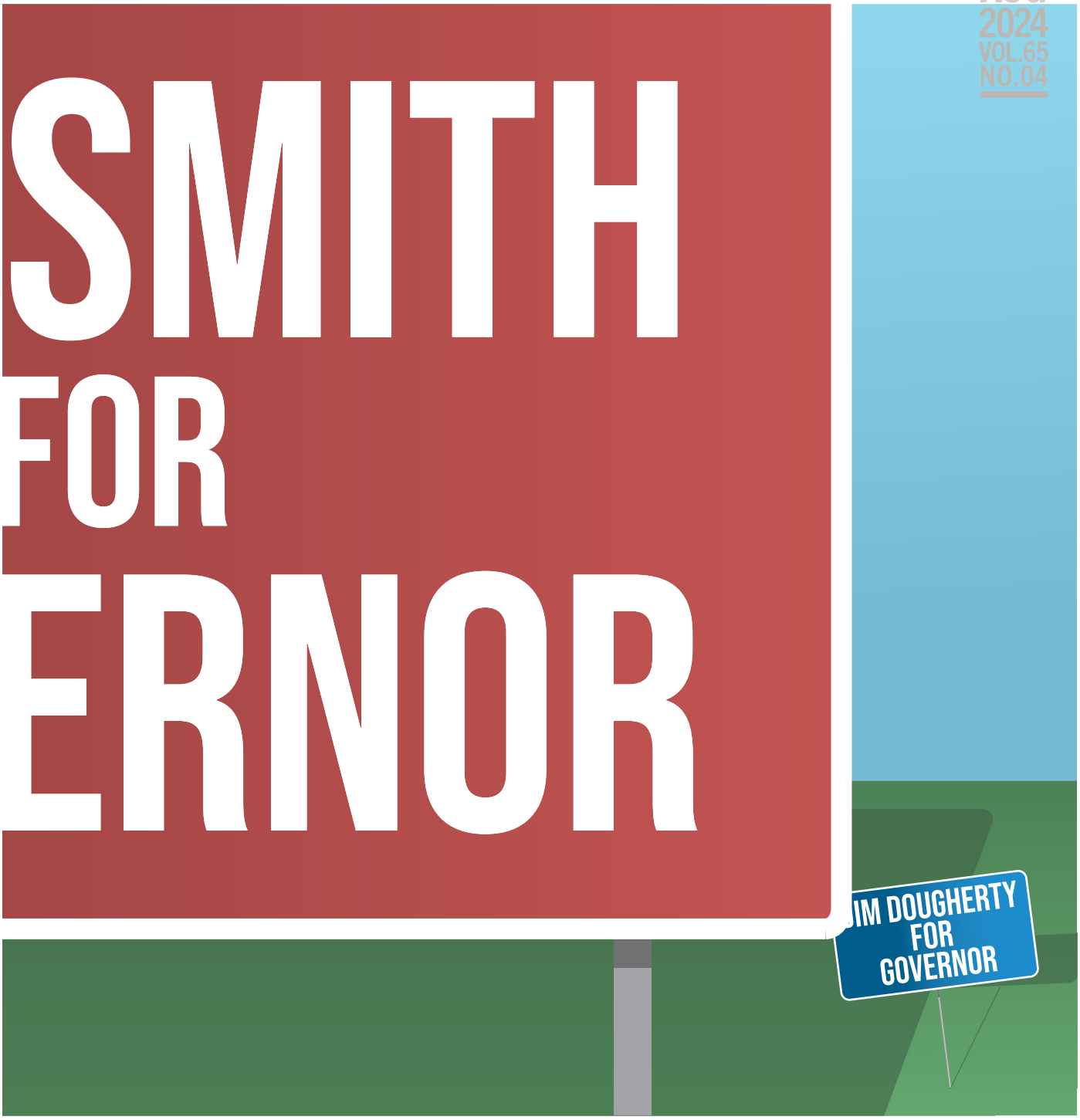
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Municipal Lawyer

THE JOURNAL OF LOCAL GOVERNMENT LAW

JULY AUG 2024
VOL.65 NO.04



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By: Eric Shytle, General Counsel, Municipal Association of South Carolina, Columbia, South Carolina and Sean Scoopmire, Planning and Law Associate, White & Smith LLC, Greenville, South Carolina

The parameters of First Amendment barriers to content-based sign ordinances continue to evolve in the wake of *Reed*. As our national electoral season approaches, a review of the permissible limits on political signage is in order. Our authors assess the current state of sign law and propose a content-neutral taxonomy.

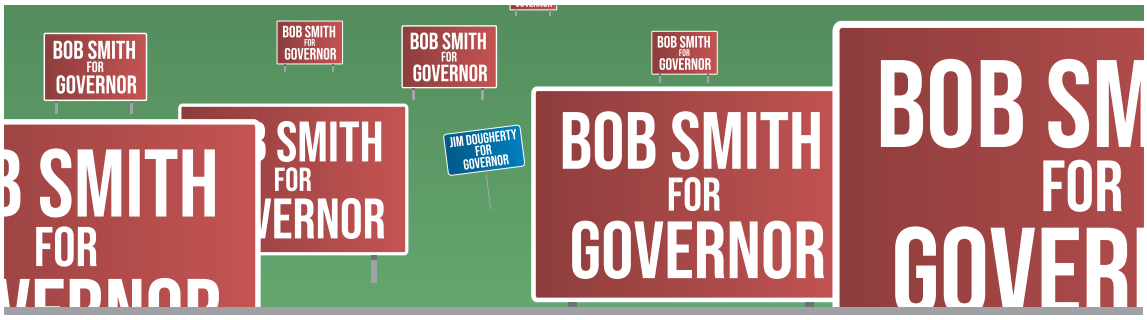
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INDEPENDENT CONTRACTORS AND OVERTIME EXEMPTIONS: THE DOL's LONG-AWAITED RULES

By: Michelle White, Employment Law Associate Attorney, Lloyd Gosselink, Austin, Texas

The question of when overtime is payable—or is not, due to one or more exemptions in the law—is hugely consequential, including to local governments who are collectively among the largest employers in the nation. Recent Department of Labor pronouncements provide additional clarity on the subject.

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LISTSERV

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

Are Listservs Dead in Light of Recent ABA Opinions? (Or just changed forever?)

Some recent American Bar Association opinions have generated robust discussion on the listserv about the propriety of discussing representation matters on the listserv… Ironic, isn't it? A long discussion about whether it is proper to do what we are already doing in the discussion?

A May 8, 2024 article in the ABA Journal reports that "The American Bar Association Standing Committee on Ethics and Professional Responsibility released a formal opinion today that provides guidance for when a lawyer can seek advice on a listserv," noting that model rules in most cases forbid posting questions or comments relating to a representation — "even in hypothetical or abstract form."

According to the article, "Formal Opinion 511 cites Rule 1.6 on confidentiality of the ABA Model Rules of Professional Conduct to say use of a listserv, beyond enabling lawyers to "keep abreast of changes in the law and its practice," and "seeking advice about a client matter" would "require a client's informed consent in most cases."

The ABA opines that "seeking advice on a listserv would be unethical if there is a reasonable likelihood that the lawyer's questions or comments will disclose information relating to the representation that would allow a reader then or later to infer the identity of the lawyer's client or the situation involved."

The explanation continues "A lawyer may, however, participate in listserv discussions such as those related to legal news, recent decisions or changes in the law, without a client's informed consent if the lawyer's contributions will not disclose, or be reasonably likely to lead to the disclosure of, information relating to a client representation."

According to the article, the listserv opinion "drew from several prior ABA formal opinions dating back to 1998, as well as recent bar opinions in Oregon and Maryland. Those state opinions spotlighted the value of listservs to lawyers to test their understanding of legal principles and to clarify the best way to proceed in unique situations."

However, the article stressed that the ABA opinion emphasized "the more unusual the situation … the greater the risk that the client can be identified, and therefore the greater the care that must be taken to avoid inadvertently disclosing client information protected by Rule 1.6." Further, it indicated "participation in most lawyer listserv discussion groups is significantly different from seeking out an individual lawyer or personally selected group of lawyers practicing in other firms for a consultation about a matter."

The standing committee periodically issues ethics opinions to guide lawyers, courts and the public in interpreting and applying ABA model ethics rules to specific issues of legal practice, client-lawyer relationships and judicial behavior. (Drawn from ABA Journal May 8, 2024)

As you can guess, this opinion drew many reactions on our beloved listserve. Some folks saw a distinction from the opinion for in-house government lawyers, and some did not. A few of the comments reveal the nature of our discussion. Here they are, both pro and con:

"That opinion seems addressed to attorneys in private practice. As others point out, my client's identity is a matter of public record – heck, it's even on my business cards."

"What about the fact that if you are a lawyer who works for the City, you are both the lawyer AND the client. In some cities, the City Attorney and their counterparts have the power to make certain decisions, enter into contractual agreements, etc. on behalf of the City. So, if I have given myself permission to float a question out to the listserv, shouldn't that count for something?"

"Now, I still do not give away confidential information… But if something has been discussed publicly, is a matter of public record, and there is only one client then how do you run afoul of this article?"

"Maybe get formal client consent to participate in the listserv or, better, to submit questions to IMLA for publication on the listserv without attribution?"

"As usual, the Ivory Tower ABA ethics mavens and state supreme court judges: Setting impossibly high standards and making things impossibly difficult for the actual, practicing attorney…Not that I have strong feelings…"

"What about questions asked at the end of a CLE presentation? I suppose that you could preface all the

listserve questions with "I am asking for a friend...."

"This is interesting … I note that it says it is unethical if the reader could infer the identity of the client… I only have one client, so that is not hard to do… But my client is a member of IMLA and knows I participate in the listserve… In fact, it is one of the benefits…. Also, it is a matter of public record that I represent my client. Does anyone think any of this makes a difference???"

"This is very timely… I just got a call from a private practice lawyer who wants to see a fiber optic cable franchise agreement our town signed with a fiber optic company. He represents another city. The agreement is already in place… It is a public document… It is not confidential… As their lawyer, am I prohibited from sending a copy to him (without permission) since it is a product of my representation? Do I have to get permission from my client? I am willing to learn here, but this sounds well, ridiculous… I guess I could just let any other employee here release it for me since they are not a lawyer? It can be requested under FOIA anyway, can't it?"

"How far do you go with this? If it is a violation to reveal the identity of a client without permission, is it a violation for me to answer when somebody asks me what I do for a living and I tell them where I work? Should I take my city name of my business card and email?"

A couple of points from the other side of the coin:

"I don't think private/gov't practice distinction is material. The GC of any non-gov't company would have the same public-recognition-of-client issues as a gov't lawyer."

"Well, we just attended an ethics CLE that touched on this issue. Apparently, ABA model Rule 1.6(c) on Confidentiality of Information, includes disclosing even public information the client does not authorize to be released.

'…(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.'

So, while it may already be in public discourse, if the client does not authorize it to be discussed/disclosed, there's an argument it still cannot be revealed by an attorney."

"We live by different rules in the public sector and reconciling some of them with the practice guidelines can sometimes be very difficult. In fact, sometimes they don't seem to make sense. However, it is the world we live in, and we signed up for it."

*****

A few points were made on the comments above:

"In House Counsel for a private business attorney is not subject to the Freedom of Information Act and their work product is not already a matter of public record."

"A lawyer can't release the public information, but can a non-lawyer release it since it is already a matter of public record?"

"It doesn't do any good to present the scenario as a hypothetical or "Asking for a friend" situation if it can be inferred from the question that the lawyer represents a specific client."

Well, you get the point. This debate could rage on. I hope it doesn't put a damper on the success of listserves. My client has benefitted greatly from my participation on the IMLA listserve. Let's see if we can keep this thing going while keeping our limits in mind.

***

On a lighter note, we had an accident in town recently involving a private citizen and a bakery truck. During the testimony, the police officer revealed that the truck was a "Tastykake" truck. The officer continued to tell that the truck spilled its load internally and that when the driver opened his door "Tastykakes" spilled out onto the road. The word "Tastykake" was used so many times that the judge grinned and said the officer was making him hungry. Later pictures of the cakes ended up in the officer's mailbox and on his cell phone. His attention to detail was admirable, but his repetition drew him a little ribbing.

We recently received a call from a "citizen" who sharply advised us to immediately post "Alligator Warning" signs at a lake in one of our public parks. This is despite the fact there has never in history been a single report of an alligator sighting in our fair city. Also, it is despite the Department of Natural Resources statement that there is no known record of alligators inhabiting the area, and their general guideline that alligators do not live above the fall line.

All of this was relayed to the caller, who vehemently stated "That is a bunch of ****! I'm from **** and I know what alligator waters look like and I guarantee you there are alligators in that lake. What? No, I've never seen one. No, I have not been there before."

***

Finally, I have to get in my usual IMLA Conference plug. We're roughly 90 days until the IMLA Annual Meeting at the Hilton Bonnet Creek near Orlando. You've heard it here before, and here it is again. These seminars are worth every bit of the money. If you have a chance, please attend. Besides being informative, they are quite a bit of fun! Hope to see you there!

The prosecution rests, your honor… ML