

# Public Corporation Law Quarterly

Spring/Summer 2011, No. 2

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## Overview of Chapter 9 Municipal Bankruptcy

*By Jason Banks, Esq. of Kerr, Russell and Weber, PLC*

### Introduction

As cities, townships and municipalities struggle to address the sobering reality of a mountain of debt and decreased revenues, one tool at their disposal is Chapter 9 municipal bankruptcy. For many at the state and local level, filing for Chapter 9 bankruptcy is still viewed as the unthinkable, nuclear option. For others, Chapter 9 is viewed as a viable tool to restore financial stability to a community.

Whether Chapter 9 filings will become a reality in Michigan remains to be seen. Governor Rick Snyder has recently announced that he does not anticipate that any municipal bankruptcy filings will take place. But until cities and towns achieve long-term solutions to resolve their cash-flow issues and debt obligations, one can never say never. At a minimum, negotiations between local governments and creditors like trade unions will likely take place under the threat of a *potential* Chapter 9 filing. This article provides an overview of the fundamental principles of Chapter 9 municipal bankruptcy proceedings.

### Authority for a Municipality to File Chapter 9

Chapter 9 of the United States Bankruptcy Code (the “Bankruptcy Code”)<sup>1</sup> permits a municipality to restructure and adjust its debts. Chapter 9 is modeled after Chapter 11, which is used primarily by businesses in order to restructure its obligations, but it has several unique features.

#### Who may file Chapter 9?

“Municipality” is defined very broadly under the Bankruptcy Code. It means a “political subdivision or public agency or instrumentality of a State.”<sup>2</sup> A “political subdivision of a State” includes cities, towns, counties, parishes, townships, villages and the like.<sup>3</sup> Courts have held that where a state grants “express sovereign powers” to an entity that performs governmental functions, such as a County, it is a “political subdivision.”<sup>4</sup>

“Instrumentality of a State” has a broad meaning as well and includes school districts, public utility boards and bridge and highway authorities. Courts have held that a transit district and even an off-track betting company may be considered instrumentalities of states.<sup>5</sup>

## Public Corporation Law Quarterly

The *Public Corporation Law Quarterly* is published by the Public Corporation Law Section of the State Bar of Michigan, Michael Franck Building, 306 Townsend Street, Lansing, Michigan 48933-2083.

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### How does a municipality obtain authority to file Chapter 9?

Chapter 9 is drafted to carefully navigate thorny constitutional and political issues. Article I of the U.S. Constitution authorizes Congress to enact “uniform Laws on the subject of Bankruptcies throughout the United States.” As a result, while state law comes into play at times (e.g., issues involving property rights), bankruptcy law is federal law. However, the Tenth Amendment guarantees the sovereign powers of states over their local units. So the drafters of Chapter 9 were charged with incorporating the principles of federal bankruptcy law without infringing on a state’s constitutionally mandated authority.

Therefore, a municipality may *only* file for Chapter 9 if it is authorized to do so under state law. Currently, 24 states authorize local governmental units to file municipal bankruptcies, while local units in the remaining 26 states are not authorized to file.<sup>6</sup>

In Michigan, municipalities are authorized to file Chapter 9. But that does not mean a municipality has an easy path to bankruptcy court. A local government and school district in Michigan may only file Chapter 9 through an emergency financial manager (“EFM”).<sup>7</sup>

Under Michigan’s *Local Government Fiscal Responsibility Act*, 1990 PA 72, two sections govern the ability of an EFM to authorize a municipal bankruptcy. With respect to local governments, the EMF has the right to “authorize the local government to proceed under title 11 (the Bankruptcy Code). . . .”<sup>8</sup> This right is subject to review and potential disapproval by the “local emergency financial assistance loan board.”<sup>9</sup> With respect to school districts, the EMF has the authority to “authorize” the school district to proceed under title 11, but this right is not subject to the review of a board.<sup>10</sup>

Under Michigan’s recently enacted *Local Government and School District Fiscal Accountability Act* (2011) (the “2011 EFM Act”), the power of an EFM to authorize a municipality to seek relief under the Bankruptcy Code is tied directly to the governor’s approval. The EMF does not have the authority to directly authorize the municipality or school board to seek relief in bankruptcy. Instead, the EMF has the authority to recommend bankruptcy relief to the governor and state treasurer.<sup>11</sup> The governor then has the right to approve the recommendation.<sup>12</sup> The EMF may only proceed under title 11 of the United States Code (i.e., the Bankruptcy Code) once it has obtained approval from the governor.<sup>13</sup>

### Eligibility Requirement for Filing Chapter 9

Once a municipality navigates the hurdles at the state level to obtain authority to file a Chapter 9 petition, it still may face a battle over whether it is eligible to be a Chapter 9 debtor. A creditor or interested party may move for dismissal and argue that a local governmental unit is not eligible for Chapter 9 relief. Eligibility requirements in Chapter 9 are much more stringent than in other bankruptcy chapters. It is relatively easy for a business to file a Chapter 11, but it is much harder to emerge from Chapter 11. Once a company files Chapter 11, the burden is on creditors or interested parties to demonstrate that a case should be dismissed.

In Chapter 9, a municipality has the burden to demonstrate that it is eligible to file Chapter 9. A municipality must be “insolvent” on a cash-flow basis, meaning it is generally not paying its debts as they become due. Finally, a municipality must intend to effectuate a plan to adjust its debts.

A municipality must also meet at least one of the following four conditions: a) the municipality has obtained an agreement on a plan from creditors holding at least a majority amount of “impaired” claims in each class; b) the municipality has negotiated in good faith with creditors but has failed to obtain an agreement; c)

the municipality is unable to negotiate with creditors because negotiation is impracticable; or, d) the municipality reasonably believes that a creditor may try to obtain a preferential payment or transfer of the municipality's assets.<sup>14</sup>

If there is an objection to eligibility, the municipality has the burden to demonstrate that it filed the petition in good faith.<sup>15</sup> Unlike other chapters of Bankruptcy Code, the eligibility issue in Chapter 9 may be hotly contested.<sup>16</sup>

## Operating in and Emerging from Chapter 9

### Court Authority Over a Municipality While in Chapter 9

Chapter 9 has been drafted to incorporate many of the provisions of the Bankruptcy Code without vesting total authority over municipalities in the federal courts. Municipalities can restructure their debts without fear of having the bankruptcy courts interfere in political decisions.

Chapter 9 specifically prohibits a bankruptcy court from interfering with (1) any of the political or governmental powers of a municipal debtor, (2) any of the property or revenues of the debtor; or (3) the municipal debtor's use or enjoyment of any income-producing property.<sup>17</sup>

In addition, the bankruptcy court cannot appoint a trustee to govern a local governmental unit. The bankruptcy court also cannot order that a municipality liquidate. These powers are significant tools in the Chapter 11 cases, as they act as significant leverage during the negotiation process, but they are unavailable in Chapter 9.

### Treatment of Bonds and Obligations in Chapter 9

Chapter 9 provides for specific treatment of obligations under bonds. Like other chapters of the Bankruptcy Code, the ability for a creditor/bondholder to recover a substantial portion of its claim, or just pennies on the dollar, is highly dependent upon the type of claim it holds.

"General obligation bonds" are bonds payable from general tax revenues and other general income of the municipal debtor and not secured by a pledge of specific revenue or other assets. These types of bonds are treated as general unsecured claims in Chapter 9. Creditors holding general unsecured claims face the risk of getting paid only a small percentage of their claims.

"Special revenue bonds" are bonds that are secured by a pledge of a specific stream of income – most often a particular tax or fees generated by a utility or other project the bonds financed. Special revenue bonds are considered to be secured claims.<sup>18</sup> Since they are secured by specific collateral or revenues, they face a significantly enhanced chance of getting paid when compared with general obligation bonds.

### Assumption or Rejection of Collective Bargaining Agreements

One of the most significant tools available to a municipality in Chapter 9 is the power to reject collective bargaining

agreements ("CBA") and terminate ongoing obligations under the CBA. Generally, CBAs and other executory or ongoing contracts are subject to rejection under Section 365 of the Bankruptcy Code. Rejection means that a party to a contract, like a business or municipality, is no longer required to perform under the contract, and any claims arising from the other party may be treated as general unsecured claims, which ultimately may be paid pennies on the dollar or nothing, depending on the case.

Contracts may be rejected under the business judgment rule, a fairly low threshold. In other words, the debtor must prove that the rejection of a contract is within its sound business judgment. For example, if an unprofitable contract is not rejected, the company will lose significant money and may not survive.

Congress passed legislation that requires a much higher threshold for companies to modify collective bargaining agreements in Chapter 11. A business may only reject or modify a CBA after satisfying potentially exhaustive statutory requirements that relate primarily to conducting lengthy negotiations with the bargaining unit. Chapter 9 does not contain these same rules.

In Chapter 9, a bankruptcy court may authorize rejection if the debtor demonstrates that: 1) the CBA burdens the estate; 2) after careful scrutiny, the equities balance in favor of rejection; and, 3) the prospects of reaching a deal in the near future are not good.<sup>19</sup>

Significant, ongoing debt obligations arising from CBAs may be the catalyst for a municipality to consider a Chapter 9 filing. In Michigan, the 2011 EFM Act, which is currently subject to a court challenge, authorizes emergency financial managers to terminate contracts like CBAs.

### Plan of Adjustment

A municipality emerges from Chapter 9 when it files a plan of adjustment (which is similar to a plan of reorganization in Chapter 11 cases). A plan of adjustment is a document that provides for the treatment of the various claims held by creditors against a municipality and restructuring of liabilities. Only a municipal debtor may file a plan of adjustment (i.e., a creditor cannot file a plan on behalf of the municipal debtor). A plan tracks many of the rules and provisions that govern Chapter 11 business reorganizations. The plan of adjustment permits a local government to obtain a "discharge" of pre-filing debts and obligations and emerge from Chapter 9 with reduced liabilities and obligations. Once the bankruptcy court approves or confirms the plan of adjustment, the municipality may exit its bankruptcy proceeding.

### Recent Chapter 9 Filings

While a few municipalities in Michigan have gone into receivership or related financial hardship proceedings, no

Chapter 9 cases have been filed in Michigan. Chapter 9 cases have been filed across the country, although they are rare. The following summarizes the more prominent filings:

- Hamilton Creek Metropolitan District, a quasi-municipal corporation in Summit County, Colorado, 1989. *Hamilton Creek Metro. Dist. v. Bondholders Colo. Bondshares (In re Hamilton Creek Metro. Dist.)*, 143 F.3d 1381 (10th Cir. 1998). The District had gone through Chapter 9 once before and had a plan confirmed that reorganized debt on its bonds. The District filed for Chapter 9 a second time, but the bankruptcy court dismissed the District's petition because the District was still able to pay debts as they became due.
- Bridgeport, Connecticut, 1991. *In re Bridgeport*, 129 B.R. 332 (Bankr. D. Conn.

1991). Filed voluntary Chapter 9 petition on June 6, 1991. State of Connecticut objected to the petition arguing that the City was not insolvent, the petition was filed in bad faith, and the Mayor was not authorized to file the petition. The Bankruptcy Court of the District of Connecticut found that Bridgeport was not insolvent and sustained the objection. Bridgeport withdrew its request for relief.

- Orange County, California, 1994. *See County of Orange v. County of Orange*, 183 B.R. 609 (Bankr. C.D. Cal. 1995). Plan of adjustment was approved after a lengthy case.
- Desert Hot Springs, California, 2001. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert Hot Springs)*, 339

## Role of a Financial Turnaround Advisor

*By Brad Coulter of O'Keefe & Associates*

A financial turnaround advisor plays an important role in any legal planning for naming an Emergency Financial Manager (EFM), avoiding an EFM, or in the worst case preparing for a potential Chapter 9 filing. A third party turnaround advisor specializes in troubled situations and brings credibility to an acrimonious situation. A turnaround advisor can provide the analytical skill that may be lacking at the municipal level and brings years of experience handling tough workout situations.

The main goal is to avoid getting into an EFM situation. Financial turnaround advisors can work with either the municipal government or school district to develop and implement a plan fixing the issues without the turmoil of the EFM process. If the situation does go to an EFM, financial turnaround advisors will likely play two main roles: providing various financial analyses of the situation and testifying in court to support actions taken by the EFM or in a Chapter 9 filing.

Turnaround advisors are used to dealing with chaotic situations where data and personnel are not always reliable. A good advisor is invaluable in analyzing data and determining the main drivers of a situation. Financial data can often be intimidating and a good advisor can boil down the data to an easy to understand level. This skill will be very important as the likelihood of legal challenges to cost cutting or revenue raising actions could require the advisor to make presentations to various constituents or provide testimony in support of the restructuring plan.

If court challenges to the EFM bog down the restructuring process, a Chapter 9 filing may become a reality. The financial

turnaround advisor will be crucial in defending challenges to the filing such as proving the entity is insolvent. In addition, the volume of financial data required for a bankruptcy filing can overwhelm the municipality's accounting staff and an advisor is often asked to handle all data preparation and analysis related to the case. Advisors may also play a key role in the negotiating process, which may take place under the threat of the appointment of an EFM and/or Chapter 9 municipal filing. A good advisor is a key member of the legal team for planning strategy, providing analysis, and constructing a plan of reorganization for exiting Chapter 9.

In summary, financial turnaround advisors can prove beneficial in all three restructuring scenarios:

- The best course is working with the city or school district to develop a plan and avoid EFM action.
- If an EFM is named, assist the EFM in developing a restructuring plan plus testify in court when necessary to support the plan
- In a worst case scenario, provide the financial horsepower necessary to guide a municipality or school district through a Chapter 9 proceeding.

### About the Author

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F.3d 782 (9th Cir. 2003). Plan of adjustment was approved.

- Camp Wood, Texas, 2005. *In re City of Camp Wood, Texas* (Bankr. W.D. Tx. Case No. 05-54480). Plan of adjustment was approved.
- Village of Alorton, Illinois, 2005. *In re Village of Alorton* (Bankr. S. D. Ill. Case No. 05-30055). Plan of adjustment was approved.
- Gould, Arkansas, 2008. *In re City of Gould, Arkansas* (Bankr. E.D. Ark. Case No. 08-12413). The City of Gould filed but subsequently moved to voluntarily dismiss its case.
- Vallejo, California, 2008. *In re City of Vallejo*, 408 B.R. 280 (B.A.P. 9th Cir. 2009). Filed for Chapter 9 on May 23, 2008. Labor unions filed motion to dismiss. Motion was denied, unions appealed, and U.S. Bankruptcy Appellate Panel for the Ninth Circuit affirmed, allowing City to remain in Chapter 9. Chapter 9 Plan was filed on January 9, 2011. This case is still ongoing.
- Westfall Township, Pike County, Pennsylvania, 2009. *In re Westfall Township* (Bankr. M.D. Pa. Case No. 09-02736). Plan of adjustment was approved.
- Boise County, Idaho, 2011. Bankruptcy Court for the District of Idaho, Case No. 11-00481-TLM. Chapter 9 Petition was filed on March 1, 2011. Boise County filed because a large judgment was entered against it and it alleges that it cannot pay its debts as a result.

## Conclusion

It remains to be seen whether Chapter 9 bankruptcy will be used as a tool to restructure the debts of cities and towns in Michigan. Governor Snyder, who must approve any bankruptcy filings, recently announced that he did not expect any bankruptcy proceedings to take place. But the winds often change quickly in politics. Furthermore, if the constitutional challenge to the 2011 EFM Act is successful, Chapter 9 may be the only option to terminate CBAs and take other action to restore a municipality's balance sheet.

Those who are convinced that no Chapter 9 filings will take place should remember that most thought that General Motors would not file bankruptcy, let alone emerge from

bankruptcy as a stronger, leaner company. It is likely that the *threat* of Chapter 9 will be a factor in negotiations between cities and bargaining units over cost-cutting measures, even if it is the unspoken “elephant in the room.” At a minimum, municipalities, creditors and practitioners would be well-served to understand the Chapter 9 process, and the potential rights that may be impacted in a Chapter 9 proceeding. 🏢

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## Endnotes

- 1 11 U.S.C. §901, *et. seq.*
- 2 11 U.S.C. §101(40).
- 3 2 *Collier on Bankruptcy* ¶ 101.40, 16<sup>th</sup> ed.
- 4 *See e.g. In re County of Orange*, 183 B.R. 594, 601 n.11 (Bankr. C.D. Cal. 1995).
- 5 *See In re Westport Transit Dist.*, 165 B.R. 93, 95-96 (Bankr. D. Conn. 1994) (*transit district*); *In re New York City Off-Track Betting Corp.*, 427 B.R. 256, 265 (Bankr. S.D.N.Y. 2010) (*off-track betting company*).
- 6 *Source: The Handbook of Municipal Bonds*, 2008.
- 7 *See MCL §141.1222 and MCL §141.1241.*
- 8 MCL §141.1222.
- 9 *Id.*
- 10 MCL §141.1241(3).
- 11 MCL §141.1523.
- 12 *Id.*
- 13 *Id.* Recently, 28 plaintiffs filed a lawsuit challenging the constitutionality of the 2011 EFM Act.
- 14 §11 U.S.C. §109(c).
- 15 11 U.S.C. 921(c).
- 16 *See In re City of Vallejo*, 408 B.R. 280 (B.A.P. 9th Cir. 2009).
- 17 11 U.S.C. §904.
- 18 11 U.S.C. § 902-2.
- 19 *N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

# Discovery Violations Involving Electronically Stored Information—The Current Trend Of Federal Court Cases Relevant To Municipalities

By Daniel Klemptner of Johnson Rosati

As a result of numerous, recent decisions in the federal court system, municipal litigants have been forced to rapidly become familiar with how to handle Electronically Stored Information (ESI) during the course of a lawsuit. This has required governmental agencies to understand and identify the type of information housed within their information systems and networks; implement appropriate protocols to safeguard ESI; and, when applicable, live with the consequences of not meeting the proper standards for dealing with ESI under the Federal Rules of Civil Procedure.

Many articles have already addressed the items that a municipality must preserve, and the kinds of storage systems available to accomplish this goal. The purpose of this article is first to briefly review a few common circumstances that generally give rise to a municipality's obligation to preserve ESI, and second to provide some current examples of federal decisions that illustrate the apparent trend reflecting courts' willingness to punish noncompliance.

## What Events Can Trigger a Municipality's Duty To Preserve ESI?

The federal standard imposes an independent duty to preserve relevant evidence when the party in possession: 1) **knows that litigation is pending or probable**, and 2) **can foresee the harm or prejudice that discarding the evidence would cause to the other side**. In other words, a party has a duty to preserve evidence that it can reasonably foresee as being relevant and discoverable in a potential legal action.

Unfortunately, this murky directive offers little guidance on what seemingly routine, daily occurrences should actually prompt a municipality to understand that a lawsuit is looming. Nevertheless, current court decisions seem to indicate that governmental agencies must begin to take precautionary measures sooner rather than later - even before a lawsuit is filed. The following is intended to be a non-exhaustive list of events that occur in the usual course of a municipality's operations for which Courts either have held or are likely to hold governmental agencies accountable for a failure to preserve evidence in anticipation of litigation:

A. Complaint and/or lawsuit

- B. Complaint (non-lawsuit) alleging harassment/discrimination in the workplace
- C. Investigation or proceeding initiated by the Equal Employment Opportunity Commission, Department of Justice, and/or the Michigan Department of Civil Rights
- D. Investigation or proceeding initiated by an internal compliance officer or ombudsman
- E. Charge of unfair labor practice
- F. Labor arbitration
- G. Employee grievance under a collective bargaining agreement
- H. Civil service proceeding
- I. Formal notice/correspondence to preserve information or evidence
- J. Internal investigation into employee misconduct
- K. Notice of intent to sue
- L. Damage claim form or any other kind of internal incident report form
- M. Administrative proceedings (i.e. denial by planning commission and/or zoning board of appeals)
- N. Freedom of Information Act request seeking materials on subjects that frequently evolve into subsequent litigation (i.e. police reports or jail records that involve the use of force on an arrestee or inmate)
- O. Personal injury or automobile accidents involving government owned buildings and vehicles
- P. Correspondence that an individual has retained an attorney to pursue a potential cause of action (such as a cease and desist letter)

When confronted with any of these situations, municipal officials should be vigilant to ensure the preservation of any ESI (as well as other evidence). This is best accomplished by consulting with an attorney and an information technology professional as early as possible, in addition to maintaining an existing policy or protocol to safeguard items that regularly have evidentiary value in civil litigation.

### What Consequences Could a Municipality Face For Breaching The Duty To Preserve ESI?

When the duty to preserve ESI is breached, a court may exercise its authority to impose the appropriate discovery sanctions. To evaluate the extent of the sanctions, the Sixth Circuit uses the same four-factor test that applies to all other discovery transgressions: (1) whether a party's failure to cooperate is due to willfulness, bad faith, or fault; (2) whether the party's failure to cooperate in discovery caused the opponent to suffer prejudice; (3) whether the party was warned that a failure to cooperate could lead to the sanction; and (4) whether less drastic sanctions were first imposed or considered.

The cases that follow are a few recent examples where federal courts have imposed sanctions for ESI-related discovery violations in litigation relevant to municipalities.

- *Plunk v Village of Elwood*, 2009 WL 1444436 (ND Ill). In this civil rights action, the plaintiffs argued that the municipal defendants destroyed and failed to preserve and/or back-up relevant ESI on multiple computer hard drives. After agreeing with the plaintiffs, the court ordered several sanctions, including: 1) instructing the jury "that the defendants failed to preserve information which existed on its computers even though it was on notice that it should preserve that evidence"; 2) precluding the defendants from arguing that the absence of any documents supporting plaintiff's contentions should be considered by the jury against plaintiffs; and 3) instructing the jury that it may infer that the failure to preserve this evidence means that the evidence contained on the computer hard drives was not favorable to defendants.
- *Technical Sales Associates, Inc v Ohio Star Forge Co*, 2009 WL 728520 (ED Mich). The defendant deleted emails and files at a time when the parties were in litigation and while it was aware that plaintiff was seeking a forensic examination of ESI. The court assessed monetary sanctions for the cost of the forensic examination (\$17,786.25) and left open the opportunity to provide an adverse jury instruction similar to the one instituted in *Plunk v Village of Elwood* (above).
- *Grange Mutual Casualty Company v Mack*, 270 Fed Appx 372 (6th Cir 2008). The Sixth Circuit Court

of Appeals affirmed default judgments of \$3.4 million and \$5.4 million entered as sanctions for the defendant's failure to respond to discovery in prior RICO actions.

- *Fleming v City of New York*, 2007 WL 4302501 (SD NY). A former New York City police officer filed a civil rights action against the City. The City failed to produce data concerning disciplinary records and demographic statistics of its employees to the plaintiff's expert even though the City's expert was granted access to this information. The court excluded the opinions of the City's expert which relied on this data, and awarded plaintiff costs and attorney fees.

### Conclusion

These cases demonstrate that a municipality should be diligent in preserving ESI even before a lawsuit begins, and must carefully comply with the Federal Rules of Civil Procedure for producing ESI in the discovery process. Otherwise, depending on the degree of noncompliance, the governmental agency leaves itself exposed to the risk - if not the certainty - of federal court sanctions. 🏢

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# Preserving Long Life Electronic Information— Special Concerns for Governmental Entities

*By Thomas D. Esordi of Kitch Drutchas Wagner Valitutti & Sherbrook*

In today's corporate world, businesses are generating enormous amounts of electronic information. Most of this information becomes obsolete even before hardware and software configurations can no longer handle it. At a minimum it becomes legacy data and remains out the litigation process.

Governmental entities face different challenges. Governmental entities may be required to maintain electronic information for long periods of time, if not forever. For those records, a preservation plan must take into account not only hardware and software advancements, but limitations of storage media and the use reliability of the information. This article will address handling those obstacles.

## Developing Requirements for Governmental Entities

Email, as the new primary means of business communication, has become the focus of decision after decision in the ever-entertaining arena of discovery disputes. The amount of email generated, coupled with its own inherent preservation and production problems, has contributed to this growth.

Electronically-stored government records face the same potential for exponential growth. The Federal Records Act of 1950 (44 U.S.C. 3101) requires agency heads to "make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and designed to furnish the information necessary to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities." As electronic information became more prevalent, expansion on this general directive was required. The Paperwork Reduction Act of 1980 (44 U.S.C. 3501) calls for the coordination of three electronic record keeping elements: (1) the integration of automatic data processing; (2) telecommunications; and (3) records management policies and procedures. Office of Management and the Budget (OMB) Circular No. A-130 was issued to specifically cover information in any form in meeting creating, maintaining, and disposal requirements of the Federal Records Act of 1950.

State laws implementing similar obligations are prevalent. For example, for purposes of effectively reducing the significant paperwork and associated costs in the daily operations of state

government, Hawaii enacted Act 177, Session Laws of Hawaii, Regular Session of 2005 (HB 515), allowing state and county agencies to create and maintain their records in electronic format. This act calls for storage of government records in electronic format, as well as the conversion of existing paper and microfilm documents to electronic documents. The Illinois [Local Records Act \(50 ILCS 205\)](#) also allows local government agencies to reproduce existing public records in digitized electronic format. However, the Act only allows this process if electronic records are reproduced on a "durable medium that accurately and legibly reproduces the original record in all details," and "that does not permit additions, deletions, or changes to the original document images."

While business entities rapidly continue to produce records in electronic form, most if not all of this information will be subject to destruction within industry standard timelines that accommodate current technological limitations. But as governmental entities generate electronic information--which by its nature is designed to have a lengthy if not infinite life span--two issues will develop: (1) can electronic information be retained for long periods in compliance with applicable law, and (2) since this information remains available, can it be maintained in a form suitable for use in the defense of a governmental client?

## Software and Hardware Restraints

A fundamental issue involving the preservation of electronic information with a long life span develops from the nature of the information itself. Anyone who has dealt with the most basic e-discovery issue will attest that it is inherently more fragile than traditional technologies, because it is more easily subject to corruption and alteration. As time progresses, the briskly-increasing number of formats and the increasing complexity of each unit of information (many times combining these various formats) exacerbate this issue and increase software dependency. Copyright/intellectual property rights associated with much of the software in use and the absence accepted industry standards for long-term access makes software dependency a negative factor.

Each type of storage media available for storage of electronic information with a long life span has its own



shortcomings. The media's negative attributes are typically emphasized when considered for long-term storage. Hard disk drives are routinely used in forms ranging from corporate servers to hand-held devices. Information is accessed quickly, efficiently, and in its intended format. But the life expectancy of a hard drive is not that long—10 years would be an outside expectation.. Moreover, close spacing between the heads and the disk surface makes hard disk drives vulnerable to head crash damage. Physical shock, contamination, and corrosion are often the culprits of such damage.

Given these hard-drive issues, the use of tape drives is generally the preferred archiving technology, despite significantly slower accessibility rates. Unfortunately, the two key components that make tape drives more favorable for back up purposes also make it the less-than-perfect medium for long life span information. Tape is rewritable and is not designed to read or write individual files. Moreover, software for tape drive use tends to be highly proprietary. Optical discs offer 100% WORM media. Limited rpm rates from a non-fixed drive and the weight of the optical heads also contribute to slow data access rates.

### Preservation Techniques Including Meta-data Maintenance

Long life span electronic information retention plans must include an assumption that the periodic transfer of electronic information from one configuration to another, or from one technology to another, is inevitable. Those of us who have read case after case imposing discovery sanctions based on the destruction or alteration of meta-data from this type of activity cringe at the thought. Given this inevitable migration of information to new configurations or formats, a method must be selected to ensure such information is appropriately maintained to conform to applicable standards. This includes not just the records themselves, but also the meta-data that goes with them. The recent decision of *National Day Laborer Organizing Network v. U.S. Immigration and Customs Enforcement Agency*, 2011 WL 381625 (S.D.N.Y. Feb. 07, 2011) makes clear that meta-data must also be produced in response to a F.O.I.A. request. Additionally, certain levels of meta-data must be maintained if a municipality is to have any hope of using such information in support of a defense.

The "computer museum" is always presented as an alternative. Saving all hardware, software, and documentation needed to support stored electronic information, however, is unrealistic for many governmental agencies. Costs associated with equipment storage will be overwhelming. Furthermore, the likelihood of hardware failure without available replacement materials is enormous. Just envision the scenario with a separate system for every 5 years' worth of information.

The next alternative is usually "emulation." By creating programs and/or hardware to simulate previous versions

while preserving the functionality of the information, this approach removes the need to maintain the original hardware and software. While the creation of simulation programs can be time-consuming and difficult to achieve, and may involve significant original costs, arguments creating an emulator may prove to be amore cost efficient solution than simply keeping the information in its original forms.

An additional approach involves packaging the electronic information with all information on how to interpret it. This is typically referred to as "encapsulation." Encapsulation packages are usually very large in size, so the migration of the encapsulation packages to different formats or configurations—the creation of encapsulated packages of encapsulated packages—is the largest drawback.

Probably the most common approach of preserving long life electronic information includes a combination of "refreshing" and "conversion." Refreshing involves the transfer of information to a new media. The conversion process then changes the information from one format to another. Often information can be moved out of a proprietary format. Tests to determine what information, including meta-data, will be lost are an absolute necessity, sometimes proving the process to be less attractive.

Whether you want to present it as evidence or simply have it available for public access, information--not just electronic information, but information in any form—is only valuable if it can be used. Meta-data is essential to this purpose. Meta-data must contain standardized elements and fields ("structured format"), as well and consistent recognizable content (e.g., "03/17/11" as the standard expression of a date), commonly referred to as controlled vocabularies. Meta-data standards are typically based on "The Dublin Core elements." These elements, intended for cross-domain information, provide fundamental components to describe and catalogue most information. The Dublin Core Metadata Initiative (<http://dublincore.org/>) provides an open forum for the development of interoperable online meta-data standards. Regardless of the migration process, adoption of appropriate meta-data elements will increase the successful use of such information.

### Addressing the Two Developing Issues

Preservation of long life span electronic information will place an ever increasing burden on multiple levels of governmental entities. The entity will need to address the assessment demand of time and money, whether it includes hired expertise, increased staffing, or system hard costs. Because communication technology is evolving so quickly, some decisions will be made with imperfect information or somewhat uncertain expectations—i.e., there will be anticipated miscalculations. The ongoing process of analyzing and implementation should be well documented and supported.

In development of the plan to preserve electronic information with a long life span, the following topics should be considered.

- The frequency at which the information will be accessed,
- The amount of time required to maintain the information (its lifespan), and
- Potential cost savings by mass storage with anticipation of sharing within the organization.

Once these issues are addressed, a plan can be put into place with the following considerations:

- What media source will be selected?
- What software is efficient and appropriate and will the proprietary nature impact other decisions?

- What hardware is necessary to process and store the information?
- What process will be used to assure that the information remains accessible and reliable, while addressing applicable security requirements?
- What level of meta-data will remain intact during anticipated migrations?

Consideration of these factors will help ensure that electronic information is retained for long periods in compliance with applicable law and can be maintained in a form suitable for use in the defense of a governmental client. 🏰

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## State Law Update

*By Ronald D. Richards, Jr. of Foster, Swift, Collins & Smith, PC*

### Municipal Employer May Require Returning Works To Provide Information on “Nature of Illness”

*Lee v City of Columbus*, \_\_\_ F3d \_\_\_ (6<sup>th</sup> Cir 2011)

The Sixth Circuit Court of Appeals has held that a municipal employer did not violate its employees’ legal rights by requiring workers returning from sick leave or restricted duty to submit a doctor’s note disclosing the “nature of the illness” to their immediate supervisors. In *Lee*, the City issued a directive that required returning employees to submit to their immediate supervisor a doctor’s note that states the nature of the illness and whether the employee was capable of returning to regular duty. Employees, upset that they had to provide medical information to their immediate supervisors, filed a class action lawsuit claiming violations of the Rehabilitation Act and privacy provisions of the United States Constitution. The trial court sided with the employees, finding the directive to be overly intrusive.

The Sixth Circuit disagreed, siding with the employer. It determined that it is lawful for municipalities to ask a returning employee about his or her general diagnosis, even if it could lead to information about an employee’s disability. And even if the city’s policy could be characterized as a disability-related inquiry, it was okay because it applied uniformly to all employees returning from leave.

The Court also ruled that Columbus’ directive did not violate employee privacy rights under the United States Constitution. It found that the directive was not an

“unwarranted intrusion” into “all areas of an employee’s personal medical information” without sufficient justification. So there was no violation of privacy rights protected under the Constitution.

### A Transfer By Death is a “Conveyance” For Purposes of the General Property Tax Act, But Does Not Uncap the Property’s Value

*Klooster v City of Charlevoix*, 488 Mich 289 (2011)

The Supreme Court recently tackled the issue of whether a transfer by death or creating a subsequent joint tenancy is a “conveyance” of property that permits a taxing authority to uncap the property’s value under the General Property Tax Act (GPTA). There, James and Dona Klooster acquired title to the property in 1959 and held it as tenants by the entirety. In 2004, Dona Klooster quitclaimed her property to James Klooster, leaving him as the sole owner. On the same day, in August 2004, James Klooster quitclaimed it to himself and his son, petitioner Nate Klooster, as joint tenants with rights of survivorship. In January 2005, James Klooster passed away, leaving Nate as the sole owner by law (the January 2005 conveyance). Later, Nate quitclaimed the property to himself and his brother Charles as joint tenants with rights of survivorship (the September 2005 conveyance).

Thereafter, the city assessor issued a notice of reassessment indicating that the taxable value had been reassessed due to the

transfer of ownership. The reassessment increased the taxable value by about \$35,000. The plaintiff was unsuccessful at the city's board of review and Tax Tribunal. The Court of Appeals reversed the Tax Tribunal.

The Supreme Court reversed the Court of Appeals, and ruled the Tax Tribunal reached the correct result. The Court's relevant holdings are as follows:

1. The Court held that the August 2004 termination of the joint tenancy by death of a co-tenant was not a transfer of ownership that uncapped the property. This circumstance falls within the joint-tenancy exception from the definition of "transfer of ownership" in MCL 21.27a. Under the joint-tenancy exception, an original owner may convey property into a joint tenancy without uncapping the property as long as the original owner is also a co-tenant in the resulting joint tenancy.
2. The vesting of a fee simple in the last surviving co-tenant of a joint tenancy with rights of survivorship is a "conveyance" under the GPTA and requires no additional writing beyond that which created the joint tenancy.
3. The January 2005 conveyance did not uncap the property since Nate was a joint tenant when James Klooster initially created the joint tenancy in August 2004 and Nate remained a joint tenant since the joint tenancy was initially created until the joint tenancy terminated.
4. The September 2005 conveyance was a transfer of ownership that did uncap the property. This is because when Nate conveyed the property to himself and Charles in September 2005, the property went from a state of sole ownership into a new joint tenancy. The September 2005 conveyance was not excluded from the definition of "transfer of ownership" in MCL 211.27a(6) because Nate was not an original owner of the property before the joint tenancy was initially created.

#### Front-Lot Owners Are Not Stripped Of Their Riparian Rights By Public Road That Is Parallel To the Lake

*2000 Baum Family Trust v Babel*, 488 Mich 136 (2010)

A dedication to the county road commission of a public road running parallel to a lake between front-lot property and the lake does not strip the front-lot owners of their riparian rights and conveys to the local road commission only those public uses of the road, not riparian rights. *Babel* involved a

road that ran parallel to the northern part of Lake Charlevoix. The plaintiffs own front lots in a subdivision on the shore, but the road abuts the shoreline and separates their lots from the lake. The road was dedicated under the 1887 Plat Act to the County Road Commission. At one point, back-lot owners began using the waterfront in front of the plaintiffs' homes to store and maintain docks. That prompted the plaintiffs to sue. The County Road Commission counterclaimed, alleging trespass against the plaintiffs as to the road. The trial court ruled for the County Road Commission. The Court of Appeals affirmed.

The Michigan Supreme Court reversed. It held that the road dedication did not strip the front-lot owners of their riparian rights. It noted that generally, it is an "indispensable requisite" that riparian lands actually touch the water. But Michigan case law recognized an exception – front-lot owners whose property is separated by a public road running parallel to the water are deemed to have riparian rights. The Court continued to recognize that exception, and concluded that the dedication conveyed to the road commission only those public users of the road, not riparian rights to the lake.

#### Failure To Respond To A Demand For Reply To Affirmative Defenses In A FOIA Case Leads To Dismissal

*Donaldson v Dep't of Agriculture*,  
unpublished per curiam opinion of the Court of Appeals  
(Docket No. 296986, dec'd 1/25/11)

The Court of Appeals upheld summary disposition in the defendant's favor when the defendant filed affirmative defenses that demanded a reply and the plaintiff did not file a reply. In *Donaldson*, the plaintiff made several FOIA requests to the Department of Agriculture. The plaintiff later sued to compel records. The Department filed a responsive pleading and affirmative defenses that demanded an answer. The plaintiff filed no response. The Department then moved to dismiss, arguing that the plaintiff admitted the Department's affirmative defenses – including that the plaintiff failed to state a claim – by failing to respond to the affirmative defenses. The trial court granted the Department's motion.

The Court of Appeals affirmed. It noted that affirmative defenses typically do not require responsive pleadings. But if a reply is demanded, then the opposing party must file a responsive pleading. Failure to reply to affirmative defenses that demand a reply results in admitting the matters alleged in the affirmative defenses. Because the plaintiff did not reply, the plaintiff admitted the affirmative defenses. Since those affirmative defenses went to the heart of the plaintiff's claims, the trial court properly dismissed the plaintiff's claim. 🏠

# Federal Law Update

By Marcia Howe of Johnson, Rosati, LaBarge, Aseityne & Field, PC and Crystal L. Morgan of Law Weathers

## U.S. Supreme Court

### First Amendment, Freedom of Speech; Right to Picket at the Funerals of Military Personnel

*Snyder v Phelps*, 131 S Ct 1207  
(March 2, 2011 - Chief Justice Roberts)

Fred Phelps, Sr. and members of the Westboro Baptist Church picketed near the funeral service of Marine Lance Corporal Matthew Snyder. The picket signs expressed Westboro's views that God hates the United State because it tolerates homosexuality, particularly in the military, and that God kills American soldiers as punishment. The signs were also critical of the Catholic Church because of its clergy sex scandal. Westboro's picketing occurred in compliance with local police regulations and was non-violent. Matthew Snyder's father later sued Westboro in federal court on a number of state tort theories. A jury found Westboro liable for intentional infliction of emotion distress, intrusion upon seclusion and civil conspiracy and awarded Snyder \$2.9 million in compensatory damages and \$8 million in punitive damages. The district court reduced the compensatory damages to \$2.1 million. On appeal the Fourth Circuit concluded that Westboro's speech pertained to matters of public concern, were not provably false and were in the form of hyperbolic rhetoric, and thus was entitled to full protection under the First Amendment.

The United States Supreme Court agreed that Westboro's speech was entitled to protection under the First Amendment and vacated the jury verdict and damage awards. Based upon the content, form and context of Westboro's speech, the Court ruled it dealt with matters of public concern. As part of its analysis, Snyder's argument that Westboro had mounted personal attacks on Snyder and his deceased son was rejected. While the Court's Opinion inferred some distaste for Westboro's tactics, Westboro had not disrupted the funeral services and thus, was entitled to picket at the permitted location. Its conduct did not, in and of itself, cause any distress. Rather, any distress resulting from Westboro's demonstration was based upon the content of its speech. As such, Westboro's speech was entitled to the First Amendment's special protection.

Snyder's claim that he was a captive audience to Westboro's speech was rejected. By acknowledging Westboro's statements were offensive and hurtful to some, they pertained to issues of public concern. The founding principles of the United States

require the Court to protect Westboro's right to make offensive and hurtful statements when they comply with reasonable time, place, and manner regulations on protected speech.

### A District Attorney is Allowed to Rely on Law School Professional and Ethical Educations as They Pertain to the Duty under Brady to Disclose Exculpatory Evidence Where There is Evidence of Only a Single-Incident

*Connick v Thompson*, \_\_\_ US \_\_\_, 2011 WL 1119022  
(March 29, 2011)

As you may recall, the dramatic unfolding of events in this case nearly resulted in the execution of an innocent man for conviction based upon a robbery and murder until the Assistant Prosecutor, who was diagnosed fourteen years later as terminally ill with cancer, finally admitted he withheld exculpatory evidence. A string of robberies, one of which resulted in the death of a prominent business man's son, was occurring in New Orleans. A few weeks later, a car was stopped on the street by a stranger demanding their valuable. The three passengers, all siblings began to comply, but the driver began to fight with assailant, which caused the robber to flee. But, during the fight, the assailant was injured and his blood dropped onto the victim driver's pants. A few weeks later, when Mr. Thompson's picture was in the paper, one of the victims identified him as their assailant as well. Mr. Thompson was arrested and prosecuted for armed robbery. After his armed robbery conviction, he was then prosecuted for death of the business man's son to prevent him from testifying or facing severe cross examination. Four prosecutors were assigned to the trial. During the investigation and up to a few days before the murder trial occurred, the swatch of clothing disappeared from the evidence and did not return until two days before the criminal trial. Although the blood type on the swatch of pants did not match the blood type of the accused, this evidence was withheld from the criminal defendant and not revealed until the guilty prosecutor confessed to his misdeed. "In late April 1999, Thompson's private investigator discovered the crime lab report from the armed robbery investigation. Mr. Thompson's day of execution was May 20, 1999.

The Orleans Parish District Attorney's Office conceded that, during the prosecution, they failed to abide by their duty in *Brady v Maryland*, 373 US 83(1963). Although no one from the District Attorney's office could remember any specific *Brady* training, they admittedly were familiar with its general requirements. The Office's policy generally was to turn



over any and all reports. Thus, the jury rejected the claim of an unconstitutional office policy, finding in favor of Thompson based upon a failure to train the Office's prosecutors on their *Brady* obligations. In his civil trial, he was awarded \$14,000,000.00, a million dollars for each year in prison.<sup>1</sup>

The Majority's rationale is based upon the rule that 42 USC 1983 applies to a municipality or governmental agency if it subjects a person to a deprivation of rights or causes someone to be subjected to a violation because a local government can only be liable or responsible for their *own* legal acts, 2011 WL 1119022, p.13, citing *Monell v DSS*, 436 US 658, 692(1978). It notes that although liability can attach in limited circumstances for a failure to train, the municipality's culpability is "most tenuous where a claim turns on a failure to train. *Id.*, 2011 WL 1119022. A failure to train or "policy of inaction" is a constitutional violation only where it has notice that its program has a particular need, that if not addressed, will result in constitutional violations, which "is the functional equivalent of a decision by the city itself to violation the Constitution. *Id.*, p.14.

Mr. Thompson's attorney did not rely on a pattern of constitutional violations that demonstrates a "continued adherence to an approach that they know or should know has failed to prevent tortuous conduct by employees"... demonstrating a "conscious disregard for the consequences of their actions" or inactions. Here, the District Attorney's Office suffered only four reversals based upon *Brady* violations for the 10 years proceeding Mr. Thompson's conviction, and those were similarly situated to the facts of this case. In this case, Thompson relied upon the single-incident theory due to the "obvious need" and "consequence of providing specific *Brady* training. Unlike the obvious need to instruct novice police officers about the illegality of using excessive force, the law school training differentiates attorneys from police officers. *Id.*, p.15. "These threshold requirements are designed to ensure that all new attorneys have learned how to find, understand, and apply legal rules". *Id.* P 16. They also must satisfy both character and fitness standards and are personally subjected to ethical standards. The majority concluded that licensed attorneys, who make legal judgments in their prosecutorial capacity, do not "present the same 'highly predictable' constitutional danger as the untrained police officers. When Thompson argued the necessary training about nuisances in the admissible *Brady* evidence, the Court was concerned that such a test would open up the floodgates of litigation and result in the courts', or worse yet, the juries micromanagement of the prosecutor's office management. Merely showing some additional training would have been useful will not establish municipal liability. The majority rejected the appellate court's rationale because, although *Brady* does encompass gray areas of the law and may be difficult, it does not follow that Prosecutors will obviously make wrong decisions.

The bottom line is that to show a *Brady* violation, plaintiff must establish a violation by the municipality. "To provide deliberate indifference, Thompson needed to show that Connick was no notice that, absent additional specified training" it was "highly predictable" that the prosecutors in his office would be confounded by those gray areas and make in correct *Brady* decisions as a result. Thomson had to show it was *so* predictable that failing to train the prosecutors amounted to "*conscious disregard* for defendants' *Brady* rights. Concluding that the case did not fall within a single-incident liability, the summary judgment motion should have been granted because of the failure to prove a "pattern of violations that would 'establish that the 'policy of inaction' [was] the functional equivalent of a decision by the city itself to violation the Constitution".

#### Failure to Preserve the Qualified Immunity Defense

*Ortiz v Jordan*, \_\_ U.S. \_\_; 131 S Ct 884; 178 L Ed2d 703; 79 USLW 4056(2011)

In *Ortiz v Jordan*, \_\_ U.S. \_\_; 131 S Ct 884; 178 L Ed2d 703; 79 USLW 4056(2011), the plaintiff/prisoner reported she was sexually assaulted by a correction officer. Although she reported the incident to her unit's case manager, nothing was done to protect her from further assaults. Consequently, she was assaulted the next night. The jail investigator did not come to her aide, but allegedly retaliated against her reports by placing her in shackles and handcuffs and putting her into solitary confinement.

The Officers filed a Motion for Summary Judgment, asserting the qualified immunity defense. After the Motion was denied, a Notice of Interlocutory Appeal based upon qualified immunity was not taken. The Plaintiff was successful at trial. The Defendants, however, failed to file any post trial motions. The failure to seek an interlocutory appeal and the failure to file the post trial motions precluded the appellate court's review. Because the Defendants argued the evidence was insufficient as a matter of law, they were obligated to bring a Rule 50(b) Motion to preserve the issue.

#### Sixth Circuit Court of Appeals' Decisions

##### First Amendment, Religious Freedom Claim

*American Civil Liberties Union of Ohio Foundation, Inc v DeWeese*, \_\_ F3d \_\_, 2011 WL 309657 (6<sup>th</sup> Cir (Ohio) February 2, 2011 - Case No. 09-4256 - Circuit Judge Clay)

A federal court declared that Judge DeWeese, a duly elected judge in the General Division of the Common Pleas Court in Richland County, Ohio, violated the Establishment Clause and enjoined the State court Judge from displaying his poster of the Ten Commandments in his courtroom. In response,

Judge DeWeese created and hung a new poster entitled “Philosophies of Law in Conflict” which contained statements of “Moral Absolutes: The Ten Commandments” and “Moral Relatives: Humanist Precepts”, and editorial comments. The final comment at the bottom of the new poster read:

The cases passing through this courtroom demonstrate we are paying a high cost in increased crime and other social ills for moving from moral absolutism to moral relativism since the mid 20<sup>th</sup> century. Our Founders saw the necessity of moral absolutes. President John Adams said, “We have no government armed with power capable of contending with human passions unbridled by morality and religion. Our Constitution was made for a moral and religious people. It is wholly inadequate for the government of any other.” The Declaration of Independence acknowledges God as Creator, Lawgiver, “Supreme Judge of the World,” and the One who providentially superintends the affairs of men. Ohio’s Constitution acknowledges Almighty God as the source of our freedom. I join the Founders in personally acknowledging the importance of Almighty God’s fixed moral standards for restoring the moral fabric of this nation. Judge James DeWeese.

The ACLU sued seeking declaratory and injunctive relief alleging a second violation of the Establishment Clause of the First Amendment to the United States Constitution. The parties filed cross-motions for summary judgment. The District Court granted the ACLU’s motion finding that the new poster violated the First and Fourteenth Amendments of the United States Constitution as well as the Ohio Constitution.

The Sixth Circuit Court of Appeals affirmed the decision of the District Court for the Northern District of Ohio relying heavily on DeWeese’s past violation of the Establishment Clause. After finding that the ACLU had standing under Article III to bring a claim, the appellate court relied upon the test set out in *Lemon v Kurtzman*, 403 US 602 (1971) to determine if the Defendant’s conduct violated the Establishment Clause. *Lemon* asked: i) whether the action has a secular purpose; ii) whether the action endorses religion; and iii) whether the action fosters excessive State entanglement in religion. Failing any one of the three-parts of the *Lemon* test is an Establishment Clause violation.

Finding Judge DeWeese’s attempt to articulate a secular purpose for the new poster was a sham, the appellate court rejected Judge DeWeese’s attempt to show a secular purpose by reframing his prior plain endorsement of religious statements in a poster by allegedly addressing an analysis of conflicting legal and moral philosophies. DeWeese’s past violation of the Establishment Clause in a manner similar to the new poster weighed heavily against a finding this new poster had a genuine secular purpose where the new poster’s patently

religious content showed a religious purpose. On this basis alone, the Judge’s conduct violated the Establishment Clause. Based upon the endorsement test set forth in *Lemon*, the court determined that DeWeese’s clear declaration of moral absolutes (i.e., The Ten Commandments) set forth in the new poster should prevail over the moral relatives in what he framed as a conflict of legal and moral philosophies. This direct link between the government and religion and his explicit endorsement of religion again violated the Establishment Clause. The Excessive Entanglement Test was not addressed by either the parties in their briefs or the Court’s opinion.

Lastly, the Court’s opinion concluded that the Defendant’s display of the new poster endorsing religion in a public courtroom did not constitute private religious expression protected under the Free Speech Clause.

#### First Amendment/Retaliation Claim for Reporting Illegalities

*Kennedy v City of Villa Hills, Kentucky*,  
2011 WL 1045t445 (6<sup>th</sup> Cir., Mich.)  
(Judges, Karen Nelson Moore/author,  
joined by Judges Siler and Griffin

During a zoning dispute about a strip mall expansion next to his home, the Plaintiff approached a police officer/building inspector, but the officer refused to speak to him. The Plaintiff, who lived on the adjacent parcel to a strip mall and presumed the area to be zoned residential, sued the strip mall’s owner. Nonetheless, bulldozers and construction workers arrived to begin construction on the expansion of the strip mall. Mr. Kennedy went to the municipal offices to confront the officer/inspector Schutzman, who refused to discuss it due Kennedy’s pending lawsuit against the strip mall owner, but came running back in to yell at Kennedy in response to Kennedy loud, insulting comments to the other officer workers. Kennedy accused that son of bitch of breaking the zoning laws. When Schutzman ran back inside and “got in Kennedy’s face”, who called Schutzman a “fat slob”. He was then arrested for disorderly conduct, verbal abuse in front of public-work employees, and yelling loudly even though the building was not open for business. The claim against the City failed where there was no history of retaliation for statements made by a member of the public. Based upon the language of the Kentucky statute forming the basis for the arrest, no reasonable officer could believe it was violated by the Plaintiff. Based upon its definition of “public alarm”, it was not intended to apply to disturbing the peace and quiet of one person. The volume of his voice was not “indeterminate”. This statute was not intended to apply to comments that offend a single police officer, who are “expected to be more thick skinned”. Probable cause to arrest did not exist. Secondly, contrary to the Fourth Amendment claim, the “motive” for the arrest is relevant. Here, a jury could conclude the officer arrested

Kennedy because he yelled at him and called him a “fat slob”. When a motive is involved, the courts generally do not grant summary judgment. The officer’s quick response to the yelling was evidence of his negative reaction to the Plaintiff’s insult.

#### Fourth Amendment Probable Cause and Excessive Force

*Huckaby v Priest*, \_\_\_ F.3rd \_\_\_ (6<sup>th</sup> Cir., 2011)  
(Judges Keith, Kennedy and Cook)

Dispatch received a phone call from the Plaintiffs’ neighbor, who reported a breaking and entering. She claimed her neighbors asked her to “watch” their house while they were out of town. When the neighbor saw a strange, out-of-state car parked outside their home and being loaded up with household items, including a computer, she call dispatch. The initial investigating officer responded and questioned the female. She explained she was staying at the home while the plaintiffs were gone, but decided to leave rather than wait for their return. She fully cooperated with the officer, allowing them to place her in the back of their vehicle while they investigated. When they entered the house to investigate, they heard footsteps upstairs and called out. A female and male came down to the first floor, claiming to be the owners of the home. The plaintiff husband and wife verified the woman’s story, but were unable to produce any evidence whatsoever of their ownership of this residence. When the plaintiff husband advised the officers he was going upstairs to provide identification, an officer followed him. A question of fact existed as to whether the wife attempted to interfere with the officers or whether they, misinterpreting her actions, caused her to fall at the base of the stairs. When the officer in the upstairs yelled that he saw a gun, they handcuffed the husband and brought him downstairs. Because the officer reported the man upstairs had pulled a gun, the officers decided to transport them all to the jail and they were led to separate vehicles. Two of the individuals were booked for possible burglary, but released five hours later. The appellate court concluded that factual questions defeated the qualified immunity defense and dismissed the appeal for lack of jurisdiction.

The court then considered the Plaintiffs’, husband and wife, claims for unreasonable search and seizures. Interpreting the facts in the light most favorable to these Plaintiffs and the visitor, Ms. Huckaby, whose identification was verified by the apparent homeowners. The purported wife, Ms. Pierce, argued that they did not immediately provide adequate identification, but their pictures and pictures of their family members were in place around the living room and on the living room walls thereby defeating the officers’ probable cause. Based upon the factual disputes, the appellate court declined to reverse the lower court’s decision.

#### First Amendment Retaliation Claim by Elected Official

*Perkins v Township of Clayton*,  
(unpublished), 2011 WL 13912 (6<sup>th</sup> Cir., 2011, decided by  
Circuit Judge Martin)

Plaintiff, Beth Perkins, had served as the Clayton Township Treasurer for a number of years when she learned that the Township Clerk had obtained discounted cell phones for family members through the Township’s cellular phone plan. Even after Perkins brought this issue to the Township Board’s attention, she later discovered that the cell phone situation still existed and that a relative of the Clerk had several contracts to provide services to the Township. Again, Perkins brought these issues to the Board’s attention, but apparently did not receive satisfaction. Perkins then met with and provided information about these issues to a local newspaper. In response, the Board began procedures to censure Perkins and began an investigation into whether Plaintiff’s disclosure of Township information to the newspaper violated the Michigan Freedom of Information Act. During this investigation, the Township Supervisor learned that Perkins had not performed some of her duties as Treasurer, and with Board approval he filed a complaint for mandamus to compel Perkins to perform her duties and for violations of the Freedom of Information Act. The Court issued a mandamus order directing Perkins to perform specific Treasurer duties, but found in her favor on the FOIA issue. There were subsequent issues regarding Perkins’ compliance with the mandamus order, and the Township filed a motion to hold Perkins in contempt for failing to comply with the Court’s mandamus order. Thereafter, Plaintiff took a medical leave and did not attend any further Board meetings. Ultimately, Plaintiff did not run for treasurer in the next election.

Plaintiff then filed a federal lawsuit against the Township alleging First Amendment retaliation based on a long list of alleged harms. The District Court ruled that the only Township actions which could legally expose it to liability were related to: i) the censure process; ii) the mandamus complaint; and iii) the motion for contempt. The District Court then granted summary judgment in favor of the Township holding that none of these actions amounted to adverse action against Plaintiff, who was a public official.

The Sixth Circuit Court of Appeals affirmed the District Court’s grant of summary judgment in favor of the Township. The Court analyzed only the second element of a First Amendment retaliation claim - adverse action, and found that factor, alone, to be dispositive. The Sixth Circuit relied heavily on its opinion in *Mattox v City of Forest Park*, 183 F3d 515 (6<sup>th</sup> Cir (Ohio) 1995) which it found to be factually similar. In *Mattox*, the plaintiff, an elected public official, had voluntarily placed herself in position where she could be criticized for her actions and political views for any number of reasons, but the defendants’ actions to discredit her after she initiated an investigation of the fire department did not rise to the level



of adverse action. The *Mattox* opinion states, “Public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views.” In this case, the Court acknowledged that while the Township had harmed Perkins, even perhaps seriously, the actions the Township took against her were sufficiently similar to those in *Mattox* to require the same result, and therefore, the Court concluded that the Township’s actions did not amount to adverse action for purposes of Perkins’ First Amendment retaliation claim.

**Civil Rights Violations - First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act (RLUIPA); Ripeness & Exhaustion of Remedies**

*Miles Christi Religious Order v Township of Northville*,  
629 F3d 533 (6<sup>th</sup> Cir (Mich) 2010 - Circuit Judge Sutton)

In response to neighbors’ complaints about increased vehicle traffic and the number of vehicles being parked at the property owned by Miles Christi Religious Order, Northville Township investigated and determined that the Miles Christi Religious Order had changed the use of its property from a residential use to a more intensive use resembling a small church or place of worship. The Township advised that such a change in use required a site plan review and requested that Miles Christi follow the site plan review procedures. Miles Christi disagreed that its use of the property had changed and that it was required to submit a site plan for review. When Miles Christi failed to submit a site plan for review or apply for a variance or otherwise comply with the Township’s site plan review procedures, the Township issued a ticket commencing a state district court proceeding. While the state district court case was still pending, Miles Christi Religious Order and two of its members filed a federal lawsuit against Northville Township, the Township Manager, Director of Community Development and Ordinance Enforcement Officer alleging violations of their rights under the First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The state court proceeding was ultimately stayed by agreement of the parties pending the outcome of the federal litigation.

The Township filed a motion to dismiss the Complaint for lack of ripeness arguing that the Township had not reached a final decision on the application of its zoning ordinance to the Miles Christi property, particularly because Miles Christi had not sought a Zoning Board of Appeals (ZBA) review of the determination that Miles Christi’s change in use triggered a site plan review. The United States District Court, Judge Borman, agreed and dismissed the case without prejudice, and Miles Christi appealed.

The Sixth Circuit in an Opinion authored by Judge Sutton, affirmed the dismissal for lack of ripeness on the basis no final decision from the Township regarding how its zoning ordinances

applied to the Miles Christi property was made. It reasoned that the ripeness doctrine and its finality requirement applied to Plaintiffs’ claims. Similar to the lower court, the Court of Appeals reasoned that because Miles Christi had not appealed the change in use determination or the site plan review requirement to the ZBA, it had not yet obtained a final decision. The Court also concluded that not exercising jurisdiction would not impose a hardship on Miles Christi because the ZBA could decide that there was no change in use and/or that Miles Christi was not required to submit a site plan for review. The Court was careful to distinguish the finality requirement from an exhaustion requirement. The majority of the panel also concluded that the alleged chill on Plaintiffs’ First Amendment rights was insufficient to relax or set aside the finality requirement.

Circuit Judge Batchelder dissented explaining that, in the context of this case, Miles Christi had suffered sufficient immediate harm to warrant not applying the finality requirement to the First Amendment claims. She went on to state that, as to the remaining Constitutional and RLUIPA claims, the Township had reached a final decision. The Director of Community Development’s decision that a change in use had occurred on the Miles Christi property and that a site plan review was required was within her authority and led to concrete consequences (the ticket being issued, state court proceedings, chill on Miles Christi’s activity) which demonstrated the finality of her decision.

**Civil Rights, § 1983, Law of the Case Doctrine**

*Rodriguez v Passinault*

\_\_\_ F3d \_\_\_ (March, 2011)

Judges White (author), Gilman and Watson  
(District Court Judge)(*Rodriguez II*)

The appellate court reversed the lower court’s judgment in favor of the Shiawassee County Sheriff’s Deputy for the fatal shooting of the Mr. Murray. Plaintiff and Murray were dropped off at Murray’s vehicle, parked outside a bar. Noticing suspicious driving, they went to Murray’s vehicle, searching the ground on foot. Murray started his engine. Fearing for his and his partner’s safety, he shot and killed him.

The officers claim the vehicle was moving directly toward Officer Passinault, who was trapped between the rear of the truck and a pole barn. The Officer, who repeatedly ordered the driver to stop, continued to accelerate toward him, notwithstanding his commands to stop. The Officer gave conflicting accounts of where he was standing when he fired 12 shots at the vehicle. An eye witness offered another version of the facts, explaining Murray was accelerating toward his only escape route, an alley, and not in the direction of Officer Passinault. In a prior appeal on this issue, *Rodriguez I*, the Sixth Circuit affirmed a dismissal of the 1983 lawsuit against *Jenkins* and reversed as to Officer Passinault.



In *Rodriguez II*, the Sixth Circuit found the Officer's shooting at the vehicle to stop that vehicle was a seizure because the driver was shot by gunfire and his passenger was injured by flying glass, which created a question of fact as to whether the passenger was physically injured. Unlike *Troupe v Sarasota Cnty., Fla.*, 419 F3d 1160(11<sup>th</sup> Cir., 2005), Murray's vehicle crashed because he was shot, not his careless driving. Although Plaintiff argued that this lawsuit and the appeal was governed by Law of the Case Doctrine based upon the appellate courts' decision in *Rodriguez I*, *Rodriguez II* merely concluded, without addressing that argument, the questions of fact precluded dismissal of the claims.

## Eastern District of Michigan

### Fourth Amendment; Warrantless Search; Code Enforcement

*Feller v Township of West Bloomfield,*  
-- F Supp2d --, 2011 WL 589377

(ED Mich slip copy - District Court Judge Zatkoff)

The Fellers own a home on Moon Lake, and in the spring of 2009, the Fellers cut down wetland vegetation and cleared additional area between their home and Moon Lake to expand their grass lawn. Upon being alerted to the Fellers' activity, a Township Code Enforcement Officer went to the property and observed evidence of a wetland ordinance violation from the public road right of way and from a nearby utility easement. The Code Enforcement Officer confirmed that the Fellers did not have a permit for their clearing activities, and he then entered onto the Fellers' property without a warrant to post a notice to stop illegal work on the Fellers' garage. Later, another Township Code Enforcement Officer entered onto the Fellers' property to investigate allegations that they had continued work in violation of the stop work notices. The Fellers sued alleging that the Township's entry onto their property without a warrant violated their Fourth Amendment right to be free from warrantless searches. The Township responded that it had observed evidence of wetland ordinance violations on the Fellers' property from the public right of way and had only entered onto the property to post stop work notices. Additionally, the Township admitted that it did not have a warrant when its Code Enforcement Officers entered on to the property but that their observation of wetland ordinance violations from nearby public areas provided reasonable cause under state and local laws for the Township's warrantless entry.

The Court held that the Township's entry on to the Fellers' property in connection with the enforcement of the Township's wetland ordinance constituted a warrantless search in violation of the Fourth Amendment and that the Township was liable under Section 1983. The Court relied heavily on the Sixth Circuit's decision in *Jacobs v Township of West Bloomfield*, 531 F3d 385 (6<sup>th</sup> Cir 2008) which involved the

same Township and a similar dispute over warrantless entry onto a private property in connection with the enforcement of Township ordinances. The Court rejected the Township's argument that a warrant was not necessary because the Township only entered the property to post notices and not to investigate allegations of wetland ordinance violations. The Court held that, although the Township Code Enforcement Officers may have observed evidence of wetland ordinance violations from public property, those officers should have used that information to obtain a search warrant before he had any right to enter onto the Fellers' constitutionally protected property. The Court likewise rejected the Township's argument that its local wetland ordinance and state wetlands protection statutes authorized the Township to enter onto Plaintiff's property for enforcement purposes without a warrant on the basis that such a position was clearly contrary to the United State Constitution and the case law pertaining to Fourth Amendment searches and seizures.

The Court also denied the Township employees' claims of qualified immunity on the basis that the law regarding warrantless searches was well-established, particularly in light of the *Jacobs* opinion, and that their admittedly warrantless entry onto Plaintiff's property violated the Fourth Amendment. In short, the Court concluded that the conduct of the Township employees was objectively unreasonable given the state of the law, and thus, they were not entitled to qualified immunity. The Court then found that the Township ordinances and its policies were the basis for the employees' illegal entry onto the Fellers' property; therefore, the Township was liable under Section 1983.

## Western District of Michigan

### Land Use; Finality and Ripeness Requirements

*Singapore Dunes, LLC v Saugatuck Township, et al.*

Slip Copy, 2011 WL 121565

January 12, 2011

The plaintiff initiated this land use dispute challenging a township zoning ordinance. The defendants moved to dismiss the case under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of jurisdiction, arguing that the plaintiff failed to exhaust administrative remedies and did not satisfy the finality requirement of *Williamson Co Regional Planning Comm'n v Hamilton Bank*, 473 US 172; 105 S Ct 3108 (1985). Specifically, the defendants argued that the case was not ripe because the plaintiff failed to seek a use variance or approval of a planned unit development ("PUD") under state statute and the township zoning ordinance. In support of their motion to dismiss, the defendants sought to introduce evidence that the township had granted use variances to other parties in the past.

The court concluded that although it may consider certain materials deciding a motion under Rule 12(b), the details of land planning decisions involving unrelated requests for use variances were not relevant to the legal issues before the court. The court explained that in determining (1) whether Michigan law and the township ordinances afford the plaintiff an administrative remedy by which it could be granted permission to use the property for a particular purpose, and (2) whether the finality requirement of *Williamson* or the broader ripeness doctrine articulated by the Sixth Circuit for land use disputes requires the plaintiff to pursue those remedies before bringing a federal lawsuit, “[t]he only materials relevant to this inquiry are the statutes of the State of Michigan, the ordinances of the Township, and federal case law.” The fact that the township may have granted or denied other landowners a variance on different facts was not relevant to the defendants’ Rule 12(b)(1) motion. *Constitutionality of Water and Nuisance Ordinances*

*Vajk v City of Iron River, et al.*  
Slip Copy, 2011 WL 101740  
January 12, 2011

This civil rights action arose out of the enforcement of the city’s water and nuisance ordinances against the plaintiffs. The plaintiffs challenged the constitutionality of the water ordinance, which permitted the city to charge a “readiness to serve” fee, plus late charges, alleging that the charges violated the due process clause and the bill of attainder clause (which prohibits laws that inflict punishment without the protections of a trial), and that the transfer of unpaid water bills to the tax bill was an unconstitutional taking. The plaintiffs also challenged the constitutionality of the noxious weeds provisions

of the city nuisance ordinance, alleging that the ordinance was unconstitutionally vague and failed to provide for meaningful notice, and that the city violated the Equal Protection Clause because it did not enforce the weed ordinance on city land. The court dismissed the plaintiffs’ complaint in its entirety.

With regard to the water ordinance, the court held that the challenged provisions, which “are common to many city ordinances, serve legitimate nonpunitive purposes and are not enacted for punishment,” do not violate the bill of attainder clause. The court also held that the challenged provisions did not violate the plaintiffs’ due process rights because “[t]hese water ordinance provisions are rationally related to the City’s legitimate interest in obtaining payment for public services”, and because MCL 141.121(3) specifically authorized the city to impose a lien for the unpaid charges and to collect the overdue water bills by using the property tax rolls.

With regard to the noxious weed provisions of the city’s nuisance ordinance, the court found that the ordinance provided objective criteria governing the property owner’s responsibilities and the circumstances under which the city will mow the property. The court noted that while the plaintiffs did not receive actual personal notice before the city mowed their property, the ordinance requirements, which were published in the local newspaper, put the plaintiffs on notice of their duty to mow. “The Court finds that Plaintiffs’ interest in receiving actual, personal notice before the City mowed their Property is impractical, and is outweighed by the City’s interest in mowing noxious weeds before they become a public nuisance.” The court also dismissed the plaintiffs’ selective enforcement claim on the basis that they failed to allege that they were members of a class or that the city’s enforcement of the ordinance was based on a discriminatory purpose. 🏠

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## Legislative Update

*By Kester K. So and Wendy R. Underwood of Dickinson Wright PLLC*

*Over the course of the last several months, the Michigan Senate and House of Representatives have considered numerous bills of municipal interest. The following are summaries of some of those bills:*

### Laws Enacted

- **Financial Emergency.** **HB 4214** creates the Local Government and School District Fiscal Accountability Act and repeals the Local Government Fiscal Responsibility Act, 1990 PA 72. See also **HB 4216**, **HB 4217** and **HB 4218** for related bills.
- **Emergency Managers.** **SB 157** amends The Revised School Code to exempt school districts operated by an emergency manager from being placed under the supervision of the state school reform/redesign officer. Amends section 1280c, 1976 PA 451 (MCL 380.1280c).
- **Collective Bargaining.** **SB 158** amends the Public Employment Relations Act to require certain limitations on collective bargaining rights and certain provisions in public collective bargaining agreements. Amends title and section 15, 1947 PA 336 (MCL 423.215).

### Bills Passed by the Senate

- **Legal Notices.** **SB 163** would amend the Publication of Notices in Newspapers Act to modify the methods of publication of legal notices and repeal portions of the Revised Judicature Act of 1961. Amends section 1, 1963 PA 247 (MCL 691.1051), and repeals sections 1461 and 1950 of 1961 PA 236 (MCL 600.1461 and 600.1950). Tie barred with **SB 164**.

### Bills Passed by the House of Representatives

- **Downtown Development Authorities.** **HB 4248** would amend the Downtown Development Authority Act to allow refinancing of certain qualified refunding obligations for downtown development authorities. Amends 1975 PA 197 by amending section 1 (MCL 125.1651).
- **Interdepartmental Transfers.** **HB 4312** would amend the Urban Cooperation Act of 1967 to allow revision of content of contracts for intergovernmental transfers of employees and responsibilities. Amends section 5 of 1967 (Extra Session) PA 7 (MCL 124.505). See also **HB 4309**, **HB 4310** and **HB 4311** for related bills.
- **Road Funding.** **HB 4347** would amend the Transfers from General Fund to County Road Fund Act to allow the transfer of county general funds raised from property taxes to a county road fund for road improvements. Amends 1917 PA 253 by amending section 1 (MCL 247.121).

### Bills Introduced in the Senate

- **Municipal Partnerships.** **SB 8** would create the Municipal Partnership Act to provide for certain municipal joint endeavors; to provide standards for, and powers and duties of, municipal joint endeavors; to authorize the levy of a property tax by a municipal joint endeavor; and to provide for the powers and duties of certain government officials. Tie barred with **SB 9** and **SB 11**.
- **Deficit Bonds.** **SB 78** would amend the Fiscal Stabilization Act to modify the provisions related to issuance of fiscal stabilization bonds. Amends sections 3, 4, 5 and 9, 1981 PA 80 (MCL 141.1003 et seq.) and adds section 4a.
- **Right-To-Work Zones.** **SB 116** would amend the Employment Relations Commission Act to allow local units of government to establish right-to-work zones. Amends section 14, 1939 PA 176 (MCL 423.14) and adds section 14a.
- **Sidewalk Liability.** **SB 201** would amend the Governmental Liability for Negligence Act to clarify that inference regarding a defect of less than 2 inches applies to any sidewalk maintained by a municipal corporation. Amends sections 1, 2 and 2a, 1964 PA 170 (MCL 691.1401 et seq.) and adds section 2b.
- **Recreational Authorities.** **SB 270** would amend the Recreational Authorities Act to include school districts. Amends section 3, 2000 PA 321 (MCL 123.1133).

### Bills Introduced in the House of Representatives

- **Charter School Cap.** **HB 4019** would amend The Revised School Code to eliminate the cap on the number of public school academies authorized by state public universities under part 6A. Amends 1976 PA 451 by amending sections 502, 502a, and 503 (MCL 380.502 et seq.).
- **Capital Outlay Bonds.** **HB 4035** would amend the State Building Authority Act to allow use of capital outlay bond proceeds for certain transit infrastructure projects. Amends 1964 PA 183 by amending section 1 (MCL 830.411) and by adding section 8b.
- **Regional Water Authority.** **HB 4112** would create the Regional Water Quality Authority Act to provide for the establishment of a regional water and sewer authority; to provide for transfer of certain rights in water supply and sewerage facilities; to provide for payment for water supply and sewerage services and facilities through rates, charges, special assessments, and other means; to provide for the issuance and payment of bonds or other obligations; and to provide for the powers and duties of certain governmental officials and entities.
- **Public Private Partnerships.** **HB 4131** would amend the State Transportation Commission Act to create public private partnerships for transportation infrastructure. Amends 1964 PA 286 by amending the title and sections 1, 6a, 7, 7a and 10 (MCL 247.801, et seq.) and by adding sections 7b, 7c, 7d, 7e, 7f, 7g, 7h and 7i.
- **Renaissance Zones.** **HB 4144** would amend the Michigan Renaissance Zone Act to create underdeveloped special assessment district zones. Amends 1996 PA 376 by amending section 3 (MCL 125.2683) and by adding section 8i.
- **Special Assessments.** **HB 4148** would create the Delinquent Special Assessment Revolving Loan Fund Act to create the delinquent special assessment revolving loan fund; to provide for the administration of the fund; to prescribe requirements for loans from the fund; to prescribe duties of certain state and local officials; and to make appropriations.
- **Undocumented Workers.** **HB 4193** would amend the Obsolete Property Rehabilitation Act to modify the eligibility requirements for an obsolete property exemption certificate. Amends 2000 PA 146 (MCL 125.2788) by amending section 8. See also **HB 4194**, **HB 4195**, **HB 4196**, **HB 4197** and **HB 4198** for related bills.
- **Legal Notices.** **HB 4319** would amend The Home Rule City Act to provide for posting of legal notices as an alternative to publishing. Amends 1909 PA 279 (MCL 117.1 to 117.38) by adding section 4t. See also **HB 4117**. 🏠

# I'll Bet You Didn't Know (or maybe you forgot): Sydney J. Harris (1917 – 1986)

*A regular feature submitted by Richard J. Figura of Simen, Figura & Parker, PLC*

As I indicated in a prior issue, I was inspired to write articles on antiquated or scarcely known laws by a now deceased journalist, Sydney J. Harris, and I promised I would talk more about Sydney Harris at a later time. That time is now.

Sydney J. Harris was an American journalist for the *Chicago Daily News* and later the *Chicago Sun-Times*. His column, "Strictly Personal," was syndicated in many newspapers throughout the United States and Canada. I became acquainted with his columns in college and read him religiously throughout law school and thereafter until he died in 1986. One of my favorites was a recurring column in which he described things he had discovered while looking up something else. Like all of his columns, these were witty and informative, and they became the inspiration for these articles I write as I had a similar experience often uncovering "gems" while researching a different matter. Sydney J. Harris died following heart surgery in 1986 at a much too young 69 years of age.

Another of his recurring column themes was one where he would compare his views of "me" and "you." He would say, for example, "I am selective, while you are discriminatory;" "You can't stay focused, but I am constantly open to new ideas;" "I am decisive and ready to go while you are impatient;" or "I like to keep all my options open, but you can't make up your mind."

Above all, however, were his numerous quotes commenting on human foibles and life in general. They were both inspirational and motivational. I ask you to forgive me for straying from my normal topic and allow me to, instead, share with you a collection of some of my favorite quotes from Sydney J. Harris. While these quotes do not deal with any particular subject of public corporate law, I have added some suggested relationship to a public corporate situation. You may also find it useful to incorporate one of these pearls of wisdom in a brief or an oral argument. Here goes.

- **Cynicism:** *A cynic is not merely one who reads bitter lessons from the past; he is one who is prematurely disappointed in the future.*

Sounds like the council member who always sees the sky falling.

- **Change:** *Our dilemma is that we hate change and love it at the same time; what we really want is for things to stay the same, but get better.*

What every candidate promises, right?

- **The road not taken:** *Regret for the things we did can be tempered by time; it is regret for the things we did not do that is inconsolable.*

Handy when you have to explain to the council why your advice didn't work out as planned.

- **Communication:** *The two words 'information' and 'communication' are often used interchangeably, but they signify quite different things. Information is giving out; communication is getting through.*

Keep this in mind when you are advising your client.

- **Realism:** *An idealist believes the short run doesn't count. A cynic believes the long run doesn't matter. A realist believes that what is done or left undone in the short run determines the long run.*

Useful advice when your client thinks the issue facing them is a waste of time.

- **Forgiveness:** *A winner rebukes and forgives; a loser is too timid to rebuke and too petty to forgive.*

Put the politics behind and move on.

- **Philosophy:** *Any philosophy that can be put in a nutshell belongs there.*

The same can be true of a legal opinion

- **Democracy:** *Democracy is the only system that persists in asking the powers that be whether they are the powers that ought to be.*

God bless free speech!

- **Ignorance:** *Ignorance per se is not nearly as dangerous as ignorance of ignorance.*

Underscores our, and our clients', need to be constantly educating ourselves.



- **Knowledge:** *Knowledge fills a large brain; it merely inflates a small one.*

Keep this in mind when a council member starts telling you what the law is (but don't let that thought come out of your mouth).

- **Secrecy:** *Many a secret that cannot be pried out by curiosity can be drawn out by indifference.*

Remember this during discovery.

- **Phony manhood:** *Men make counterfeit money; in many more cases, money makes counterfeit men.*

Amen!

- **Middle age:** *Middle age is that perplexing time of life when we hear two voices calling us, one saying, "Why not?" and the other, "Why bother?"*

I can't think of a relationship to public corporate law, but I like the quote.

- **Youthful arrogance:** *Nobody can be so amusingly arrogant as a young man who has just discovered an old idea and thinks it is his own.*

Sounds a lot like that new council member.

- **Promises:** *Nothing is as easy to make as a promise this winter to do something next summer; this is how commencement speakers are caught.*

It's also how some people get elected.

- **Education:** *The whole purpose of education is to turn mirrors into windows.*

Keep this in mind when "educating" the court.

- **English language:** *It is odd and a little unsettling to reflect upon the fact that English is the only major language in which "I" is capitalized; in many other languages "You" is capitalized and the "i" is lower case.*

A good reminder to those who are elected to serve the public.

- **Patriotism:** *Patriotism is proud of a country's virtues and eager to correct its deficiencies; it also acknowledges the legitimate patriotism of other countries, with their own specific virtues. The pride of nationalism, however, trumpets its country's virtues and denies its deficiencies, while it is contemptuous toward the virtues of other countries. It wants to be, and proclaims itself to be, "the greatest," but greatness is not required of a country; only goodness is.*

What more can be said?

- **Life:** *When I hear somebody sigh, "Life is hard," I am always tempted to ask, "Compared to what?"*

When being chastised by a judge or a city council, remember: This too shall pass.

- **Happiness:** *Happiness is a direction, not a place.*

Nothing more to say. 🏰

