sector Collective Bargaining and Employee Health Benefits

In 2023, 24 states amended legislation or enacted bills related to public sector employees, notably in Colorado where most county employees were allowed to move forward with an elections and collective bargaining process.[9]

In states like California and New York, which have already passed similar laws, the number of public employees forming unions continues to grow. California amended its rules governing legislative staff, joining Maine and Oregon allowing these employees to unionize.[10] Minnesota and Washington also made it easier for unions to communicate with

public employees.[11] In 2023, Michigan became the first state to repeal its Right to Work laws. As of March 2024, collective bargaining agreements in Michigan may include clauses requiring the payment of union dues as a condition of employment.

In addition to strengthening collective bargaining rights, many states expanded mandatory benefits for blue collar workers. In Colorado, the Healthy Families and Workplaces Act requires employers to provide at least 48 hours of paid sick leave per year.[12] Illinois went a step further, requiring all employers to provide at least 40 hours of paid leave per year that may be used for any purpose.[13] In Connecticut, non-exempt service workers will be able to use sick time to take a "mental health wellness day."[14] Georgia now requires employers to give employees time off to vote, either on election day or on a designated early-voting day.[15] Colorado has created a wage theft enforcement fund to directly repay employees who have been the victims of wage theft and to seek reimbursement from employers.[16]

Although not directly related to the public sector, 2023 saw major strikes in entertainment, healthcare, education, and automobile manufacturing industries, while strikes of rail transit and UPS workers were narrowly avoided. Organized labor seems to be experiencing a resurgence across the nation, signified by President Biden joining United Auto Workers on the picket line in Detroit last September, a first for a sitting president. States and the federal government appear to be prioritizing laws that strengthen collective bargaining and increase employee benefits, and employers should be prepared for more legislation of this nature in 2024.

Limitations on Employer COVID Vaccination Requirements

Since 2020, COVID hospitalizations and deaths have declined substantially. The Biden Administration suspended vaccine requirements for federal employees and contractors on May 11, the same day it declared the end of the COVID public health emergency.[17] In 2023, several states have taken it a step further, barring private employers (with few exceptions) from requiring employees to be vaccinated for COVID, including Idaho,[18] Florida,[19] and Utah.[20] Texas's ban on employee vaccine mandates takes effect in 2024.[21] Given the current trajectory of the COVID pandemic, these bans might have little practical impact as fewer and fewer employers look to prioritize full COVID vaccination among their employees. However, a resurgence in COVID infection rates would thrust these prohibitions into the spotlight and potentially result in legal controversy.

National Trend Against Non-Competes

For those public employers that are a part of projects or agreements that include restrictive covenants, the legal trend across the country is towards limiting or prohibiting non-compete agreements. At the federal level, various agencies are taking aim at non-compete agreements. In January 2023, the Federal Trade Commission (FTC) proposed a new rule that could supersede state laws to invalidate all employment-based non-competes, arguing that these agreements drive down wages, stifle innovation, and harm markets.[22] The FTC will vote on the proposed rule in 2024. The National Labor Relations Board (NLRB) has already taken a similar stance against non-competes.[23] Even before the federal campaign against non-competes, states throughout the country had already been introducing significant limitations on these agreements. Four states currently bar all employment-based non-competes: California, Minnesota, North Dakota, and Oklahoma. New York is likely to join this list with a bill now awaiting Governor Hochul's signature.

Many states that have not banned non-competes have drastically limited their terms or restricted the number of employees who can be bound by them. Since 2022, Colorado has limited non-compete provisions to "highly compensated" employees, requiring these agreements to be no broader than necessary and be limited in scope to the protection of trade secrets.[24] In 2023, Maryland amended its labor codes to prohibit non-competes for employees who earn less than or equal to 150% of the state's minimum wage.[25] Washington now prohibits non-competes for employees making less than $100,000 per year.[26] Other states have barred employers from extending non-competes to specific types of employees. Indiana recently invalidated non-competes for primary care physicians, make it easier for other types of physicians to buy their way out of previously binding non-competes, and render unenforceable future non-compete agreements for physicians who are terminated from employment without cause or at the end of their current contracts.[27]

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Larry Lee is a 27-year practitioner, shareholder and labor and employment attorney for Jones & Keller. He represents numerous employers in the public and private sectors. Larry has successfully defended many employers in federal and state courts, arbitrations, federal circuit appeals courts for claims filed under Section 1983, Title VII, state anti-discrimination statutes, wage and hour laws, and common law breach of employment contracts. Larry has also negotiated against the NLRB in claims filed against employers. On a daily basis, Larry provides advice and counsel to management clients on legal compliance as well as practical resolutions to complex workplace issues. He can be reached at llee@joneskeller.com.



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State laws against non-competes (as well as proposed federal rules) generally have carve-outs preserving employment-based non-solicit or non-disclosure agreements, especially if these agreements can be plausibly linked to the preservation of trade secrets or confidential information. However, the writing is on the wall that employers across the country will have fewer and fewer options to ensure that today's employees don't quickly become tomorrow's competitors.

Major Supreme Court Employment Law Decisions

In 2023, the United States Supreme Court issued two landmark decisions with widespread ramifications for employers. The first, deciding *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina, et* al[28] did not directly concern employment law. Regardless, it may still have significant downstream consequences for employers seeking to diversify their workforce or to shield themselves from liability from discrimination claims. The second case, *Groff v. DeJoy*,[29] heightened the standard for employers to deny requests for religious accommodations. These two decisions are examined below, as well as one important case currently being considered by the Court that could transform the analysis of "adverse employment actions" in workplace discrimination lawsuits.

In *Harvard*, Students for Fair Admissions, Inc. (SFFA) claimed discrimination against Asian-American applicants in the school's admission practices. SFFA alleged that Harvard used a soft quota system that essentially froze the number of Asian-Americans admitted each year despite a growing proportion of qualified Asian-American applicants. They argued this was accomplished through a grading system that consistently ranked Asian-American applicants lower on personality scores, whereas other racial groups scored higher in personality metrics despite having lower academic ratings. Harvard argued that its ranking system complied with prior Supreme Court rulings[30] and that race was but one of a multitude of factors considered during its admissions process. The school claimed a completely race-neutral applicant analysis would not allow it to meet its goals for maintaining a diverse student body.

Harvard's policy was upheld both by the District Court and the First Circuit before certiorari was granted. At the Supreme Court, amicus briefs in favor of Harvard's ability to consider race in its admission policies were filed by the American Bar Association, the American Civil Liberties Union, the NAACP Legal Defense and Education Fund, and the United States Solicitor General.

In a 6-2 vote, the Court found that Harvard's race-based affirmative action programs in college admissions violate the Equal Protection clause of the Fourteenth Amendment.[31] Chief Justice Roberts wrote for the majority that "[e]liminating racial discrimination means eliminating all of it" and that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color."[32] Though the case only concerned college admissions, its potential impact on future discrimination claims, especially those in the employment field, was evident. On June 29, 2023, the same day the decision was released, the chair of the Equal Employment Opportunity Commission (EEOC) issued a statement decrying the decision in *Harvard*, asserting that "[i]t remains lawful for employers to implement diversity, equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace."[33] Two weeks later, the Attorneys General of thirteen states[34] issued a letter to the CEO of every Fortune 100 company referencing *Harvard* and demanding these companies comply with "race-neutral-principles in [their] employment and contracting practices" or "face serious legal consequences."[35] In August, the American Alliance for Equal Rights[36] sued two of the largest law firms in the country, challenging diversity fellowships offered for law students by arguing the programs violated federal anti-discrimination laws.[37]

In the employment context, hard racial quotas, or setting aside a certain percentage of positions for members of an underrepresented race or ethnicity, was already a controversial practice. In the wake of *Harvard*, such blunt tactics appear legally perilous. It should be noted that *Harvard* does leave a carve-out for universities to consider an applicant's race so long as this analysis is individualized to the applicant's unique life experiences.[38] Like university applicants, prospective employees may have faced unique hardships related to race, and examining how the applicant overcame these hardships would not be outside the proper purview of a hiring authority.

The second case from the Court's 2022-23 Term with major implications for employment law is *Groff v. DeJoy*.[39] Gerald Groff began working as a mail carrier for the United States Postal Service (USPS) in 2012. As an evangelical Christian, Groff requested a religious exemption from working Sundays. Although his request was accommodated for some time, USPS eventually informed Groff that he would again be assigned shifts on Sundays. Groff refused, was repeatedly sanctioned, and resigned as a result in 2019. He filed suit,

alleging religious discrimination and failure to accommodate his request for an exemption. USPS argued it had a non-discriminatory justification for requiring Groff to work Sundays and that accommodating Groff's request would result in undue hardship for the organization. The Eastern District of Pennsylvania agreed, ruling in favor of USPS and finding that employers were not required to accommodate an employee's religious practices if it would impose anything more than a *de minimis* hardship on the employer. The Third Circuit affirrmed, and the Supreme Court granted certiorari in January 2023.

In a unanimous decision released on the same day as *Harvard*, the Court clarified that the "more than a *de minimis* cost" standard was not sufficient for demonstrating that an employer would suffer an "undue hardship" in providing an employee's religious accommodation. The court clarified that, in order to reject an employee's request for religious accommodation, the burden placed on the employer by the accommodation must "result in substantial increased costs in relation to the conduct of its particular business."[40] The judgment below was vacated and the case was remanded back to the Third Circuit to determine whether USPS could demonstrate that accommodating Groff's religious exemption from working on Sundays represented a substantial, rather than merely more than *de minimis*, burden.

The Court declined to provide a new definition "undue burden" with regards to religious accommodation, stating that the analysis was still a "fact-specific inquiry." As a result, employers deciding whether to grant religious accommodations must take into account the actual expense of granting the employee's request and whether their organization actually has (or could have) the staffing flexibility to adjust to these changes. The heightened undue burden standard in *Groff* represents a meaningful escalation from the prior "more than *de minimis*" analysis, resulting in less leeway for employers. Consequently, it might be prudent for employers to show deference to credible religious accommodation requests rather than risk liability under a new and vaguely defined standard.

Harvard and *Groff* are already upending long-standing assumptions about discrimination and accommodation claims in the employment sphere. Another case to be decided in the current term, *Muldrow v. City of St. Louis*,[42] could short-circuit the adverse employment action requirement for employees asserting discrimination claims, reducing or eliminating the need for the employee to demonstrate they suffered a "significant disadvantage" as a result of the alleged discrimination. In 2020, Sergeant Jatonya Muldrow of the St. Louis Police Department filed a lawsuit alleging that City discriminated and retaliated against her on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964.[43] Muldrow alleged, inter alia, that her transfer to an arguably less desirable position and the Department's refusal to grant her request to transfer out of that position was based on sex discrimination and constituted an adverse employment action by the Department.

The Eastern District of Missouri granted the City's motion for summary judgment, finding that Muldrow could not demonstrate an adverse employment action. The Eighth Circuit affirmed. It concluded that, although an undesirable transfer or failure to grant a transfer request could constitute an adverse employment action if it produced a "material employment disadvantage,"[44] Muldrow did not show she "suffered a significant change in working conditions or responsibilities and, at most, expresse[d] a mere preference for one position over the other."[45] The court listed relevant factors that might constitute a material employment disadvantage, including a reduction in pay, supervisory duties, or prestige, a shift to undesirable schedule or hours, or lessened promotion potential. However, it found Muldrow had not met her burden with regards to these metrics.

The Supreme Court granted Muldrow's petition on the limited question of whether Title VII prohibits discrimination in transfer decisions absent a separate court determination that the transfer caused a "significant disadvantage." Muldrow argues that Title VII categorically prohibits all discrimination based on protected classes such as sex and that, consequently, there is no requirement to show said discrimination led to a material employment disadvantage. The case was argued on December 8, 2023. If the Court rules in favor of Muldrow, employers could face expanded legal liability for any employment decision that implicates protected characteristics, even if the decision itself does not result in a material employment disadvantage. And, as noted by EEOC Commissioner Andrea Lucas in a recent statement, *Muldrow* could significantly curtail employers' diversity programs.[46] Employers might be compelled to ignore race, color, religion, and sex entirely in management of their organizations if the Supreme Court finds for Muldrow.

Public employers should now be especially cautious when considering a protected class (e.g., race) for hiring, promoting/demoting, and termination decisions. Although race-based quotas have been illegal for decades, employers should continue to set aspirational goals for improving diversity. But after the Court's rulings in 2023, employers should also be careful to avoid practices that may be viewed as allowance of race-based preferences or illegally setting aside certain

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Power Surge: The Benefits and Challenges of Data Center Development

By: LEO P. ROGERS,
County Attorney, Loudoun County, Virginia and
BUDDY RIZER, *Executive Director,*
Loudoun County Economic Development Authority



Data centers are the unsung heroes of the digital revolution, powering the technologies that have become integral to our lives. From facilitating global communication to driving artificial intelligence (AI) to generating cryptocurrencies and enabling cloud computing, data centers are indispensable in modern society. Their role will continue to expand as technological innovation accelerates, unlocking new frontiers and opportunities in the ever-evolving digital landscape. These facilities are the backbone of the modern digital network, enabling businesses, governments, and individuals to harness the power of data, cloud computing, and connectivity.

There are hundreds, if not thousands, of individual data centers located around the globe, but certain locales have emerged as the leaders in attracting and supporting their aggregation. These include Singapore, Hong Kong, and Silicon Valley among the world's top such locations. But one region outpaces the next six data center powerhouses combined, both international and domestic: Loudoun County, Virginia.

Focusing on Loudoun County, this article will describe why data centers are so lucrative, why they have been and will continue to be in demand, how localities need to balance the fiscal benefits of economic development with good land use planning, what issues localities should consider in reviewing administrative and legislative land use applications by data centers, how the impacts of data centers may be mitigated, and finally take you on a tour of a data center.

The Data Center "Big Bang"

The concept of data centers dates back to the emergence of mainframe computers in the mid-20th century. In the 1950s and 1960s, computers occupied entire rooms and were operated by specialized teams. These mainframes required controlled environments, including temperature and humidity regulation, to ensure optimal performance. Data was stored on magnetic tapes and punch cards, laying the foundation for the idea of centralizing computing resources. As computing technology advanced, data centers evolved with many companies building their own facilities to house the hardware necessary for their own operations.

The 1990s mark a significant turning point in the history of data centers with the proliferation of the internet and the dotcom boom. The increasing demand for online services, e-commerce, and connectivity led to the establishment of commercial data centers. Pioneering companies like Equinix and Digital Realty offered co-location services, allowing businesses to rent space for their servers within these facilities. The 2000s witnessed the rapid growth of virtualization technology and the emergence of cloud computing. Cloud providers like Amazon Web Services (AWS), Microsoft Azure, and Google Cloud introduced the concept of renting computing resources on-demand, eliminating the need for businesses to manage their own physical servers. This shift catalyzed the expansion of massive data center complexes around the world, designed to accommodate the infrastructure required for cloud services. Distinct from these cloud-based functions, but also driving the need for massive centralized computing facilities in the last decade, was the emergence of cryptocurrencies.

Data Center Logistics

This accelerating demand for computing resources drove exponential growth in dedicated physical facilities. Since 2015, data center space worldwide has grown 17-fold to approximately 3.6 billion square feet. Data center growth, as measured by power consumption, is anticipated to be 10 percent a year through 2030. The continued rise in

the use of AI will further drive the need for data center expansion.

As data centers have proliferated across the world, they have become similar in their size and design. Striking albeit vague concrete structures on the outside, on the inside data centers house a series of complex processes and mission-critical equipment that enable the reliable operation of the internet economy. Some of the critical components of the buildings include:

Servers and Hardware: The primary purpose of a data center is to house servers, which are powerful computers designed to handle data storage, processing, and networking. Servers come in various forms, from traditional rack-mounted servers to blade servers that maximize space efficiency.

Networking Infrastructure: Data centers require robust networking infrastructure to ensure seamless communication between servers, devices, and external networks. This includes routers, switches, and firewalls that manage data traffic and security.

Storage Systems: Data centers house a variety of storage systems, including hard drives, solid-state drives, and other storage arrays. These systems store vast amounts of digital information that businesses and users rely on.

Cooling Systems: The heat generated by the intense processing power of servers can be detrimental to their performance and lifespan. Data centers employ sophisticated cooling systems to maintain optimal operating temperatures.

Power Distribution: Uninterrupted power supply is critical for data centers to ensure constant operation. Data centers employ redundant power sources, backup generators, and Uninterruptible Power Supply (UPS) systems to prevent downtime.

Security Measures: Security is paramount in data centers due to the sensitive nature of the data they house. Facilities implement access controls, surveillance systems, biometric authentication, and other measures to protect against unauthorized access.

Monitoring and Management Tools: Advanced monitoring and management tools track the performance of servers, cooling systems, and other components, ensuring efficient resource allocation and timely troubleshooting of issues.

Meet Loudoun County, Virginia

In the 1990s Gatorade's slogan was "I want to be like Mike." Michael Jordan was the greatest basketball player of his time, maybe ever. When it comes to attracting data center development in the 2020s and the foreseeable future, many localities may say "I want to be like Loudoun," given that Loudoun County, Virginia is home to Data Center Alley and has the largest concentration of data centers in the world. As noted above, the next six highest data center markets combined wouldn't equal what exists in Loudoun.

This dominance can be attributed in part to a single transformative cyberspace innovator. Loudoun was the home to internet pioneer America Online. AOL chose Loudoun County as its headquarters in 1997 and became a major driver in attracting a high-level technology workforce and the construction of digital infrastructure. With its headquarters already based in the County, AOL recognized the need for robust infrastructure to support its expanding user base and the increasing demand for online content. The company established data centers in the region to house the servers and networking equipment that formed the backbone of its services. By the mid 2010s, Loudoun became the largest co-location market in the world, and led the industry into the cloud as AWS built its largest collection of data centers throughout the late teens and early 2020s.

Today, Loudoun County is home to more than 175 data center buildings comprising more than 31 million square feet, with another 4 million square feet currently under development. Data centers have greatly contributed to the quality of life and the amenities offered in Loudoun. They are a major reason why last year new commercial investment in Loudoun exceeded $10 billion, which is more than several states. Since 2010, as data centers proliferated in Loudoun, the real estate tax rate decreased by nearly one third while the County budget increased by nearly 400 percent. In addition, data centers have provided high end construction jobs, employed a high-income work force, promoted associated business growth, and attracted prestigious technology companies to locate nearby.

The rapid growth of data centers in Loudoun County, however, created negative impacts on the community, exceeded available electrical capacity, drove up the cost of land, squeezed out other types of commercial,

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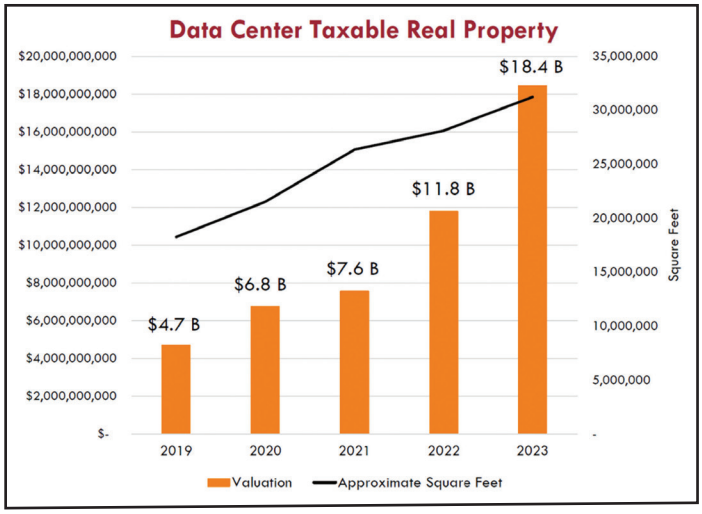
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residential and community development, and resulted in community opposition to new data center development. These concerns often echo issues raised elsewhere about the negative consequences of data centers. Some of these are discussed below.



Use of Resources and Sustainability

As concerns about energy consumption and environmental impact grew, data centers faced pressure to become more energy efficient. The latter half of the 2000s and the 2010s saw a focus on sustainability and green initiatives within the industry. Data center operators began implementing advanced cooling techniques, optimizing server configurations, and adopting renewable energy sources to reduce their carbon footprint.

Data center operators have sought to reduce their power consumption, use more green and renewable energies, and reduce water consumption. They have become outspoken advocates in the battle to fight climate change. Corporate leaders such as Microsoft, Facebook, and Salesforce, are establishing sustainability strategies to support the planet. Microsoft released an aggressive plan to halve its carbon emissions by 2030. Amazon Web Services has committed to the use of 100% renewable energy by 2025 and currently has more than 120 megawatts of renewable projects in the works. Environmentalists are noticing. Greenpeace gave Apple, Facebook and Google an "A" on their clean company scoreboard and Salesforce, Microsoft and Equinix have been given high grades in categories such as energy transparency, renewable energy commitment, energy efficiency and advocacy. Analysts have reported a significant decline in pollution over the U.S., northern China and western Europe as compared to the same time frame in 2019. Energy sustainability is a priority for the data center industry, which accounts for about 3% of global power consumption.

Here are a few of the ways that the data center industry is working toward its sustainability goals:

Investing in Green Energy: Utilizing green energy sources, such as wind and solar power, is a primary way for a data center to reduce its carbon footprint. In Virginia, the industry is working together with Dominion Energy to deliver an unprecedented amount of renewable energy, including an 830-acre solar array planned for Loudoun County.

Energy-Efficient Buildings: Given their usage of such outsized amounts of energy for computing purposes, data center buildings are understandably scrutinized for their energy efficiency. Many Loudoun data centers use energy-efficient building design standards, such as Leadership in Energy and Environmental Design (LEED).

Energy Storage: Utility-level energy storage is coming, with several operators already announcing projects to use lithium-ion batteries for their backup power. Full adoption of this technology could lead to the eventual elimination of diesel backup generators.

Minimizing Water Usage: Data centers use water to cool their computer equipment. In addition to utilizing reclaimed water lines, data centers in Loudoun are exploring new ways of cooling, including air cooling, recycled water loops and submersive cooling technology.

E-Waste Management Programs: Nearly all operators have implemented electronic and electrical equipment recycling programs.

Ongoing Investment in New Technologies: Data center operators continue to innovate and look for new ways to reduce their carbon footprint, including waste heat recycling, on-site energy generation and other initiatives that can help the industry better integrate with their communities.

Local Planning and Zoning Considerations: Loudoun's Example

As the data center industry becomes more entrenched in our communities, local governments are working to understand how to accommodate these facilities within their zoning ordinances and planning documents. Loudoun may serve as a useful exemplar. In 2000, Loudoun County first addressed data center zoning in a determination letter by the Zoning Administrator, which stated, "Uses commonly referred to as 'data centers' are most similar to 'office' and are permitted wherever offices are permitted." At the time industry representatives described the use to Loudoun staff as similar to what was commonly known as a telephone exchange building. These were generally small structures, infrequently sited by telecommunications providers to house equipment, and had little to no occupancy by employees and generated minimal amounts of traffic. Loudoun's ordinances allowed office use by-right in many zoning districts. Coupled with market conditions and a staggering magnitude of demand that was not known in 2000, this decision to consider data center and office uses as equivalent led to the proliferation of data centers where a more strategic land use and planning approach would not have otherwise permitted them. Data center development drove out other forms of commercial development and resulted in existing land uses (commercial,

residential, and civic) to be sold and redeveloped as data centers.

In 2000, the County's Comprehensive Plan, Choices and Changes, General Plan 1990 – 2000 was undergoing a major revision that dealt primarily with planned reduced residential densities in the County's rural area. The Comprehensive Plan carried over many of the non-residential land use policies of the prior plan that supported planned business and industrial land uses generally along transportation corridors and proximate to Dulles International Airport. The planning policies did not account for the advent of the data center phenomenon. For the period between 2000 and 2014, the zoning permission for data centers was based on the determination letter allowing data centers to locate where office uses were allowed. While that may appear to some observers in hindsight to be short sighted, due consideration must be given to Loudoun's rapid population growth creating a demand for residentially zoned properties to provide housing for the influx of residents. Many properties were proposed for conversion from non-residential planned land use and non-residential zoning to absorb the demand, so proposed data center development was welcomed as an alternative to diminishing acreage otherwise planned for business development. Continued data center development also began to offset the burden on residential property owners to pay the costs of increased local services escalating due to increasing population levels.

Regulating data centers in the same manner as office buildings meant applying the same setbacks, parking allocation, front entrance requirements, height, massing, and floor to area ratios. At the time, Loudoun's Zoning Ordinance did not require windows and architectural treatments for large buildings. Buildings were designed and constructed to accommodate their function, which for data centers resulted in large concrete buildings resembling warehouses more than office buildings.

As a significant number of data centers were constructed, the differences between office use and data center use became apparent. An office building primarily houses people during the day, meaning that the office building has parking, utilities, HVAC, and other facilities sized in a manner for an office use. Additionally, due to the nature of the office use, office buildings are developed in a manner that is reasonable attractive to the public with careful attention paid to screening, landscaping, and aesthetics. An office building primarily housing people also has windows and architectural treatments to enhance the buildings appeal to workers and visitors.

In contrast to office buildings, data centers primarily house computer equipment, require significant amounts of electricity, robust cooling systems, and require many huge backup generators. A single data center may use up to 32 megawatts or more of electricity. A series of high voltage powerlines are required to meet the electricity demands of data centers. The backup generators also need to be regularly operated to ensure they will function when needed. Mitigation of noise impacts is a significant difference between data centers and office buildings.

These differences in ancillary needs (i.e., high voltage transmission lines, power substations, numerous large and loud generators, and massive HVAC systems) impact surrounding properties and caused the County to define data centers as a specific use. In 2014 zoning amendments defined the data center use as:

> A facility used primarily for the storage, management, processing, and transmission of digital data, which houses computer and/or network equipment, systems, servers, appliances and other associated components related to digital data operations. Such facility may also include air handlers, power generators, water cooling and storage facilities, utility substations, and other associated utility infrastructure to support sustained operations at a data center.

The 2014 amendments also introduced performance standards for data center development that required the following measures:

- -Principal building facades need to avoid undifferentiated surfaces by including design elements such as a change in building height, building step back or recesses, fenestration or change in use of building material.
- -Screening of mechanical equipment.
- -Exterior lighting to be fully shielded and directed downward.
- -Provisions for pedestrian and bicycle facilities.
- - Additional standards for landscaping, buffering, and screening.

While the amendments added specificity to Loudoun's ordinances regarding the use, the district use permissions stayed largely similar. As a result, the amendment did not constrict data center development.

The next major update to the County land use policies occurred in 2019 with the adoption of the Loudoun County 2019 Comprehensive Plan. This effort introduced the concept known as "place type" in the County's long-term land use planning document. This step began the initial effort to strategically align a land use policy document with zoning district regulations that would serve to implement the comprehensive plan. While many articles on Loudoun's data center experience attempt to introduce the topic, the discussion herein offers a practical explanation.

The place type planning approach designates land areas appropriate for uses based on context within the County's five plan policy areas; the suburban policy area; the transition policy area; the rural policy

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area; the towns and joint land management area(s) (JLMAs); and a newly added urban policy area. The text below offers insight into this planning approach.

The Loudoun County 2019 General Plan describes the place type approach as follows:

The place type approach differs from the County's previous approach to land use planning in that it provides a way to shape the future of Loudoun by concentrating on context – the look and feel of places, their form and their character – instead of focusing only on conventional land use categories and specific uses. Place type categories define not only the basic expected land uses for Loudoun County 2019 General Plan [CHAPTER 2-8] specific areas in the County, but also preferred development patterns, streetscapes, and design features that make places and environments visually distinctive and functional for people.

The place type approach is intended to create distinct and "complete" residential neighborhoods, employment centers, open spaces, and other areas. By providing greater flexibility in development types and uses while providing additional guidance on design expectations, place types can also facilitate more dynamic, livable neighborhoods and allow for established areas to evolve and improve. In the next graphic you will find the transect of the County, which transitions from rural to increasingly urban place types. A transect defines a series of place types that transition from sparse rural farmhouses to the dense urban core. Each place type contains a similar transition from the edge to the center of the neighborhood. The transect does not show all place types found in the plan, but rather a few to show the transition at a higher level. Through the use of place types in the General Plan, the County aims to achieve Loudoun's vision for a prosperous and inclusive community consisting of great places in a variety of settings.

Further, most data center development occurs in the suburban policy area and examples of place types that either call for data center development or do not portend that type of development are the suburban employment and suburban mixed use place types, respectively.[1] The suburban mixed use place type is called for along the County's major transportation corridors of Route 7, Route 28 and Route 50, while the suburban employment place type is designated in areas north and west of Dulles Airport. The place type concept, as described above, also includes use categories expected in each area including core and complementary uses that will fulfill the intent of the place type and appropriate conditional uses. Within the suburban mixed use place type, no category of core, complementary or conditional use includes data centers. Within the suburban employment place type, data centers are listed only within the category of conditional uses.

The place type planning approach equips the Loudoun Board of Supervisors (Board) with policy guidance to consider the possibility of future amendments to the zoning ordinance to direct future data center development to districts that are located within the place type that calls for such uses, or to add new performance standards or to consider approval by special exception. As 2023 draws to a close, the only amendments now before the Board are those that add additional performance standards but largely maintain the current district use permissions.[2] Additional amendments are possible once the 2024 Board establishes its future work program.

Future regulations will also need to address technical considerations, such as power supply, connectivity, and infrastructure requirements. Additionally, the environmental impact of data centers, including energy consumption, water usage, and waste management, must be carefully weighed against local sustainability goals. However, all regulations will need to strike a balance between supporting economic growth and innovation while addressing the potential issues. Collaborative approaches that involve community engagement and public input are crucial to achieving this balance.

Recommendations: Regulating Impacts and the Siting of Data Centers

Jurisdictions should define the term "data center" as a distinct use in their zoning ordinance and comprehensive plan. The definition should be broad enough to encompass small or modular data centers, which are a few hundred or thousand square feet to large traditional data centers which sometimes exceed one million square feet. The definition and its application in the ordinance should also be flexible enough to cover data centers which are ancillary to a principal use. The impacts of each type of data center vary greatly and must be addressed differently for planning and zoning purposes.

For planning purposes, the comprehensive plan should identify planning areas where data centers may be located, where data centers are prohibited, and where the data center use can be controlled through a legislative approval such as special exceptions or use permits. Zoning ordinances should identify development criteria for by-right data centers located in close proximity to homes, schools, civic uses, and commercial development. These development criteria include size, height, buffers, setbacks, design and construction standards, landscaping, noise attenuation, backup power, and the provision of utilities.

To expand on this point further,

subject to market specific indicators, most data center developers are interested in obtaining a floor-area ratio (FAR) of 1.0 or more and a building height of 100 feet or more. Jurisdictions need to recognize and incentivize locations where local zoning can accommodate such bulk standards and when developed adjacent to residential areas, require screening, buffering, and noise attenuation that mitigates visual and aural impact. Areas subject to airport noise or ambient noise levels that are similar to data center noise impacts provide opportunities that may be suitable for future data center development. Areas that are proximate to existing utility infrastructure also may be preferred for data center development. This will be challenging for jurisdictions like Loudoun given the diminishing supply of suitable tracts of land in the suburban policy area. In the face of this challenge, a review of the land use place types and development of realistic regulations that are scalable and context appropriate are needed.

Additionally, the location of permitted data center development should be based on the ready availability of high voltage transmission lines. Electrical utilities will be required to serve the data centers. This may require new high voltage transmission lines along highways, scenic corridors, environmentally sensitive areas, or in close proximity to residential developments.

Noise is an ever-present impact of data centers. The most frequent noise complaints relate to the operation of the generators. Data centers may be required to run their generators due to power outages and the generators need to be tested regularly. Site and building design can greatly reduce this impact. More significant buffers, setbacks and landscaping may reduce this noise impact on other properties. Another less common complaint is a low frequency persistent humming noise usually generated by fans or chilling units. The hum may be troublesome even within the standards set by a local noise ordinance.

Localities should consider performing a land study to determine the best location for large data centers. An analysis of available land may help localities plan for and zone land properly for by-right data center uses. A data center park would allow buildings to be grouped in a given area where impacts may be greatly reduced or mitigated through reasonable performance standards. Design and setback regulations may also be reduced within the park. The co-location of data centers provides the opportunity for shared facilities such as backup power generation that can make data centers more eco-friendly. In addition, co-locating data centers provides the best opportunity to recapture the energy and heat expended by data centers and reuse that power to increase energy efficiency and reduce environmental impacts.

Take the Tour

To further compare Loudoun County's data center industry with Gatorade, the motto should be the internet's "Performance Starts Here." As data centers are highly secure facilities, an invitation is required to get a peek behind the curtain. Protecting the information stored in the cloud is critical to the data center market. Once an invitation is received, registration with the data center is required and strict appointment times are set to ensure smooth entry and minimize disruptions to ongoing operations.

Passersby will notice security measures such as large windowless walls, fencing, wires, bollards, surveillance cameras, gates, lighting, ditching, and security guards. Inside the facility is more of the same as visitors are restricted to an access-controlled vestibule while credentials are checked. The tour begins with a security guard leading the way, while another person follows in the rear.

Inside the bowels of the building, a cavernous steel and concrete structure that is many football fields long by several football fields wide unfolds and the cool air of the climate-controlled facility, in an effort to "Beat the Heat" (Gatorade!) is immediately felt. Given the high level of security at these facilities, a combination of digital keys and biometric data, including fingerprints and retina scans, are used to control access. The tour guide explains the intricacies of the cooling setup, including hot and cold aisle containment and airflow management techniques to keep the servers at optimal operating temperatures.

The secured rooms are owned or leased by operators and house data from companies large and small within highly advanced servers. These servers are replaced frequently to keep up with changing technologies and energy efficiency. Upon approaching one of the racks of servers you can feel the heat being generated and hear and feel the electricity pulsing throughout the units. Most impressively, you view racks filled with servers as far as your eyes can see. The tour guide explains the specific server models and functions, highlighting aspects of their CPU, memory, energy use, and storage configurations. When security escorts a visitor from the room, the doors are meticulously closed and secured.

One of the more interesting parts of a data center is the electrical power storage and generation. Data centers cannot tolerate even momentary interruption in service, therefore, an army of locomotive-sized generators, flanked by UPS systems are used in the event of a power outage to support the critical load needed within the data center. At the conclusion of a data center tour, an extensive question and answer session is offered, with information that includes an overview of the data center's commitment to environmental sustainability, such as using renewable energy and green building design. Departing the secure facility leaves you marveling at the complexity and sophistication that goes into the development and operation of data centers from a technical and practical perspective.

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Municipal Bulwarks: Battling for Corporate Accountability

By: DANIEL HINKLE, *Senior State Affairs Counsel, American Association for Justice*



Introduction

In the battleground of public interest litigation, municipalities have emerged as valiant defenders of community rights, tirelessly combating corporate entities determined to evade accountability and offloading their impacts onto society. The resulting damage takes various forms: treating and rehabilitating injured constituents, first responder and law enforcement expenses, new infrastructure requirements, and myriad indirect costs. This fight for accountability underscores that communities pay the price when corporations profit from public nuisances. Municipal litigation against malfeasant corporate actors has proven to be a critical tool in balancing the scales of justice. In the past 20 years, municipalities have been leaders in holding multinational corporations accountable for the harms they have inflicted on localities – from opioids, that killed hundreds of thousands and caused incalculable harm on communities, to PFAS-contaminated drinking water, excessive insulin prices charged by drug manufacturers, and hooking another generation on dangerous tobacco products.

The Corporate Challenge

The municipalities' success in these arenas has not gone unnoticed by corporate defendants and corporations who fear they could be future defendants. These companies are now using their trade associations and membership organizations to coordinate a nationwide response that would significantly reduce the capacity of local governments to assert their legal rights.

This corporate line of attack was first telegraphed in a 2019 report published by the U.S. Chamber Institute for Legal Reform (ILR) titled "Mitigating Municipal Litigation."[1] The U.S. Chamber (Chamber) proposes a state legislative assault plan that would dramatically limit municipalities' legal autonomy. It seeks to restrict municipalities' ability to sue, by defining permissible defendants, altering available legal actions, and limiting the court's jurisdiction. The two most likely proposals include stripping municipalities of the power to hire outside counsel on a contingency fee basis and allowing the state Attorney General (AG) to usurp municipal litigation in almost every circumstance.

If this playbook sounds familiar, that's because you've seen it before. In the aftermath of the Tobacco Master Settlement Agreement (MSA), where state AGs negotiated a global settlement of claims against the top four cigarette companies, tort reform organizations responded with a coordinated campaign aimed at undermining impact litigation brought by the AG's office. They worked through the American Tort Reform Association (ATRA), which was co-founded by the tobacco industry in 1986, and the American Legislative Exchange Council (ALEC), a 501(c)(3) organization with a hybrid membership structure of state legislators and corporate interests. ALEC corporate members write model policy that ALEC public members bring back to their statehouses.

By 1998, ALEC had adopted the Private Attorney Retention Sunshine Act (PARSA),[2] which targeted an AG's ability to contract with outside legal counsel on a contingency basis. Although it was presented as promoting "transparency," the primary consequence of the legislation was imposing price controls that effectively cut off the ability for outside counsel to represent the state. That same year, the Chamber established ILR, whose sole purpose is to limit the liability of major corporations. ATRA, ALEC, and ILR share many

of the same corporate members. The PARSA model legislation was written and advocated for solely to protect ATRA, ALEC, and ILR members from being held accountable for their actions.

As the opioid litigation is coming to a beneficial resolution for municipality plaintiffs represented by outside counsel, it is inevitable that these corporations and their trade associations will turn their corporate lobbying power toward squashing future claims. Johnson & Johnson (J&J), who is contributing $5 billion to the nationwide opioid settlement agreement[3] has held a board seat on ILR since 2003. The Center for Political Accountability found that J&J gave the Chamber and ILR at least $2,637,500 from 2015 through 2021[4] during the height of the opioid litigation.

It is anticipated that over the next few years, hundreds of bills will be introduced in dozens of statehouses that would prevent municipalities from protecting their communities. Many of these threats are outlined below. Local governments need to be aware that their rights are under a coordinated and extremely well-funded campaign to evade accountability. Fortunately, there is a way to fight back.

The Evolution of Municipal Litigation

Municipal litigation has evolved significantly over the past decade, enabling local governments to independently tackle harms inflicted on their communities by major corporations. Historically, municipalities relied on state or federal actions to redress corporate wrongdoing, but now they actively initiate lawsuits for community-specific issues. This shift has empowered cities to directly address a wide range of harms.

The lawsuits referenced above have led not only to significant financial settlements, but also policy changes that directly benefit local communities. For instance, school districts on the front line of the vaping epidemic demanded marketing restrictions to stop JUUL from targeting youth; those demands were ultimately reflected in settlements[5] entered into by state AGs before separate resolution of the school district claims. In the opioid context, distributors must now increase and improve their drug diversion monitoring practices and will henceforth operate under the oversight of an independent third-party.[6]

Such outcomes not only offer immediate redress, but also set precedents for addressing similar issues that will deter future harm. Wrongdoers, not taxpayers, should pay when corporate actions cause harm to the community. This underscores the critical role of municipal litigation in ensuring corporate accountability and community welfare.

Role of Outside Counsel in Empowering Municipalities

As municipalities face complex legal challenges, outside counsel becomes invaluable, providing specialized knowledge and expertise that municipal legal teams might not possess, especially in niche or technically intricate domains. Beyond their legal acumen, outside counsel offers strategic guidance, drawing from their experience in similar cases and their awareness of broader legal trends. This collaboration equips municipalities with the necessary tools to navigate these challenges effectively, ensuring they are well-prepared to protect and advocate for their communities' interests. Most municipalities also do not have the annual budget necessary to devote staff time to litigate these years-long, complex, and expensive legal battles. Hiring outside counsel on a contingency fee basis keeps valuable law department personnel focused on their important responsibilities to the community.

Contingency fee arrangements are both ethically and practically beneficial for municipalities in these cases. Under contingency arrangements, municipalities pay legal fees only if the litigation is successful, aligning the interests of the municipality with those of the outside counsel. This model reduces financial risks for municipalities, enabling them to pursue important legal battles that would otherwise be financially prohibitive. For example, it would be impossible for any individual municipality to take legal action against opioid manufacturers, distributors, and other parties responsible for the harms caused by the opioid crisis, due to the overwhelming expenses and high risk of failure. Such cases rely on the support of outside counsel willing to work on contingency and front the costs of litigation.

The effort put into the opioid multidistrict litigation (MDL) is a vivid example of how outside counsel make certain cases possible. Over 400 lawyers and staff members devoted an astounding 2 million hours to this complex case. Their meticulous efforts encompassed the review of over 50 million documents to find the damning evidence implicating manufacturers and distributors in the epidemic. Furthermore, these legal professionals conducted over 800 depositions, cumulatively lasting more than 5000 hours, generating a vast amount of detailed testimony spread across an untold number of pages. Remarkably, these attorneys and their teams invested nearly $150 million of their own funds into this legal battle, including a staggering $65 million spent on experts alone, highlighting the depth of their commitment to building a robust case.

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This financial undertaking was made without any guarantee of compensation, illustrating the significant risk they shouldered in pursuing justice on behalf of the affected municipalities. It underscores the critical role of outside counsel in supporting municipalities through intricate legal challenges, particularly when the stakes are high and the odds daunting.

Breaking Down the Corporate "Mitigating Municipal Litigation" Document

ILR published a roadmap to its proposed immunity legislation in "Mitigating Municipal Litigation,"[7] referenced above, which outlines a campaign aimed at reducing the power of municipalities to hold corporations accountable. Authored by experienced state legal figures now working as corporate defense counsel, the paper systematically proposes reforms targeting every aspect of the legal process to shield corporate defendants.

1. **Restricting Outside Counsel:** Proposes requiring AG approval and statutory fee caps for contingency fee contracts, all aiming to restrict municipalities' access to competent outside counsel. Based on precedent, these proposals are likely to come first.
2. **Limiting Municipal Plaintiffs:**
   - Revoking Litigation Rights: Proposes eliminating municipalities' ability to file certain lawsuits, drawing from past examples like legislation targeting firearms litigation. This includes barring local governments from suing certain industry groups and removing punitive damages for public entities.
   - Removing Parens Patriae Standing: Suggests revoking this right where it exists, diminishing municipalities' capacity to represent residents.
   - Requiring AG Approval for Lawsuits: A proposal, like Ohio Attorney General Yost's in 2020, would expand "state concern" principles, centralizing litigation under state AGs, limiting local government affirmative litigation and potentially diverting settlement recoveries away from municipalities.
   - Reinforcing Municipal Cost Recovery Rule: Aims to prevent municipalities from recouping tort-based expenses on the grounds that those costs are pre-existing municipal responsibilities, discouraging lawsuits and shifting corporate-created financial burdens to taxpayers.
3. **Granting Corporate Immunity or Preempting Municipal Claims:** Encourages states to immunize specific industries from municipal lawsuits. Points to examples in the agriculture and food industries. Promotes collusive settlements with the AG that override municipal claims.
4. **Revising Tort Law to Insulate Corporate Defendants**: Advocates for redefining public nuisance claims, shortening claim periods, and implementing stricter legal standards to obstruct municipal litigation against various industries.
5. **Stripping Courts of Jurisdiction:** Proposes limiting state courts' authority in hearing certain claims and their power to order specific types of relief, further reflecting corporate interests.

These reforms are the end goal of a comprehensive strategy to weaken municipal litigation capabilities, prioritizing corporate defendants over public safety and accountability. To counter these proposals, local governments need to dig into the justifications offered by corporate defendants for their implementation.

Building the Municipal Bulwark

Municipalities themselves are the most effective advocates for the primacy of municipal litigation. Sharing constituents with state legislators, municipal officials have a deep understanding of local concerns. They can engage with state legislators within their communities, showcasing new infrastructure, introducing new social workers or police officers, and demonstrating firsthand the benefits of settlements or judgments. This local, personal connection is pivotal in countering the extreme rhetoric they are likely to encounter in the state legislature.

The companies responsible for causing harm to municipalities and their citizens fail to acknowledge their accountability. To maintain political tact, they justify their reform proposals by claiming to address various issues: streamlining settlements, protecting state power from usurpation, protecting consumers' piece of the pie, and protecting municipalities themselves from trial lawyers. These justifications are weak, and educating lawmakers on their shortcomings is essential.

Navigating Settlement Complexities to Provide Municipal Remedies

A primary justification raised by corporate defendants for shielding themselves from accountability is the complexity of widespread municipal litigation. This litigation, they argue, hinders the achievement of "finality and predictability" that encourages corporate settlements. Instead of negotiating with 51 state AGs and federal entities like the Department of Justice or Federal Trade Commission, corporations face settlements with thousands of municipal defendants, each presenting distinct demands.

When companies cause widespread harm, they face widespread litigation. Providing a sufficient remedy to satisfy all claimants is always a sticking point that corporate defendants lament, but the MDL process and other procedural devices provide a mechanism to address this issue. In addition, negotiating with 30,000 local governments, though significant, may

be less complex than resolution of other claims corporations face, such as the nearly 285,800 claimants that 3M negotiated with in the combat earplugs litigation.

Corporate proposals to address the complexity in settling cases are often self-serving and contradictory. While they decry the lack of coordination among municipalities, their proposals aim to prevent municipalities from coordinating through outside counsel who could effectively organize claims. Instead of working to harmonize state laws for consistent, robust damages across jurisdictions, they advocate for eliminating municipal plaintiffs and muddling state tort law to complicate legal proceedings.

More tellingly, the ILR is simultaneously leading the attack on the federal MDL process used to coordinate the opioid litigation.[8] Their primary grievance is the supposed over-inclusion of opioid claims in the MDL proceedings, suggesting that an excessive number of claims are being coordinated.

This contradiction raises a critical question: Is their issue with municipal litigation its perceived decentralization, or its potential for effective coordination?

The inherent contradictions in such critiques are manifest. The harm caused to municipalities by corporate defendants will only be remedied if the municipality is represented in litigation. These contradictory arguments citing a lack of coordination in municipal litigation and over-coordination in private plaintiff MDLs, are rooted in an indefensible policy stance: an aversion to being held accountable for the harm they cause.

Resisting State Overreach in Municipal Legal Affairs

It is anticipated that one type of legislation addressing municipal litigation prerogatives will focus on the "usurpation of state power." The argument is that municipal litigation encroaches upon the state legislature's power to "regulate product sales and marketing practices," and subverts the AG's power to sue private companies for wrongs done to the public.

While state legislators and AGs may agree with this talking point, the argument is little more than a transparent effort to shield dangerous corporations. Nothing about municipal litigation undermines a state legislature's power to regulate dangerous products. For instance, state legislatures have implemented drug monitoring programs, regulated PFAS in water systems, and mandated energy transitions to combat climate change. AGs have similarly been involved in addressing public nuisance claims. Municipal litigation does not restrict the actions of these state actors; it can act as a complementary tool to remedy these problems.

It can also be the last line of defense when state legislators and regulators are slow to act. For example, polluters have poured hundreds of millions of dollars[9] over the past decade into limiting PFAS liability,[10] often successfully. Legislation in North Carolina that would hold polluters accountable has been consistently defeated, transferring the cost of clean drinking water to ratepayers. Municipal litigation offers an avenue for addressing corporate harms when the legislature or the AG will not.

The Chamber is at the heart of these efforts to avoid accountability. In 2022, it led a coalition[11] to oppose using the EPA's Superfund program to expedite PFAS cleanup. The Chamber often supports usurping state power for their corporate members, as seen in their support for Altria in 2021[12] and in an amicus brief for McKinsey[13] in the opioids MDL.

Ultimately, the Chamber's corporate members have no interest in promoting the AGs' capacity either. In 2019, the Oklahoma AG collaborated with external counsel to sue opioid industry defendants and recover over $900 million for the state—one of the highest per-capita recoveries nationwide. This was despite a bench trial against J&J that resulted in a loss after the Supreme Court overturned the verdict. Nevertheless, the state enacted a law curtailing the AG's power to hire outside counsel in the future. It is noteworthy that the legislature did not enact a law expanding public nuisance claims to cover the conduct that caused the state's opioid epidemic. Instead, they voted to curtail future litigation that depends upon the expertise of outside counsel.

Expanding Compensation to Remedy Harms

The Chamber argues that municipal litigation diverts money from other plaintiffs, as though settlements are a pie and municipalities are taking more than their fair share, leaving just a slice for everyone else. To the contrary, the reality is that the inclusion of municipalities in litigation forces corporations to bake a bigger pie that will serve everyone at the table.

This argument is specious in the wake of the opioid litigation. Despite years of Department of Justice and state AGs' efforts, the opioid defendants ultimately agreed to a $55 billion settlement specifically to avoid municipal litigation. Municipalities, in the opioid litigation and in the other claims discussed in this article, are in the best position to articulate the concrete harms that the defendants have caused. If they are not involved in litigation to hold these companies accountable, then these companies pass off the cost of the harms they cause onto local taxpayers and ratepayers.

More importantly, restitution paid to municipalities goes toward remedying the harms. The Tobacco MSA is instructive here. While the settlement was an important tool for accountability, it was not without its flaws. The AGs' settlement

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PRACTICE TIPS

By: RANDY FIFE,
City Attorney (ret.),
Idaho Falls, Idaho

Success as a Local Government Lawyer

Play it straight down the middle. If you start to answer legal questions politically or emotionally, your employment will be short (because you are not providing good legal services). You'll inevitably end up on the "wrong" side of a vote/elected official, even if you were on the "right" side of a prior vote.

Stay in your lane. You are not an elected official and it's not "your" city. When a city attorney forgets their place and begins to direct or persuade based upon personal preference, they drift into the political and their advice is not legal advice, it's the exercise of political or personal will. Remember, you don't work for any particular elected official; you work for the entity as a whole. The entity is your client.

Try not to take it personally. Many otherwise good people who are under stress do not present their better selves. Many are new to discussing things that they're passionate about and don't know how to listen or persuade effectively. Some are mad, scared, frustrated, confused, and/or uniformed. Be kind, explain without condescension, and extend charity and patience. That is not just the right thing to do, it saves all sorts of time and trouble in the long run. Why create an enemy who will complain to your bosses? If the elected officials don't take your advice, help minimize the risks and move on. Don't stew or say, "I told you so."

Be fair and honest, "own" your advice, and admit your mistakes. This is key to maintaining your integrity and the confidence of elected officials, staff, the press, and the public. Once any of these groups decide that they cannot be confident in your advice, the city should/will hire someone they can trust.

Attend any training meeting that the elected officials attend, if possible. This will reduce the cherry picking of information that an elected official might want to believe or thinks they heard.

Take time to train new officials and volunteers on committees, commissions, and boards. This will give you a chance to explain ethics, open meetings, public records, and procedures that create significant management and legal problems when disregarded.

This is a job, not your life. If you need to change directions, get counseling, start a hobby, exercise, drink less, take more time off, quit, delegate, change your hours, etc. Do it.

Help the decision-making body remember the people who are not in the room. You are in the unique position of helping the entity "get it right," regardless of the immediate pressures of the moment or who is advocating. Reminding decision-makers of the law, fairness, and the process due is a very important part of the job, even when that is unpopular; looks like you are directing an outcome; or subjects you to criticism. Getting it right is more important than style points or being popular.

Embrace the challenge. Anything that can happen in a city can happen where you serve. The variety, complexity, and personal nature of municipal law is almost unlimited. You get involved in matters that matter. No other law job is as broad - from the First Amendment to neighbor disputes to cats, dogs, and chickens. (BONUS. No one can come close to the stories you can tell at a party!}

Keep your Bar card. You can always get another job. ML



Randy Fife recently retired after serving 10 years as City Attorney in Idaho Falls, Idaho.. He was an Assistant City Attorney in Dallas, Texas in the 80s and City Attorney in Moscow, Idaho from 1996 to 2013. Randy's private practice experience included immigration law and workers compensation and insurance defense litigation. He completed undergraduate studies at Utah State University and earned his law degree at Southern Methodist University Dedman School of Law, graduating in 1983.

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AMICUS

By: AMANDA KARRAS,
IMLA Executive Director and General Counsel

Retaliatory Arrests are Back at the Supreme Court

When the Supreme Court decided *Nieves v. Bartlett* more than four years ago, it was the third time the Court had attempted to resolve the vexing question of whether probable cause defeats a First Amendment retaliatory arrest claim as a matter of law. The Court first grappled with the question in *Reichle v. Howards,* but punted after granting the Secret Service officer qualified immunity, concluding if a right existed, it was not clearly established.[1] Next up, the Court contended with the issue in *Lozman v. City of Riviera Beach,* a case involving a quintessential gadfly who was arrested at the city council meeting.[2] But again, the Court concluded the question "must await a different case" because the facts were "far afield from the typical retaliatory arrest claim."[3] In this case, Lozman had brought the claim against the City itself, rather than the officer, alleging an "'official municipal policy' of intimidation."[4] The Court concluded that if a plaintiff can prove, with objective evidence, "the existence and enforcement of an official policy motivated by retaliation," then the claim may move forward under *Monell* even if the officer had probable cause to arrest.[5]

The *Nieves* Exception

Finally, a year after the Court decided *Lozman,* the Court granted certiorari in a case involving a more "typical" arrest situation in *Nieves v. Bartlett. Nieves* centered on events that transpired during the "Arctic Man" festival, which occurs in a remote portion of Alaska, home to a small community.[6] But "once a year, upwards of 10,000 people descend on the area for Arctic Man, an event known for both extreme sports and extreme alcohol consumption."[7] Between the remote location, alcohol consumption, reckless behavior, snowmobiling, fighting, and extreme temperatures, what could go wrong?

As a refresher, in 2014, Troopers Nieves and Weight were working the festival and they encountered Bartlett at a large outdoor party where it appeared minors were drinking alcohol.[8] When they first approached Bartlett, he refused to speak to Trooper Nieves.[9] Meanwhile, Trooper Weight spotted a minor drinking alcohol and began to speak with him. Bartlett, who was intoxicated and weighs 240 lbs., then rushed over to Trooper Weight and the minor and stepped between them, getting very close to Trooper Weight.[10] Trooper Weight pushed Bartlett to create space for himself and Trooper Nieves arrested Bartlett for disorderly conduct and resisting arrest.[11] Bartlett alleges that after the arrest, Trooper Nieves said: "bet you wish you would have talked to me now."[12] After the prosecutor dismissed charges, Bartlett sued under §1983 claiming, among other things, that the arrest violated the First Amendment.

The Supreme Court held that *generally* speaking, a plaintiff must plead and prove the absence of probable cause to move forward with a retaliatory arrest claim under the First Amendment.[13] The Court explained that retaliatory arrest claims suffer the same challenges as retaliatory prosecution claims, like the ones at issue in *Hartman v. Moore,* because both can present "a tenuous causal connection between the defendant's alleged animus and the plaintiff's injury."[14] Further, the Court noted that speech can inform an officer's (often split second) decision to arrest by "convey[ing] vital information – for example, if [the arrestee] is ready to cooperate or rather presents a continuing threat," making the causal connection in these cases complex.[15] (internal quotations omitted).

That would have been the end of the issue, but the Court explained that the rule it announced contains a "narrow qualification" for the situation where an officer has probable cause to arrest but where officers "typically exercise their discretion not to do so."[16] The Court provides an example of someone who is complaining about the police and then jaywalks.[17] Because so few people are actually arrested for jaywalking, if a plaintiff can present "objective evidence that he was arrested when otherwise

similarly situated individuals not engaged in the same sort of protected speech had not been," then the plaintiff can proceed with the retaliation claim, even if the officer had probable cause to arrest.[18] The Court stressed that the inquiry is objective in such a case and statements and motivations of the officer are irrelevant at this initial inquiry stage.[19]

The decision sparked several concurring and dissenting opinions, and two of the nine Justices came to different conclusions over the majority's meaning of the exception. Justice Sotomayor's dissent read the majority's exception as not requiring direct evidence of improper retaliation and instead, accepting a plaintiff's showing of more generalized comparator evidence, whereas Justice Gorsuch in his concurrence noted that admissions and other types of evidence might be enough to proceed (though the majority eschewed a test inquiring into the subjective motivations of the officer).[20] Justice Sotomayor, while objecting to the narrow type of evidence required to fall within the majority's exception, also highlighted the lack of clarity in the exception, noting that "[w]hat exactly the Court means by 'objective evidence,' 'otherwise similarly situated,' and 'the same sort of protected speech' is far from clear."[21]

Gonzalez v. Trevino

Given Justice Sotomayor's dissent noting the lack of clarity in *Nieves*, it is unsurprising that the lower courts split over what the majority meant regarding the type of evidence necessary to satisfy the *Neives* exception. The Fifth Circuit requires specific examples of non-arrests as comparators while the Seventh and Ninth Circuits require "objective proof of retaliatory treatment" to satisfy the exception.[22] The Supreme Court granted certiorari in *Gonzalez v. Trevino* to provide clarity and answer two questions: (1) Whether the probable-cause exception in *Nieves* can be satisfied by objective evidence other than specific examples of arrests that never happened; and (2) whether *Nieves* is limited to individual claims against arresting officers for split-second arrests.

In this case, Sylvia Gonzalez was elected to a seat on the city council for Castle Hills, Texas, a town with fewer than 5,000 residents. As her first act in office, she called for the removal of the city manager by organizing a nonbinding petition. During Gonzalez's first city council meeting, a resident submitted the petition to remove the city manager. The petition was then presented to the Mayor, who put the petition with his papers. During the meeting, a citizen accused Gonzalez of misleading her regarding the nature of the petition and indicated that Gonzalez asked her to sign the petition under false pretenses.[23] The meeting grew contentious, and was adjourned to continue the following day.

The next day, the Mayor placed the petitions on top of his paperwork, attaching them with a large black binder clip.[24] During the meeting, the Mayor noticed that the petitions were gone and he noticed a similar stack of papers clipped together with a black binder with Gonzalez's things, but he initially assumed the city secretary had collected the petitions.[25] However, after the meeting, the secretary asked for the petitions, which made the Mayor realize they were now missing.[26] At this point, he asked the police officer presiding over the meeting to find out if Gonzalez had taken the petitions.[27] Gonzalez denied having the petitions and opened her binder and started flipping through the papers to show the officer.[28] She continued to state she did not have the petitions and stopped before reaching the stack of papers with the black binder clip. The Mayor and the officer pointed to the stack of papers with the black binder at which point, she pulled them out and gave them back.[29] Gonzalez contends that she did not intentionally place the petition in her binder.

The police officer investigating the allegation ultimately determined that Gonzalez violated Texas Penal Code §§37.10(a)(3) and (c)(1), which provide that "[a] person commits an offense if he ... intentionally destroys, conceals, removes, or otherwise impairs the verity, legibility, or availability of a governmental record." The investigation took over a month because the officer interviewed witnesses, including the citizen who accused Gonzalez of obtaining her signature for the petition under false pretenses, which he believed provided a motive for her taking the petitions.[30] He also reviewed the videos from the city council meeting which showed Gonzalez reaching to take the petitions from the Mayor's belongings while he was occupied speaking with another person .[33] The officer secured a warrant for Gonzalez's arrest, and she spent the day in jail.[32]

Gonzalez sued under Section 1983, claiming that she was arrested in retaliation for her protected speech. She claims that this particular criminal statute has not been used in the county to criminally charge someone trying to steal a nonbinding or expressive document in the last decade. While there were 215 grand jury indictments under the statute, she claims none remotely resembled the facts of this case.

The Fifth Circuit held that Gonzalez' claim does not fall within the *Nieves* exception because she did not present "objective evidence

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ETHICS

By: TAMARA L. NILES,
City Attorney, Englewood, Colorado

A Municipal Attorney's Ethical Limitations and Best Practices in Responding to Public Criticism

When conditions of local government take an unexpected turn, the municipal attorney can be front and center of a public controversy. Whether earned or not, the local government attorney—who is often forward facing, a regular presenter at open meetings, and quite possibly one of a public employer's highest-paid employees—can be publicly maligned for policy, decision-making, and rejected (confidential) legal advice. Anecdotally, vitriolic public comment regarding the municipal attorney has become increasingly more common; or at a minimum, more widely-distributed online and in social media.

The American Bar Association acknowledged that:

> [l]awyers regularly are the target of online (and offline) criticism. Clients, opposing parties, and others are increasingly taking to the internet to express their opinions of lawyers they have encountered. Lawyers are left in the quandary of determining whether and how they ethically may respond when the opinions posted are unflattering, and the facts presented are inaccurate or even completely untrue."[1]

Unlike other public employees, however, the attorney is generally prohibited under applicable ethics rules from correcting false statements made in these public allegations.

While "[i]n most instances the best advice is to ignore the criticism,"[2] after careful analysis a municipal attorney may determine that it is in the public's best interest--or their own-- to squarely address it and/or formulate a formal response. This article provides ethics considerations for public criticism responses,[3] recommendations from multiple ethics opinions analyzing this issue, verbatim potential public responses, and practical options for local government attorneys.

A. Attorneys Must Carefully Consider (and Reconsider) Whether to Publicly Respond to Criticism

Political controversy can result in inflammatory (if not defamatory) public, online and social media criticism regarding the municipal attorney. Whether it is proposing a dog regulation (which seems to elicit an especially emotional citizen reaction), case law-required procedural changes that do not align with certain religious beliefs, or discussing legal implications of conversion to a single organized trash hauler, a city attorney's public presentation or response to a council member inquiry can suddenly make the attorney a target of repeated public vocal and written criticism. As any long-term municipal attorney who has sat through many a public comment period can attest,

> [u]nflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website are an inevitable incident of the practice of a public profession…[4]

A careful attorney may choose to take no responsive action to public comment or written/online criticism. As the American Bar Association concluded, "[a]s a best practice, lawyers should consider not responding to a negative post or review…"[5] Similarly, the Michigan Bar Association

> urges lawyers proceed with caution noting that any well intentioned and otherwise permissible response to negative criticism can quickly devolve into an online repartee that could implicate MRPC 1.6. In addition, it should be noted that responding to the criticism itself may draw even more unwanted attention to the original accusations.[6]

While a full-time, in-house city attorney may be unconcerned with Yelp reviews or false social media claims, part-time city attorneys may maintain simultaneous private practices in which potential clients consider public reviews and/or criticism. In this case, despite these concerns, a response to criticism may have a required business purpose.

> Because online reviews are so important to a lawyer's practice, online reputation management is crucial. Therefore, it

may be in the lawyer's best interest to respond to a negative review.[7]

B. Code of Professional Responsibility Limits Content of Attorney Public Responses

Even if public criticism misstates public events or cites legal documents not protected by attorney-client privilege, Model Rule of Professional Conduct 1.6(a) generally prohibits revealing any information—even information within the public domain—regarding client representation unless (a) the client gives consent, or (b) disclosure is impliedly authorized.[8] Information also may be disclosed if it meets one of the exceptions under Rule 1.6(b), such as to secure legal advice regarding ethics rule compliance when faced with the deterioration of a client relationship[9] or to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client…"[10]

While a handful of state ethics opinions have held that false online claims by clients or former clients may allow limited confidential disclosures,[11] the vast majority of jurisdictions conclude that the disclosure of confidential information in response to *any* online review is prohibited in the absence of express client authority:[12]

> A negative online review, alone, does not meet the requirements for permissible disclosure in self-defense under Model Rule 1.6(b)(5) and, even if it did, an online response… relating to a client's representation… would exceed any disclosure permitted under the Rule."[13]

Moreover, "[v]irtually any response to online criticism is going to implicate either client confidences or secrets that are protected… [14]

The most common fact scenario for an in-house municipal attorney, however, occurs when someone that has never been a client—such as a citizen—posts a negative review or lodges public criticism. In that case, attorneys choosing to respond may do so by truthfully stating the person is not a client or former client, given that the ethical duties of confidentiality don't apply in the absence of an attorney-client relationship.[15] The Michigan Bar Association even provides a proposed response when "[r]andom persons who were not part of the case post reviews of the attorney or firm" as follows:

> [Law firm name] provides our clients with effective, zealous representation [considering inserting mission here] and our duty to our clients is our utmost priority. As you were not involved directly in any matters handled by this firm, please contact our office directly so that we may discuss your concerns.[16]

C. ABA/Ethics Opinions Provide Potential Responsive Actions to Public Criticism

In lieu of providing a substantive response to public criticism, several authorities suggest that attorneys consider:

- Seeking removal of the information from an online platform;[17]
- Ignoring it;
- Issuing an invitation to contact the lawyer privately to resolve the matter; or
- Responding directly to the person who posted the criticism.[18]

In addition, the ABA and many a state bar association have issued sample verbatim, Rule-compliant public statements to respond to criticism, such as:

> "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."[19]
>
> "As an attorney, I am constrained by the Rules Regulating The [insert state] Bar from responding in detail, but I will simply state that it is my belief that the [comments/post] present neither a fair nor accurate picture of what occurred and I believe that the [comments/post] [is/are] false."[20]
>
> "My professional and ethical responsibilities do not allow me to reveal confidential client information in response to public criticism."[21]
>
> "[Law firm name] provides our clients with effective, zealous representation. Our duty to our clients is our utmost priority. If you have concerns regarding your case, please contact the attorney who represented you."[22]

Even if utilizing one of the above responses, it should be reiterated that "[p]osting any response to negative online criticism is risky."[23] Despite this, the Oregon Bar Association suggests an additional response "by directing the reader to positive reviews by other clients… and the attorney may also make generic, truthful statements about the lawyer's practice."[24]

D. Additional Options to Consider for False or Unfounded Public Criticism

While the above-cited authorities analyze fact-scenarios applicable to the general legal practitioner most commonly facing criticism by clients or former clients, municipal attorneys most commonly face criticism by non-clients, such as members of the public or other concerned citizen groups. While not cited in ethics opinions, municipal attorneys have additional available tools to respond to and/or correct public criticism and false information regarding

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Tamara Niles has been a City Attorney for over 16 years, in both Kansas and Colorado. She served as the President of the City Attorneys Association of Kansas and on the University of Kansas School of Law Board of Governors; has presented continuing legal education on open meetings, open records, and ethics; and previously taught business law as an adjunct professor. Niles was named a 2023 IMLA Fellow, and received the 2023 Outstanding City Attorney award by the Denver Metro City Attorneys Association. She has been the City Attorney in Englewood, Colorado since June 2021.

their public client and representation.

1. Utilize PIO/Communications for Formal Client Response.
While a local government attorney cannot disclose information considered confidential under Rule 1.6, the same information may not be subject to the same limitations when known and disseminated by other employees—in fact, it may be the very role of other employees to disseminate client information that an attorney otherwise cannot. Therefore, while a municipal attorney must be mindful to protect attorney-client privileged or confidential information, they may consider referring the matter to the client's Public Information Officer or communications department, to determine whether an official city response is appropriate to correct the spread of misinformation or unfounded personal attacks against an employee.

2. Communicate Directly with Client Constituents to Correct False Statements.
If an unfounded claim appears to gain steam or is especially inflammatory, a municipal attorney can (and arguably should) provide a private explanation or response to client constituents, such as the elected governing body. While recommended best practices on communication with client constituents to build and maintain trust exceeds the scope of this article, municipal attorneys could consider regularly-scheduled one-on-ones with elected officials to brief them on issues concerning the city attorney's office (and, among other things, lay the groundwork for upcoming legislation). This provides a natural venue for addressing unfounded criticism, correcting misstatements, and requesting guidance. Further, if municipal attorneys deem it necessary, they may be able to request an executive session under applicable open meetings laws for an attorney-client privileged discussion with the entire body.

3. Request Authorization to Release Draft Statement in Response.
Attorneys are not prohibited from releasing confidential information regarding their representation—instead, they must first obtain client consent. "The lawyer is free to seek informed consent of the client … to respond, particularly where responding might be in the client or former client's best interests."[25] Municipal attorneys should consider drafting a response that is "professional,"[26] "proportionate and restrained,"[27] notifying their client constituents of applicable ethical duties of confidentiality, and requesting authority for the release of the proposed responsive statement containing said confidential information. The municipal attorney should only publicly disseminate the proposed response upon authorization by the client.

4. Consider Legal Action in Response to Defamation.
In severe or pervasive cases of false public allegations, municipal attorneys could consider legal remedies for defamation.[28] Such a proposal should be very carefully evaluated and navigated, likely with client constituent knowledge (if not consent), given the complex intersection of the First Amendment, heightened burden of proof for public figures, and potential negative political backlash against the public employer and elected body.

Conclusion

As seasoned attorneys can attest, public criticism of the local government lawyer attorney is not unusual. But how a municipal attorney responds (or not responds) is the critical component to ensuring compliance with client confidentiality ethical requirements and maintaining one's reputation intact. Therefore, municipal attorneys should carefully ensure rules of professional conduct and best practices are steadfastly followed with integrity and restraint. ML

Notes

1. ABA Comm. on Ethics & Prof'l Resp., Formal Op. 496 at 1 (2021).
2. Ky. Bar Ass'n Formal Ethics Op. E-448 at 1 (2019).
3. Professional conduct rules, and opinions interpreting those rules, may vary state-by-state and country-by-country. Therefore, this article provides general guidance, but is not legal advice. Anyone faced with a similar situation should complete their own analysis and contact their own attorney as allowed by Model Rules of Prof'l Conduct R. 1.6(b)(5) to determine compliance with applicable professional conduct requirements. This article applies American Bar Association model rules and U.S. state bar ethics opinions. International practitioners should consult their applicable ethics rules and guidance.
4. NY State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 at 4 (2014).
5. ABA Op., *supra* note 1, at 1.
6. Mich. Bar Ass'n Formal Op. R-26 at 2 (2022).
7. N.C. Bar Ass'n Formal Op. 2020-1 (2021).
8. ABA Model Rules of Prof'l Conduct R. 1.6(a) (2023)
9. *Id.* at R. 1.6(b)(4). But attorneys should use caution when disclosing such information in an attorney list serv. *See* Ill. Bar Ass'n Prof'l. Conduct Advisory Op. 12-15 at p. 1(2012) ("Use of a lawyer listserv … can be a useful and effective means to educate lawyers and can provide a resource when lawyers engage in research and decision-making. However, when lawyers consult with other lawyers who are not associated with them in the mater, both the consulting lawyer and the consulted lawyer must take care to protect client confidentiality and the attorney-client privilege ...").
10. *Id.* at R. 1.6(b)(5).
11. *See* Colo. Bar Ass'n Ethics Comm., Formal Op. 136 (2019); D.C. Bar Ass'n, Formal Op. 370 (2016); Ariz. Bar Ass'n, Formal Op. 93-02 (1993). *But see* People v. Underhill, 2015 WL

4944102 (Colo. O.P.D.J. Aug. 12, 2015) (18-month suspension for online response including confidential/sensitive client information); People v. Isaac, 470 P.3d 837 (Colo. O.P.D.J. 2016)(six-month suspension for response revealing confidential information).
12. *See, e.g.,* Mo. Bar Informal Op. 2018-08 (2018)("If Attorney chooses to post a response to an online review, the response may acknowledge an attorney's obligation to comply with professional obligations and must reveal no information related to the representation in violation of Rule 4-1.6."); Pa. Bar Ass'n Legal Ethics & Prof'l Responsibility Comm. Op. 2014-200 (2014); N.Y. State Bar Ass'n Comm. on Prof'l Ethics Op. 1032 (2014); N.J. Advisory Comm. on Prof'l Ethics Op. 738 (2020); Nassau County Ethics Op. 2016-01 (2106); Penn. Ethics Op. 2014- 200; W.V. Legal Ethics Op. 2015-02. *See* also In re: Conry, OSB 18-104 (Or. Sup Ct. 2022) (reprimanding responding attorney).
13. ABA Op., *supra* note 1, at 1.
14. Mich. Op., *supra* note 6, at 1.
15. Fla. Bar Ass'n Formal Op. 21-1 at 2 (2021); *see also* N.C. Op., *supra* note 7. *But see* Model Rules, *supra* note 3 at 1.18 for prospective clients, which could apply depending upon the circumstances.
16. Mich. Op., *supra* note 6, at 2.
17. *See* Ore. Bar Ass'n Formal Op. 2022-201 at 8 (2022)("Some sites that allow professional service reviews may remove reviews upon receipt of a report that the reviewer was not an actual client or customer.").
18. ABA Op., *supra* note 1, at 7.
19. Pa. Bar Ass'n, Formal Op. 2014-200 at p. 1 (2014).
20. Fla. Op., *supra* note 15, at 2.
21. Ky. Op., supra, at 1.
22. Mich. Op., *supra* note 6, at 2.
23. Ore. Op., *supra* note 17, at 5.
24. Id. at 8.
25. Fla. Op., *supra* note 15, at 2, quoting ABA Op., *supra* note 1.
26. N.C. Op., *supra* note 7 (lawyer may post response that is "professional and restrained").
27. Los Angeles County Ethics Op. 525 at 1 (2012)(in discussing a former client's disparaging comments, a public response cannot disclose confidential information, cannot injure former client's legal position, and is "proportionate and restrained").
28. Ore. Op., *supra* note 17, at 8 ("Oregon RPC 1.6 is not, without more, a bar to the attorney's ability to seek legal redress, such as a claim for defamation."); N.C. Op., *supra* note 7 ("If there is a basis in law and fact for a defamation suit … the Rules of Professional Conduct do not prohibit Lawyer from filing such a suit.").

Employment *cont'd from page 9*

job positions based on race.
By now, most employers have reviewed their anti-discrimination policies as well as DEI programs and avoid relying on race as a factor for employment decisions, especially in hiring job applicants. Governmental decision-makers will need the advice of counsel well-versed in Title VII and state anti-discrimination laws and regulations, with expertise to assist with DEI initiatives while avoiding discriminatory practices for all applicants, and the ability to recommend more compliant policies.

Take Notice Public Employers: Changes in Collective Bargaining and Severance Agreements

While the National Labor Review Act (NLRA) does not apply to federal, state or local governments, states are moving towards the creation of expansive, pro-labor rights for public sector employees. The composition of the NLRB saw no changes in 2023, but it issued three notable decisions with far-reaching consequences. Two NLRB decisions addressed employers' duty to bargain during contract negotiations, *Wendt* and *Tecnocap*.[47] Another, *Mclaren Macomb*,[48] limited employers' ability to create severance agreements with terms that conflict with the NLRA. All three decisions and their implications are examined below.

In *Wendt*, an employer had dismissed several employees after their union had been certified but while negotiations for a collective bargaining agreement were still ongoing. In its arguments, the employer, citing *Raytheon*,[49] argued that these dismissals were justified as consistent with its past practice of conducting layoffs during downturns to its business. The NLRB disagreed, overruling *Raytheon* and deciding that unilateral conduct during a bargaining period was permissible only when the employer has demonstrated a regular and consistent past practice that was not subject to a large measure of discretion. The NLRB found that the dismissals at issue were discretionary and thus unjustified. The NLRB also clarified that an employer may not "defend a unilateral change in terms and condition of employment that would otherwise violate Section 8(a)(5) by citing a past practice of such changes before its employees were represented by a union and thus before the employer had a statutory duty to bargain with the union." [50]

In *Technocap*, the NLRB considered a similar issue to that decided in *Wendt*. The *Technocap* employer unilaterally altered employee schedules while the employees were negotiating a collective bargaining agreement. The employer and the union had previously had a collective bargaining agreement that allowed the employer to unilaterally alter employee schedules. However, the NLRB found that, since the clause that had enabled the employer to modify employee schedules had expired, it could not be used to as a basis for discretionary and irregular unilateral conduct like the alteration of employee schedules. Nor could an employer use the now expired clause to demonstrate adherence to past practice. Between *Wendt* and *Technocap*,

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INSIDE CANADA

By: MONICA CIRIELLO,
Director of Municipal Law and Licensing Compliance, City of Hamilton, Ontario

Ungracious Candidates, Contentious Rideshares, Hydrovac Squabbles, and More

Unsuccessful Candidate Challenges Validity of Mayoral Election
Clarke v. Toronto (City), 2023 ONSC 6495 https://canlii.ca/t/k16j8
The Applicant, an unsuccessful candidate for the 2023 mayoral election in the City of Toronto (City), filed an application challenging the election results pursuant to s. 83 of the *Municipal Elections Act, 1996*, S.O. 1996, c. 32, Sched ("*Act*"). The City argued that the application should be dismissed as frivolous or vexatious pursuant to Rule 2.1.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

HELD: Application dismissed.

DISCUSSION: The Applicant argued that debate organizers relied on flawed subjective election pollsters to determine which candidates for mayor to include in debates, that ultimately allowed those candidates to attract more media attention. The Applicant further argued that the six candidates that were included in the debates unfairly received more media coverage than the other 96 candidates. It was the Applicant's position that the election was rigged and Ms. Olivia Chow, the successful mayoral candidate, did not win the election fairly through democratic means. The City relied on Rule 2.1.01, which permits the Court to nip the proceeding in the bud (*Gao v. Ontario (Workplace Safety and Insurance Board*), 2014 ONSC 6100, if it appears to be frivolous or vexatious or otherwise an abuse of process of the Court. The City submitted that the Court should use its discretion to rigorously enforce such Rules to dismiss the proceeding as it lacks legal basis and will inevitably fail. The Court agreed with the City, finding that the application was frivolous and vexatious and would inevitably fail. The *Act* provides that the Court shall not determine an election to be invalid if the election was conducted in accordance with the principles of the *Act*, and the *Act* does not regulate the conduct of debate organizers, pollsters, or the media. Application dismissed pursuant to Rule 2.1.01.

Developing: Uber Challenges Cap on Rideshare Licenses Uber_CoT_NoA_12.04.23_CV-23-710729.pdf | Powered by Box

At an October 11, 2023, meeting of Toronto City Council, the Council introduced and passed a motion capping the number of rideshare licences amid a debate about the need to reduce gas emissions in the taxi and ride-sharing industry to meet the longer-term goal of transiting the industry to zero emission vehicles by 2030. City Council argued that the cap would reduce pollution and congestion in the core of the City.

Uber Canada (Uber) has filed a notice of application, alleging that the cap was enacted in bad faith and contrary to the City's own procedural bylaws. The application requests that the Court quash the City By-law that implements a cap on ride-share company driver licences for illegality under section 214(1) of the *City of Toronto Act, 2006*, S.O. 2006, c. 11, Sch. A ("*Act*"). Uber's position is that the City failed to provide public notice of the licence cap, contrary to the *Act*, that the City enacted the licence cap in bad faith absent staff recommendation or stakeholder consultation, and that the cap unlawfully discriminates in the administration of the City's licensing scheme. Uber submits that a cap in the number of licenses is a significant legislative step that radically changes the licensing scheme set out in the City's Licensing By-law, and to so implement such a change, the City was required to give public notice.

It is Uber's position that the cap on the number of licenses should be stayed pending the disposition of the application. At this time the application is still before the Court.

City's Obligations Justifying Denial of Advertisements
Association for Reformed Political Action Canada v. Hamilton (City of), 2023 ONSC 6443 https://canlii.ca/t/k18gt

The Applicant, a grassroots Christian political advocacy organization, submitted a proposed advertisement which stated "We're for woman's rights" with a photo of four women of various ages, including an ultrasound scan of a fetus captioned "Hers. Hers. Hers. And Hers." to the City of Hamilton (City) to be posted on City transit vehicles. The City rejected the ad. The City found that the words "And Hers" below the picture of the ultrasound "would need to be revised so as to not reflect personhood in relation to the [fetus] image" in order to be consistent with the Canadian Code of Advertising Standards, Clause 1 and the *Criminal Code*, R.S.C.1985, c. C-46. The Applicant filed an application for judicial review.

HELD: Application granted.

DISCUSSION: The Applicant argued that the City's decision to reject the ad violated section 2(b) of the Canadian Charter of Rights and Freedoms, which protects freedom of expression. Prior to the hearing, the City agreed with the Applicant's position that the City had not provided adequate reasons in its decision as required by the Supreme Court of Canada's decisions in *Dore v. Barreau du Quebec*, 2012 SCC 12 and *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12. Specifically, the City's decision was silent on the Applicant's right to freedom of expression balanced against the City's statutory obligations. It was the City's position that the Court should decline to consider what the City may have considered but did not communicate and remit the matter back for the City to undertake a fulsome analysis with detailed reasons as was done in *Guelph and Area Right to Life v. City of Guelph*, 2022 ONSC 43. The Applicant disagreed. The Applicant argued that the Court should hear the argument on the application and issue an order that the City accept the ad, ultimately seeking a determination from the Court that a fetus is a person, and therefore the ad should be posted on City transit vehicles. The Court disagreed with the Applicant and revisited the specifics of the application. The application raised concerns that the City failed to conduct a robust *Dore* and *Loyola* analysis, and in doing so infringed on the Applicant's rights. The Court agreed that the City failed to take these steps. The Court, consistent with the long-standing practice on judicial review, saw no unfairness in remitting the matter back to the City, the original decision-maker, rather than stepping in at this stage to provide reasons on the issue. Application for judicial review granted.

Hydrovac Waste Management Facility is Not General Industrial Use
Gellarne Holdings (2001) Ltd v Edmonton (City), 2023 ABCA 327
https://canlii.ca/t/k14rg
The City of Edmonton (City) approved a development permit to the Respondent for a property with a proposed use as a hydrovac waste management facility. The Appellant, a neighbouring property owner, appealed the development permit to the Land and Property Rights Tribunal (Tribunal). The Tribunal denied the Appellant's appeal, finding that the proposed use was a General Industrial Use and upheld the permit. The Appellant appealed.

HELD: Appeal granted.

DISCUSSION: The Respondent's position is that the proposed use of its property as a hydrovac waste management facility is a General Industrial Use, and the development permit was properly approved. The Appellant argued that the proposed use is a Major Impact Utility Service or a Minor Impact Utility Service and is not a General Industrial Use; therefore, the Tribunal erred in law by finding that the Respondent's proposed use of the land was a General Industrial Use and upheld the permit. General Industrial Uses, Major Impact Utility Services and Minor Impact Utility Services are all defined in the City Zoning By-law. If a development is a Major Impact Utility Service or a Minor Impact Utility Service, it is not a General Industrial Use. In other words, Major Impact Utility Services and Minor Impact Utility Services are exclusions from a General Industrial Use. Both parties conceded that there was a two-prong analysis to demonstrate a General Industrial Use and made arguments on both prongs to the Tribunal: first, does the use as presented fit within the uses or activities listed in section 430 of the City Zoning By-law and second, if yes, does it fall within one of the specific exclusions, including Major and Minor Impact Utility Services.

The Court found that despite both parties making arguments on both prongs, the Tribunal Decision did not include either an express conclusion or any reasoning on the second prong, which was ultimately the crux of the Appellant's appeal. The Court held that the Tribunal's decision lacked justification and reasonableness on the central issue of whether the Respondent's proposed use is excluded as a permitted use on the property by virtue of being a Major or Minor Impact Utility Service. The Appellant met the burden of demonstrating that the Tribunal Decision was unreasonable, the appeal was granted, and the matter was remitted to the Tribunal for reconsideration. ML



JOIN IMLA FOR OUR CAN'T-MISS COMPARATIVE LAW CONFERENCE AT LAKE COMO, ITALY—OCTOBER 16–20, 2024. IMLA WILL BE PARTNERING WITH UNIONE NAZIONALE AVVOCATI ENTI PUBBLICI (UNAEP), ITALY'S NATIONAL ASSOCIATION OF LOCAL GOVERNMENT ATTORNEYS. MORE DETAILS TO FOLLOW!



In advance of IMLA's 2024 Comparative Law Conference in Italy, we speak with **Maria Elena Argento**, the Secretary of the Sicily Region of Unione Nazionale Avvocati Enti Pubblici (UNAEP), the Italian local government lawyers organization we'll meet next October.

ML: Nice to meet you, Maria, as IMLA looks ahead to October 2024 when we'll convene in Italy. Could you tell us a little about how and why you became a local government lawyer?

-I graduated with honors from the University of Palermo in 1986, providing a Constitutional Law thesis on the political responsibility of parties in government crises and an Administrative Law essay on local authorities. After two years of attending courtrooms, in 1988, I qualified to practice as a lawyer at the Court of Appeal of Caltanissetta.

Administrative Law has always been my passion. I really wished to defend public administrations, participate in the formation of laws and the various decision-making processes. So I took part in public competitions for Referendum Councilor at the Legislative and Legal Office of the Sicily Region and at the Local Health Unit of Enna. After being accepted for both, in 1988, I chose to deal with healthcare in Enna. I was entrusted with responsibility for the legal office of the Local Health Unit.

Twelve years later, I qualified to practice in Italian Superior Courts. I am currently the Head of the Complex Operational Unit of the Provincial Health Authority of Enna. I collaborate with various other legal departments and am the contact person for labor law anti-violence issues.

ML: Thank you. We'll be meeting in Lake Como, but please familiarize us with Enna, and some of your favorite things about your city.

-Enna is the capital of the province of Enna, one of nine provinces in the Sicily Region, and is located exactly in the center of Sicily, hence its nickname "Umbilicus Siciliae." Enna is the highest provincial capital in Italy and has around 28,000 inhabitants. It is considered the "City of Myth," referring to the the Myth of Kore (Persephone), which is said to explain the changing of the seasons. Legend has it that the Greek goddess Persephone was abducted on the shores of nearby Lake Pergusa. Pluto (the god of the underworld) fell so madly in love with Persephone that he kidnapped her and took her to his realm. Kore's mother, Demeter wandered for nine days and nights and, in desperation, ceased taking care of her divine duties as Goddess of the Crops. Jupiter, seeing the Earth becoming barren, forced Pluto to return Kore to her mother. Eventually, a compromise was reached: Kore/Persephone would live with her mother for six months (spring and summer) and six months with her husband Pluto (autumn and winter). The Free University of Enna is named after Kore, symbolizing our great cultural identity with the Myth.

The real driving force of the City are its small artisans, restorers, bookbinders, bakers, and restaurateurs. A small jewel is the Duomo, with its wonderful wooden coffered ceiling. Other sites are the castle of Lombardy, the Tower of Frederick II of Swabia, the nature reserve of Lake Pergusa, the Archaeological Museum, the Museum of Myth and the Brotherhoods museum, where precious objects relating to the Holy Week are exhibited. Enna also has two arenas-a University Citadel and a Sports Citadel.

I really like the centrality of my city. From every point, the visitor's gaze extends over golden fields, up to Mount Etna with its spectacular lava effusions. On clear days, you can spot the sea, from which numerous conquering peoples arrived in Sicily over the centuries. Today, Sicilians welcome and easily interact with many different cultures, growing and enriching themselves.

ML: Against that inviting backdrop, what are the laws that govern your city?

-The fundamental pillar of Italy's decentralized government is Article 5 of our Constitutional Charter and Title V of the Constitution. Italy is a democratic Republic divided into twenty Autonomous Regions; fifteen are categorized as "Ordinary Statute" and five as "Special Statute," which allows a measure of home rule. Sicily is among the latter. The Municipality is responsible for functions that serve its residents. These include:

1) demographic services;
2) social services and assistance for the frail, disadvantaged or needy;
3) school and educational services;
4) cultural, sporting and recreational services;
5) mainaining the municipality's real estate assets, allowing private construction subject to evaluating environmental impact compliance with urban planning rules;
6) green maintenance; and
8) urban police; and
9) waste collection (fow which the city applies a tax).

ML- Thank you. And how is your City Government organized?

The city is represented by an elected Mayor, who is also the highest local authority on healthcare matters. He/she can issue, in cases linked to public safety needs, urgent ordinances which can also be carried out with the help of

Continued on page 32

Continued from page 31

local police. During Covid, many such emergency ordinances were issued. Legislative authoity resides in the City Council, made up of twenty members who are elected by the people. Executive power lies with a council made up of individual councillors competent in various subjects and selected by the Mayor. And local judicial power is exercised through Justices of the Peace. They are not appointed and are separate from the legislative and executive powers.

ML-Tell us a bit about your Law Department.

The Department is autonomous and reports to Provincial Health Authority. It is divided according to specializations: administrative and criminal law, tax and corporate law, civil law, and labor law. It consists of three lawyers, two men and a woman, and is assisted by an archivist, and three administrative assistants. Assigments vary by legal and economic complexity. There are three levels: basic professional, simple structure, and complex structure. The latter is the most senior and requires at least five years of managerial experience. I managed Advocacy with a simple structure beginning in 2003 and complex structure assignments beginning in 2017. The positions last five years, and are reconfirmed only after a positive evaluation from a Technical Board--an external commission made up entirely of lawyers from other healthcare companies. We offer performance pay, commensurate with achievement of the percentage of objectives set by a performance plan.

ML: And what is your role?

I am the Director of the Legal Complex Operational Unit. The Director is authorized to provide written and oral opinions to the General Management and to the Managers of the other Complex Units. All opinions, even if provided by other lawyers, must be countersigned by the Director. Apart from that, I prepare an annual report on our activities, draw up our work plans, teach and speak at conferences, and manage relationships with other institutional bodies. I also manage a litigation risk fund of more than 14 million euros.

The Healthcare Agency has four hospitals throughout the province, analysis laboratories, veterinary facilities, pharmacies, family doctors and pediatricians. It has over 4000 employees and many affiliated facilities. Among other things, I deal with professional liability for medical malpractice, procurement, debt collection, and labor law cases brought by employees. And we act as a civil party in trials for crimes against the public administration, to protect the image of the public body damaged by crimes such as fraud, corruption, embezzlement or abuse. At this time, approximately 1800 trials involving all areas of law are pending.

Continued on page 33

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- Labor Relations Guide

International *cont'd from page 32*

ML: That's a huge responsibility! Now, as a final item, a question about Italy-besides visiting Enna and Sicily, what are some other sights and experiences you'd recommend for every visitor?

–Definitely Florence is a city most worth visiting, a true jewel. And Rome, of course, and Venice, not to mention Assisi, Matera, Bari, Naples, and you name it. Beyond that, you must not miss the opera at the historic Milan Teatro alla Scala and the concerts at Verona Arena, Bellini Theater in Catania, the Teatro Massimo or Teatro Politeama in Palermo--but above all the ancient drama performances at the Greek Theater of Syracuse located within the Neapolis.

Finally, as a Sicilian, I must recommend tasting Sicilian cassata, which should be considered a gift to humanity, and the jubilation of colors and flavors celebrated in cannoli, arancini, pasta with sardines, Trapani busiate, the Neapolitan pastiera, and the babà. For Italians, you know, food is culture!

ML: Thank you, Maria. We'll see you next October at Lake Como-

Power Surge *cont'd from page 15*

Conclusion

The data center industry is a complex and rapidly evolving sector that enables the technologies upon which we rely. Data centers offer a magnificent opportunity for localities to capitalize on a growing enterprise that provides exponential returns on investment. Business development in the community, taxes for local schools and programs, and opportunities for a well-compensated workforce point to data centers as quality community partners. With intentional planning from community leaders and open dialogue with data center partners, localities can ensure they implement best practices for smart growth of an exciting industry within their borders.

If you would like additional information to better understand the various aspects of this dynamic growing industry (or to discuss Gatorade marketing campaigns of years past), we are available to assist you in exploring the regulatory framework, environmental implications, land use considerations, and economic impact of data centers. impact of data centers.

Notes

1. Other place types included in the suburban policy area, transition policy and JLMA policy area that call for data center development include the Suburban Industrial/Mineral Extraction Place Type, the Transition Light Industrial Place Type, the Transition Industrial/Mineral Extraction Place Type, the Leesburg JLMA Employment Place Type and the Leesburg JLMA Industrial/Mineral Extraction Place Type.
2. As of late 2023, data centers remain allowed permitted by right in the PD-OP, PD-IP, PD-RDP and PD-GI zoning districts and by special exception in the CLI district. Current amendments allow the use in the MR-HI district. Draft performance standards as of late 2023 include additional façade treatment requirements and site planning standards such as loading bay location, location of mechanical equipment screening, refuse collection standards, additional parking setbacks and setbacks to residential development, and noise, light and glare standards.

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with Big Tobacco gave state legislatures full control over the distribution of funds meant to pay for ballooning Medicaid budgets and to reeducate citizens who had been lied to for decades about the "safety" of smoking. The settlement awarded funds to states for Medicaid and anti-smoking education, but many states diverted these funds from their intended purposes. Only around 2.5 percent of the funds[14] have gone toward tobacco control and only two states[15] fund their state tobacco control program at the level recommended by the CDC. North Carolina even used 75 percent of its settlement funds for tobacco production.[16] Many states securitized their settlement proceeds, resulting in annual payments to Wall Street in exchange for a one-time cash infusion that is long forgotten.

In contrast, the National Opioid Settlement demands that at least 70% of the funds[17] are to be used to fund future opioid-remediation efforts. This is in line with how Orange County California voters[18] mandated that 80 percent of money from the tobacco settlement be spent on smoking-related programs—creating one of the most effective smoking cessation programs in America. The difference between states and municipalities is clear —municipalities are appropriate stewards of these funds because they are closer to the harm and see the urgency in addressing it.

Protecting Contractual Freedom as a Means to Corporate Accountability

The Chamber's final attack is leveled at the personal injury bar. Lawyers working on contingency are criticized because they "advocate for positions taken by local government officials" and force "large, rapid settlements" that direct funds into municipal budgets. More seriously, they suggest that hiring outside counsel is unethical, and unfair to corporate defendants because contingency fee counsel is financially motivated to seek the largest possible judgment. This argument can be effective when deployed against the ignorant.

To counteract this narrative, it is critical to highlight the harms, and remedies, at the heart of any litigation. For instance, the impact of opioid abuse on municipalities has been devastating. Local governments face an array of challenges, necessitating increased funding across several key areas:

1. Medical and Treatment Needs: There is a pressing need for more social workers, family advocates, and treatment facilities to address opioid addiction. This includes funding for medication-assisted treatment programs, detox centers, and educational services for opioid use disorder (OUD). Additionally, municipalities need resources to re-educate the medical community on proper opioid prescription practices.

2. Law Enforcement and Administrative Requirements: Law enforcement requires funding for opioid task forces, training in overdose response, and purchase of life-saving treatments like Narcan and Naloxone. The surge in drug court cases also demands increased funding for court administrators, prosecutors, public defenders, and social workers.

3. Emergency Medical Services Supplementation: Emergency medical services, including firefighters and ambulance crews, require additional resources to handle the surge in opioid-related incidents. They need extra funding for emergency medical personnel, specialized training, and essential supplies to effectively manage and respond to the escalating volume of opioid overdose emergencies.

The widespread impact of opioid abuse even extends to hindering municipalities' access to capital,[19] affecting their ability to provide basic public services and infrastructure.

Fully comprehending the scope of harm from opioid and other public nuisances on municipalities can be critical to framing the need to stop that harm from happening and obtain the resources necessary to address it. Hiring competent outside counsel working on contingency is simply the means for obtaining that remedy.

It should go without saying that suing well-financed and powerful corporations is an immense and risky undertaking. Few municipalities could sustain the attorneys' fees, discovery costs, expert witness charges, and other costs of litigation over the years it could take to reach resolution. Even if the funds were available, the chance of unsuccessful litigation is real, and no municipal government would authorize such a gamble. For instance, in the opioid MDL, the plaintiffs' legal team invested well over $100 million and thousands of hours over many years—all with the risk that it would have been for not if juries were unpersuaded or the legal theories foundered (as happened in the Oklahoma AG's case against J&J). Thus, engaging outside counsel on a contingency basis—where top lawyers waive hourly fees and cover litigation costs for a share of any recovery—is the most viable way for municipalities to hold corporations accountable.

It is no wonder that the Chamber would attack the contingency fee arrangement. This opposition isn't limited to legislative contexts; corporate defendants often claim ethical breach and due process deprivation in court when facing government plaintiffs represented by contingency-based firms. These arguments, based on the idea that state lawyers should not be personally motivated to enforce the law, have been rejected time and again by courts across the country because the municipal client retains ultimate control over the litigation.

Unlike corporate defense counsel who work on an hourly rate and may be incentivized for prolonged

Municipal Bulwarks *cont'd from page 34*

litigation to increase legal fees, contingency fee counsel are motivated to work efficiently and maximize recovery for their clients. The American Bar Association (ABA) Rules guide this representation and Rule 1.2(a) provides that "a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued…" and "[a] lawyer shall abide by a client's decision whether to settle a matter." While it is true that a client may defer to the lawyer's expertise in technical, legal and tactical matters, municipal clients retain ultimate control over the litigation.

Conclusion

The role of municipal affirmative impact litigation in championing public interest cannot be overstated. Nor can the legislative threat it is under. It is a powerful tool that municipalities use to protect the rights and welfare of their communities, largely made possible through partnerships with outside counsel. This collaborative approach not only strengthens the legal expertise available to municipalities, but also enhances their ability to effectively represent the interests of their citizens.

To protect this capacity, it is crucial to connect with lawmakers and counteract any narratives that seek to undermine municipal authority and litigative capabilities. It is also imperative that this community collaborates to counteract an extraordinarily well-funded corporate campaign. The trial lawyer associations in your states will be valuable partners in tracking and responding to these legislative threats. Doing so not only defends the autonomy of local entities, but also provides checks on abuse while upholding the democratic values embedded in our multilevel system of governance. ML

Notes

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Notes

1. Reichle v. Howards, 566 U.S. 658, 664–65 (2012). In *Reichle*, a Secret 1.

Amicus *cont'd from page 23*

that she was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[35] The court reasoned that *Nieves* required Gonzalez to provide evidence of others "who engaged in the 'same' criminal conduct but were not arrested, and she was unable to do so, failing to identify others who had mishandled a government petition and were not prosecuted.[36] Instead, she provided evidence of who was prosecuted under the statute and argued their offenses were different than hers.[37] The Fifth Circuit declined to construe the absence of arrests for her specific acts as indicative of officers exercising discretion and rejected her invitation to infer that "because no one else was prosecuted for similar conduct, her arrest must have been motivated by her speech."[38]

Conclusion

Four years after announcing what it purported to be a "narrow exception," the Supreme Court has the opportunity in this case to clarify what exactly it meant in *Nieves*. The Court will answer what type of evidence a plaintiff must proffer to support a claim for retaliatory arrest even where probable cause to arrest exists. *Nieves* emphasized that the exception was narrow, and the way to prove the exception will help inform whether it is truly narrow or not. If the Court allows an expansion in the type of evidence a plaintiff may provide including, as Justice Sotomayor and Justice Gorsuch argued for in their separate writings in *Nieves,* a "commonsensical" approach to the exception, then local government liability in this area is likely to increase. As the Fifth Circuit observed, the Seventh Circuit has already adopted the expansive reading of *Nieves* proposed by Justices Sotomayor and Gorsuch.

In *Nieves*, IMLA had argued for a bright-line approach - i.e., where probable cause exists to arrest, there can be no retaliatory arrest claim under the First Amendment.[39] That approach was rejected, but IMLA believes the Court should stand by what it said in *Nieves* and that the exception should be truly narrow. While the Institute for Justice, who is representing Gonzalez, has done a good job spinning the facts in the plaintiff's favor (emphasizing that she was 72 years old and put in jail over a minor offense), the concern is that the Court could broaden the exception to the point where local governments will be subjected to significantly more retaliatory arrest claims, thereby increasing liability for local governments. The Fifth Circuit's approach to the evidentiary question provides the narrowest way to view the exception, which would limit liability for local governments.

Moreover, retaliatory arrest claims are easy to allege and challenging to defend in most contexts involving police officers making on-the-spot arrests. As the Court explained in *Nieves* when it rejected a subjective component to the exception:

> policing certain events like an unruly protest would pose overwhelming litigation risks. Any inartful turn of phrase or perceived slight during a legitimate arrest could land an officer in years of litigation. Bartlett's standard would thus "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties."[40]

With a broad exception, as advocated by the petitioner, police officers could be hamstrung in their abilities to make split-second arrest decisions. Given the number of arrests each year, which are estimated to be about 27,630 per day, a broad exception could provide crippling liability for local governments.[41]

Another wrinkle for the Court to address is this was not a split-second decision case. This case involved a warrant and a month-long investigation. And the Court is sure to grapple with those facts. On the one hand, the Institute for Justice frames the lengthy investigation as a reason the Court should not need to worry about the general rule that probable cause bars these types of claims because there was no heat of the moment decision-making and thus no need to protect officers from these types of claims. On the other hand, the warrant could also cut in favor of the City due to the fact that a neutral decision-maker found probable cause existed, thus supporting the idea that the ultimate arrest, even if removed in time from the protected speech, was not motivated by any alleged retaliatory animus. Ultimately, this case will provide clarity for local governments and hopefully stay within *Nieves'* framing of a "narrow" exception. ML

Notes

1. Service agent arrested someone who approached Vice President Cheney and touched him after the agent heard him say "I'm going to ask [him] how many kids he's killed today." Id. at 660-61.
2. Lozman v. City of Riviera Beach, 138 S.Ct. 1945, 1949 (2018).
3. *Id.* at 1954.
4. *Id.*
5. *Id.*
6. Nieves v. Bartlett, 139 S. Ct. 1715, 1720 (2019).
7. *Id.*
8. *Id.*

9. *Id.*
10. *Id.*
11. *Id.* at 1720-21.
12. *Id.* at 1721.
13. *Id.* at 1723-24.
14. *Id.* at 1723.
15. *Id.* at 1724.
16. *Id.* at 1727.
17. *Id.*
18. *Id.*
19. *Id.*
20. Compare Nieves v. Bartlett, 139 S. Ct. 1715, 1740 (2019) (Sotomayor, J. dissenting) with *Id.* at 1734 (Gorsuch, J. concurring).
21. *Nieves*, 139 S. Ct. 1715, 1741 (2019) (Sotomayor, J. dissenting).
22. *See* Petition for Cert., No. 22-1025, available at: https://www.supreme-court.gov/Docket PDF/22/22-1025/264005/20230420105239077_Petition%20for%20a%20Writ%20of%20Certiorari.pdf.
23. *See* Pet. App., p. 159a, available at: https://www.supreme-court.gov/Docket PDF/22/22-1025/264005/20230420105307703_Appendix.pdf.
24. *Id.*
25. *Id.*
26. *Id.* at 160a.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 158a-163a.
31. *Id.*
32. Gonzalez v. Trevino, 42 F.4th 487, 489–90 (5th Cir. 2022).
33. *Id.* at 490.
34. *Id.*
35. *Id.* at 492.
36. *Id.*
37. *Id.*
38. *Id.*
39. *See* IMLA Amicus Brief, available at: https://www.supreme-court.gov/Docket PDF/17/17-1174/60763/20180827132011284_SLLC%20amicus%20brief%20in%20Nieves%20v.%20Bartlett%208-27-2018.pdf
40. *Nieves*, 139 S. Ct. at 1725.
41. *See* Department of Justice, *2019 Crime in the United States*, available at: https://ucr.fbi.gov/crime-in-the-u.s/2019/crime-in-the-u.s.-2019/topic-pages/persons-arrested.

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Employment *cont'd from page 27*

employers are substantially limited from unilaterally modifying employee working conditions during collective bargaining agreement negotiations.

In *Mclaren Macomb*, an employer offered a severance agreement to eleven bargaining unit employees that had been permanently furloughed. The severance agreement prohibited the employees from making disparaging comments about the employer or from revealing the terms of the agreement itself. The NLRB decided the severance agreement was unlawful, concluding that it would have required the employees to waive their rights under the NLRA. In the NLRB's view, this would also have the undesirable effect of preventing employees from communicating about the conditions of their employment and might chill participation in future NLRB investigations. *Mclaren Macomb* suggests the NLRB might begin taking a more hands-on approach to other common terms of employee severance agreements, including non-compete, non-solicit, and no poaching clauses. In fact, a May 2023 memorandum issued by theNLRB's General Counsel Jennifer Abruzzo took the position that, except in limited circumstances, non-compete agreements violated the NLRA.[51]

Conclusion

Employment law in 2023 saw widespread expansion of employees' rights in the public sector in numerous states as well as through two landmark decisions in the Supreme Court. Governmental decision-makers should ensure that their employment policies, rules, template agreements, and everyday practices that govern the workplace have been carefully reviewed by an experienced employment attorney. Employers should also check the websites of their state's civil rights divisions as well as the departments of labor for amended governing rules and procedures. Stay tuned for more employment law changes and enactments in 2024 as public sector employees' rights across the U.S. will continue to expand. **ML**

Notes

1. Colorado had perhaps the most updates to employment regulations of any state over the last five years: Colorado Chance to Compete Act (C.R.S. § 8-2-130) prevents employers from inquiring about applicant's criminal history in initial application or barring persons with criminal histories from applying; Colorado Wage Payment Act, (C.R.S. § 8-4-101) strengthens penalties and definitions of wage theft; Create a Respectful and Open World for Natural Hair Act (C.R.S. § 24-34-301) includes hair texture, types, styles associated with race for employment discrimination claims; Sexual Orientation Employment Discrimination Act (C.R.S. § 24-34-402) adds gender identity/expres-

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sion into statutes prohibiting discrimination; Colorado Healthy Families and Workplaces Act (C.R.S. § 8-13.3-401) employers must provide at least one hour paid leave per 30 hours worked, expands when employees can use paid leave; The Restrictive Employments Agreement Act (C.R.S. § 8-2-113) drastically limits classes of employees bound by non-compete and non-solicitation agreements, breadth of agreements, and the notice required for enforcement; Collective Bargaining by County Employees Act (C.R.S. § 8-3.3-101) allows many county employees to unionize/collectively bargain; Equal Pay for Equal Work Act (C.R.S. § 8-5-201) requires employers to publicize job opportunities to all current employees, including pay, benefits, eligibility and application deadlines; must announce name/job titles of persons selected; must publicize career progression requirements; Job Application Fairness Act (C.R.S. § 8-2-131) prohibits employers from inquiring about age in initial job application; Wage Theft Act (C.R.S. § 8-4-113) creates wage theft enforcement fund to repay employee victims of wage theft; Protecting Opportunities and Workers' Rights Act (C.R.S. 24-34-407) lowers standard of proof for workplace harassment claims, limits non-disclosure agreements to allow more reporting of alleged discrimination.

2. Colorado adopted gender identity and gender expression into statutes prohibiting discrimination against members of a protected class in 2021.

3. Minn. HF1655.

4. C.R.S. § 8-2-131.

5. C.C.R. Title 2, Section 11017.1.

6. C.R.S. § 8-5-201.

7. Il. HB3129.

8. Minn. SF 2909.

9. Larry Lee and Javier Heres, *Unionization of Public-Sector Jobs in Colorado: The Collective Bargaining by County Employees Act,* Municipal Lawyer vol. 63, no. 6, November-December 2022, pp. 20-21, 31, 34-35

10. Cal. AB 1, Legislature Employer-Employee Relations Act.

11. M.S.A. § 179A.07; Wash. S.B. 1200.

12. C.R.S. § 8-13.3-401.

13. 820 ILCS 192.

14. Conn. S.B. 2.

15. O.C.G.A. § 21-2-404

16. C.R.S. § 8-4-113.

17. The Biden-Harris Administration Will End COVID-19 Vaccination Requirements for Federal Employees, Contractors, International Travelers, Head Start Educators, and CMS-Certified Facilities (May 1, 2023).

18. I.C.A. § 73-503.

19. F.S.A. § 381.00316.

20. U.C. § 34-56-201

21. Tex. S.B. 7 Health & Safety Code Sec. 81D.001.

22. Fact Sheet: FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition (January 5, 2023).

23. Non-Compete Agreements that Violate the National Labor Relations Act, Memorandum GC 23-08 (May 30, 2023).

24. .R.S. § 8-2-113.

25. M.C.A., Lab. & Empl. § 3-716.

26. Wash. RCW 49.62.020.

27. I.C.A. § 25-22.5-5.5.

28. 600 U.S. 18, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023).

29. 600 U.S. 447, 143 S. Ct. 2279, 216 L. Ed. 2d 1041 (2023).

30. Primarily Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003).

31. Justice Jackson recused herself in Harvard; she participated in North Carolina, where the vote was 6-3.

32. *Harvard*, 143 S. Ct. at 2147.

33. Statement from EEOC Chair Charlotte A. Burrows on Supreme Court Ruling on College Affirmative Action Programs (June 29, 2023), https://www.eeoc.gov/newsroom/statement-eeoc-chair-charlotte-burrows-supreme-court-ruling-college-affirmative-action.

34. The thirteen states included Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, and West Virginia.

35. Letter from 13 State Attorneys General to Fortune 100 CEOs (July 13, 2023), www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf.

36. Led by the same legal activist who spearheaded SFFA's claim in *Harvard*, Edward Blum.

37. Both cases were dismissed after the two firms named as defendants, Perkins Coie and Morrison Foster, changed the eligibility requirements for the fellowship programs.

38. "[N]othing prohibits universities from considering an applicant's discussion of how race affected the applicant's life, so long as that discussion is concretely tied to a quality of character or unique ability that the particular applicant can contribute to the university." *Harvard*, 143 S. Ct. at 2147.

39. 143 S. Ct. 2279.

40. *Id*. at 2295.

41. *Id*. at 2294.

42. 143 S.Ct. 2686.

43. No. 4:18-CV-02150-AGF, 2020 WL 5505113, at *2 (E.D. Mo. Sept. 11, 2020), aff'd sub nom. Muldrow v. City of St. Louis Missouri, 30 F.4th 680 (8th Cir. 2022).

44. Muldrow v. City of St. Louis Missouri, 30 F.4th 680, 688 (8th Cir. 2022), cert. granted in part, 143 S. Ct. 2686 (2023) (quoting Clegg v. Ark. Dep't of Corr., 496 F.3d 922, 926 (8th Cir. 2007)).

45. *Id*. at 688-89.

46. Andrea R. Lucas, *With Supreme Court affirmative action ruling, it's time for companies to take a hard look at their corporate diversity programs,* Reuters (June 29, 2023), https://www.reuters.com/legal/legalindustry/with-supreme-court-affirmative-action-ruling-its-time-companies-take-hard-look-2023-06-29/.

47. Wendt Corp., 372 NLRB No. 135 (Aug. 26, 2023); Tecnocap LLC, 372 NLRB No. 136 (Aug. 26, 2023).

48. Mclaren Macomb, 372 NLRB No. 58 (Feb. 21, 2023).

49. Raytheon Network Centric Sys., 365 NLRB No. 161 (Dec. 15, 2017).

50. Wendt Corp., 372 NLRB No. 135 (Aug. 26, 2023).

51. Non-Compete Agreements that Violate the National Labor Relations Act, Memorandum GC 23-08 (May 30, 2023).

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