Legal Issues in Council Self-Regulation within Municipal Governance and the role of the City Attorney

Part II



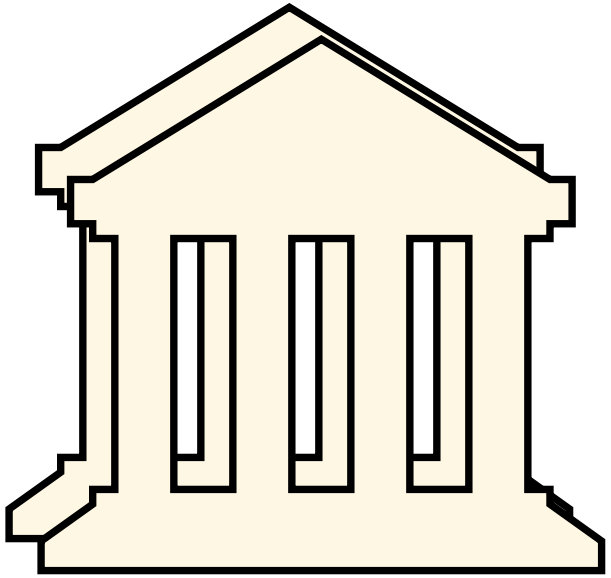
IMLA Presentation

September 27, 2024

Presenter:

Stephen K. Postema

Overview



Why this Topic?

Council Self-Regulation

Claims Arising from Council Regulation

The Role of City Attorneys

Why Analyze Councilmember Behavior?



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

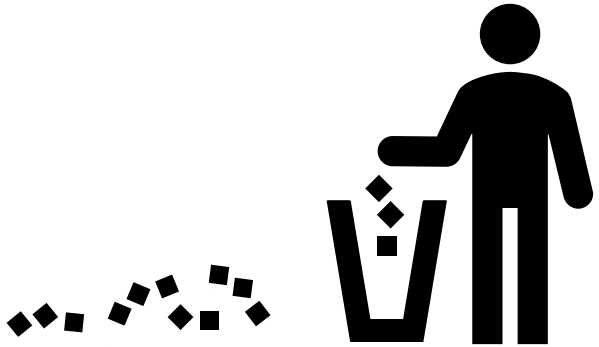
Why Does This Topic Create Unease?

Political Bodies have difficulty regulating themselves.



Why Does This Topic Create Unease?

Municipal Governance can be **messy.**



City Attorneys must often help clean up the mess.

Why Does This Topic Create Unease?

Bad reactions to City Attorney involvement from some *councilmembers*.



Why are City Attorneys Involved?

CHARTER DUTY

- Advisor and Counsel to the City
- Institutional Client

PROFESSIONAL DUTY

Model Rule of Prof. Conduct 1.13(b)

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

Why are City Attorneys Involved?

- Charter Interpretation
- Limits of Power
- Council Rules Draft and Analysis
- Procedural Issues
- Legal Consequences

Improper Conduct Can Cause Liability



FROM THE HEADLINES

"Grand Traverse County official who flashed gun on Zoom faces federal lawsuit"

Grand Traverse County, MI
4/12/2021

Detroit Free Press

Councilmembers Can Disrupt City Operations / Employee Morale



FROM THE HEADLINES

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

Evanston, Ill. 2/23/2023

Evanston RoundTaable

Disruptive Councilmembers Can Thwart Governance



FROM THE HEADLINES

“Flint councilman thrown out of meeting after barrage of racial slurs.”

Flint, MI 1/24/2023

Mlive

Actions Harm City Reputation and Residents



FROM THE HEADLINES

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

Ann Arbor, MI 8/15/21

MLive

Panel: Practical Issues

You've done everything upfront.

You've employed all the Practical Tips.

Nevertheless you will face:

COUNCILMEMBER CONDUCT CRISIS

Council Self Regulation



Reprimand



FROM THE HEADLINES

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

Ann Arbor, MI 8/5/21

Michigan Daily

Censure



From the Headlines:

“Colorado Springs city councilman censured, removed from committees, boards”

- Colorado Springs, CO 7/02/24
- KOAANEWS5

Removal from Committees



FROM THE HEADLINES

“Ann Arbor council members removed from committees in 7-4 vote along factional lines”

Ann Arbor, MI 12/06/2021

MLIVE

Panel Discussion

Due Process Issues



Check Roberts Rules Issues if Applicable.



Removal From Office



Is this allowed under State Law?



Is this allowed under City Charter?

Due Process for Removal

- ✓ Notice
- ✓ Hearing
- ✓ Public Vote



Removal by Governor

In Michigan

M.C.L 168.327
Removal of city officers by governor



Recall



FROM THE HEADLINES

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

Ann Arbor, MI 3/26/2021

(Mlive Media Group)

Panel Discussion

Removal and Recall

Procedures

Use of Outside Counsel

Be Prepared for Further Litigation



FROM THE HEADLINES

Eric Mays' lawsuit thrown out by judge, costs city $24,000

Flint, MI March 10, 2021

Be Prepared for Further Litigation



From the Headlines

"Flint woman's lawsuit claims suspension of Councilman Eric Mays violates her constitutional rights"

MLIVE 2/20/ 2024

No “First Amendment Retaliation”



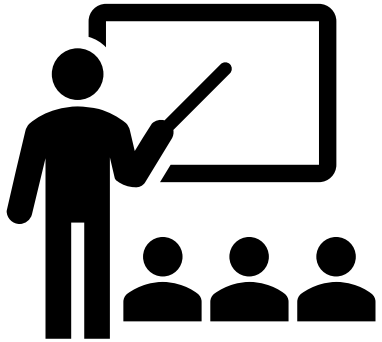
U.S. Supreme Court **Unanimously** Rules in Favor of Censure

Houston Community College v. Wilson

142 S. Ct. 1253 (2022)

Warning: Wilson Ruling Narrow

Watch For The Future Application of This Case



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

Post-Wilson Case Law

- Removal of Statutory Funding for Board Member Office is Retaliation

Temple v. Lower Elkhorn Nat. Res. Dist., 20. Dist. LEXIS 229405 (2023)

12-hour advance notice rule for Legislature to enter Stated Capitol is a form of punishment.

Boquist v. Courtney, 32 F. 4th 764, 775 (9th Circuit, 2022)

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



Whitener v. McWatters

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

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

No “First Amendment Retaliation” Claim for Censure

Zilich v. Longo, 34 F.3d 359, 363 (6th Cir. 1994)

The Sixth Circuit Court of Appeals found that a resolution “expressing the disapproval and outrage of the council” at a former council member’s actions did not amount to retaliation and did not violate the First Amendment.

But, retaliation claim stands for physical threats, harassment, and vandalism.

Zilich v. Longo, 34 F.3d 359, 365 (6th Cir. 1994)

Retaliation against a resident under color of law for the exercise of First Amendment rights is unconstitutional.

First Amendment Retaliation for Producing Rifle by Commissioner during Public Comment

MacIntosh v. Clous, 69 F 4th 309, 6th Cir. (2023)

Commissioner is not protected by the First Amendment for wielding a rifle as "expressive conduct" when done at a virtual public meeting under 12(b)(6) analysis.

Legislative Immunity

Bogan v. Scott-Harris,
523 U.S. 44 (1998)



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

Legislative Immunity



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

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

Censure does not violate the Bill of Attainder Clause

Zilich v. Longo, 34 F.3d 359, 363 (6th Cir. 1994)

Where the role is traditionally a legislative function not a judicial function, the Bill of Attainder Clause does not outlaw legislative action against a specific legislator. Legislative bodies may censure, suspend or otherwise discipline a member.

Note: Protection of a Councilmember's social media as personal, does not necessarily insulate a Council from imposing sanctions based on that speech.

Lindke v. Freed, 601 U.S. ___ (2024)

This case simply addressed a claim by commenters that they had a right to comment on a public official's social media account.

This case case out of Michigan held that a municipal official's social media account is personal except if the following are met:

1) The official has the governmental authority to speak on the subject, and

2) The official uses that authority when speaking on social media

Reporting of Councilmembers Actions to Outside Agencies

When?

Why?

To whom?

- State Attorney General
- FBI Public Corruption Unit

Panel:
Role of the City Attorney in Responses

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

Panel: Defusing Attacks



"Ann Arbor councilwoman accuses city attorney of being 'loyal to the mayor'"

December 11, 2020

MLive

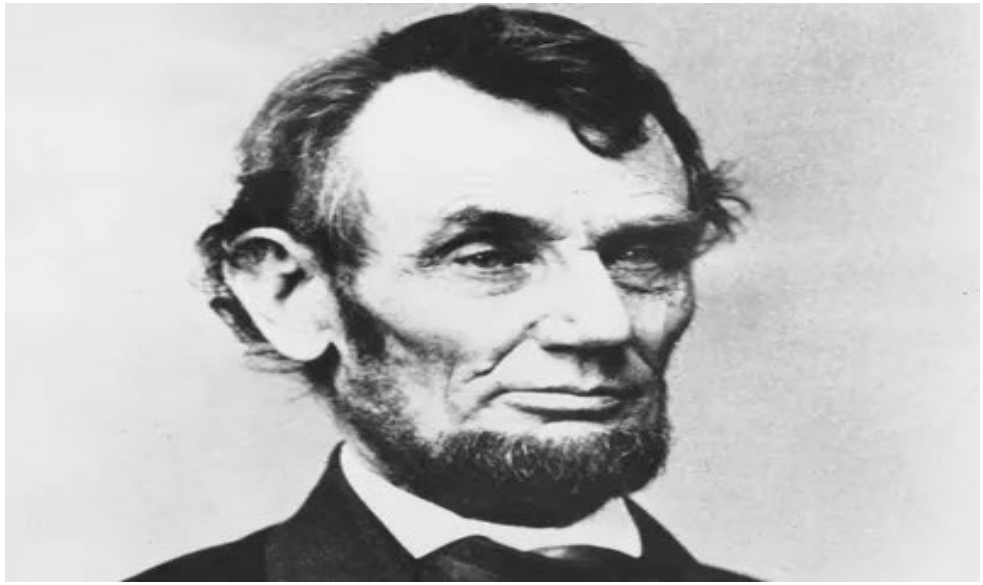
Panel: More Practical Tips

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

<u>BOTTOM LINE</u>

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

Final Thoughts



"And This Too Shall Pass."

Abraham Lincoln,

1859

Questions?

Contact Information

Stephen K. Postema

734-846-1495

postema@cmplaw.com