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MCLE SELF-STUDY

Regulation of Day Laborers: Between the Street and a Hard Place

*By Michael Torres and Scott Smith**

In the arena of immigration and worker documentation, summer came early this year. May began with clashes in Los Angeles and ended with heated debate about federal immigration reform. In the meantime, seemingly detached from this drama, California day laborers stand together on sidewalks, parking lots and places in between. Many are America's latest arrivals in search of work and a better life. In exchange for a day's wage, the day laborer will haul debris, dig a trench or tile a bathroom. Although the exact number is impossible to determine, some experts estimate that approximately 117,600 day laborers operate within the country at any given time, with the largest concentration in the West.[1]

California cities face the difficult proposition of balancing the day laborers' rights with the local residents' concerns. Some residents complain that day laborers create dangerous traffic conditions and criminal activity, such as public urination, fighting and public intoxication.[2] Other residents express frustration with federal immigration policy and enforcement, and openly speculate that reducing day labor opportunities will indirectly influence federal policy and immigration trends.

Most municipal forays into the regulation of day labor solicitation are based on traditional police power exercises relating to traffic, pedestrian safety, health and hygiene, and the use of public spaces for commercial activity. Cities traditionally address these concerns by regulating locations for solicitation and vehicular traffic relating to day labor stops. Some have created publicly financed day labor sites. However, community action groups such as the American Civil Liberties Union ("ACLU") and the Mexican-American Legal Defense and Educational Fund ("MALDEF") have challenged many of these attempts as unconstitutional. Regulation of solicitation itself is often invalidated by federal courts.

The purpose of this article is to provide an overview of the current status of day laborer regulation. In Part I, we review two trial court decisions against the cities of Glendale and Redondo Beach. In Part II, we review impermissible day laborer regulations. And in Part III, we review permissible day laborer regulations.

I. RECENT CASE LAW

A. *Comite De Jornaleros De Glendale et al. v. City of Glendale*, U.S. Court of Appeals Docket No. 05-55880

In this 2005 case, the District Court for the Central District of California entered a permanent injunction against a City of Glendale ordinance designed to prohibit

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solicitation of employment from any street, roadway, curb, parkway, alley or highway.[3] Glendale had enacted this ordinance to promote pedestrian safety, traffic and quality of life issues.[4] Specifically, the ordinance provided:

A. No person shall stand in or on any street, roadway, curb, parkway, alley, highway or driveway and solicit or attempt to solicit employment, business or contributions of money or other property from the occupant of any vehicle while that vehicle is located on any public street, roadway, alley, highway or driveway and not lawfully parked within, or immediately adjacent to, any industrial or commercial zone within the city.

B. No person, while the occupant of any vehicle located on any public street, roadway, alley, highway or driveway and not lawfully parked, shall solicit or attempt to solicit employment, business or contributions of money or other property from a person who is on or within any street, roadway, curb, parkway, alley or driveway within, or immediately adjacent to, any industrial or commercial zone within the city. [5]

In essence, the Glendale ordinance prohibited solicitation of passing vehicles from the street or curb in commercial areas while allowing solicitation on all city sidewalks and in residential areas. Additionally, since 1997 Glendale had provided day laborers a publicly funded Temporary Skilled Worker Center adjacent to a Home Depot. The Center is administered by Catholic Charities,[6] is open seven days a week from 6:00 a.m. to 4:00 p.m., and is available free of charge to day laborers. The Center operates as an intermediary between employers and day laborers, negotiating pay and hours. The Center also provides day laborers "restrooms, bottled water, a television, tables and benches in the shade, vending machines and pay phones."[7] The ordinance's findings reveal Glendale's cognizance of the increased protection afforded speech communicated on public streets and other public forums.

In order to determine the degree of protection afforded to a First Amendment activity, a court will first examine the forum in which the activity is pursued.[8] The first step in this involves determining the extent to which the location in question has been opened for expressive activity, or free speech. In 1983, the Supreme Court concluded that government property falls into three categories with respect to expressive activity: 1) property that has traditionally been open for expressive activity, such as streets and sidewalks ("traditional public forum"); 2) property that is specifically designated for expressive activity by the government ("designated public forum" or sometimes "limited public forum"); and 3) property that is neither traditionally available nor specifically designated for expressive activity or public communication ("non-public forum").[9]

The United States Supreme Court has long recognized that certain public locales, such as sidewalks, streets and parks, are traditional public forums which have "immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens and discussing public questions."[10] As a result of the heightened protection afforded to public forums, "the government's ability to permissibly restrict expressive activity is very limited....[S]peakers may be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[11] However, cities are able to enact time, place and manner regulations in public forums.[12] Glendale believed that its ordinance was a reasonable time, place and manner restriction because it was: 1) content-neutral, 2) narrowly tailored to serve a significant government interest, and 3) left open ample alternative channels of communication.[13]

The District Court agreed that the ordinance was content-neutral because Glendale's principal purpose in enacting the ordinance was to "alleviate significant secondary effects, including reducing traffic congestion, assuring the safety of drivers and pedestrians, and preserving and improving the quality of life for residents and business owners."[14] It also found that the asserted municipal interest underlying the ordinance: "reducing traffic congestion, assuring the safety of drivers and pedestrians, and preserving and improving (where possible) the quality of life of its residents and business owners," were legitimate governmental purposes. However, the District Court found that the ordinance was not narrowly tailored to those significant governmental interests due principally to its vagueness.

The Glendale ordinance designated "curbs" as areas where solicitation was prohibited on the ground that it is unsafe to stand on the curb. Yet, the ordinance banned only standing on the curb to solicit work "by use of the spoken word, bodily act, or gesture."[15] The court reasoned that if it were dangerous to stand on curbs for day labor solicitation, it should also be dangerous for any person to stand there, including "jugglers, acrobats, [and] pet walkers . . . ."[16]

The court also found the ordinance vague. An ordinance is vague if it either: 1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits, or 2) authorizes or encourages arbitrary and discriminatory enforcement.[17] The District Court found the ordinance vague because: 1) the court saw "no significant distinction" between solicitation taking place on a sidewalk (which the ordinance allowed) and solicitation taking place from the curb, which the ordinance prohibited; 2) the term "curb" was not defined within the ordinance; 3) the ordinance did not prohibit solicitation on sidewalks, but the undefined terms "street" and "curb" could be read to include sidewalks; and 4) it was "unclear where the curb ends and the sidewalk begins."[18] For this reason, the District Court found the ordinance "vague

and not sufficiently tailored" to further Glendale's interests in promoting safety and improving quality of life, and also that it "is likely to chill permissible speech inasmuch as the boundaries of solicitation are unclear."[19]

The court granted a permanent injunction against enforcement of Glendale's ordinance. The matter is currently under appeal with the United States Court of Appeals for the Ninth Circuit.

B. *Comite De Jornaleros De Redondo Beach et al. v. City of Redondo Beach* (2006) 475 F.Supp. 2d 952

In this case, the District Court for the Central District of California invalidated the City of Redondo Beach's solicitation ordinance on grounds that it infringed upon day laborers' First Amendment rights. Redondo Beach Municipal Code Section 3-7.1601 provided:

(a) It shall be unlawful for any person to stand on a street or highway and solicit, or attempt to solicit, employment, business or contributions from an occupant of any motor vehicle. For purposes of this section, "street or highway" shall mean all of that area dedicated to public use for public street purposes and shall include, but not be limited to, roadways, parkways, medians, alleys, sidewalks, curbs, and public ways.

(b) It shall be unlawful for any person to stop, park or stand a motor vehicle on a street or highway from which any occupant attempts to hire or hires for employment another person or persons.

Unlike the City of Glendale, Redondo Beach did not provide a publicly funded day laborer work center, and its ordinance explicitly applied to sidewalks. Like the *Glendale* court, the *Redondo Beach* court held that the City's ordinance, while regulating expression in a traditional public forum, was not directed at the content or message of the day laborers' speech.[20] Accordingly, the court evaluated the ordinance as a content-neutral time, place and manner regulation. As such, the ordinance needed to be narrowly tailored to serve a significant government interest, and leave ample alternative channels of communication for persons affected by it.[21]

The District Court recognized that the ordinance advanced several significant governmental interests, including the promotion of safer and more efficient traffic flow, and minimizing the public safety risk of impromptu street-side employment transactions.[22] The ordinance also sought to reduce the harmful secondary effects of day laborers congregating for such transactions, including littering, public drunkenness and fighting.[23] The City had indicated its expectation that the ordinance would help to maintain a desirable and welcoming aesthetic within the city limits.[24] The District Court found these goals to be "axiomatically" and "intrinsically" significant government interests.[25]

However, as with Glendale's ordinance, the District Court found that the Redondo Beach ordinance was too vague and thus, not narrowly-tailored to accomplish the City's significant government interests.[26] The District Court found that the ordinance "sweeps in" too much constitutionally-protected conduct because it applied to both streets and sidewalks, and because it did not define the terms "solicitation" and "employment."[27] The District Court further found the ordinance "overbroad" with respect to motorists because it could apply to vehicles lawfully parked or stopped in low-traffic areas with or without the dangerous conditions the City sought to limit.[28] The District Court found the ordinance's objectives could be accomplished through direct enforcement of other city ordinances and state statutes regarding traffic, loitering, drinking, and assault and battery.[29]

The District Court also found the ordinance failed to leave open adequate alternative channels for expression protected by the First Amendment.[30] The Court reasoned that nearby shopping center parking lots are not equivalent forums for soliciting work, that alternate means of solicitation would not be as effective for employment, and that no accessible alternate venues, such as dedicated hiring centers[31], were available for seeking employment. This case also is currently under appeal with the United States Court of Appeals for the Ninth Circuit.

II. IMPERMISSIBLE DAY LABOR REGULATIONS

As the trial court decisions and pending appeals in the *Glendale* and *Redondo Beach* cases demonstrate, the law surrounding day laborer regulations presents a weak foundation for cities wishing to regulate solicitation per se. The principal impediment to regulation is the fact that most day labor solicitation ordinances regulate speech on streets and sidewalks, quintessential public forums. "Public fora generally are those 'places which by long tradition or by government fiat have been devoted to assembly and debate' [and] certain public locales, such as sidewalks, streets, and parks have been recognized as traditional public fora ... 'immemorially ... held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"[32] As a result, regulating any speech in these areas is an uphill battle.

Regulation of day labor solicitation within public forums may restrict time, place and manner of solicitation provided the restrictions: 1) are content-neutral, 2) are narrowly tailored to serve a significant government interest, and 3) leave open ample alternative channels of communication.[33] "The principal inquiry in determining content-neutrality is whether the government has adopted the regulation of speech because of disagreement with the message it conveys."[34] The test for narrow tailoring requires a showing that a "reasonable fit" exists between a legitimate interest and the means of obtaining that interest.[35] However, the means of regulating the interest need not "be the least restrictive or the least intrusive means."[36] Lastly, a city bears the responsibility to prove that alternative channels of communication

exist, such as publicly funded hiring sites.[37]

Content-neutrality makes for a difficult starting point. Cities allowing permitless solicitation for street vendors, performers and even non-profits will find it difficult to single out day laborers. For example, would a city be able to prohibit day laborers from soliciting work on public sidewalks while allowing fire fighters or other community organizations to solicit donations on public sidewalks?

Narrowly tailoring ordinances relating to streets, curbs, gutters and sidewalks may be difficult under the *Glendale* and *Redondo Beach* decisions. Certainly, clear definitions and a breakdown of the components of city streets and rights-of-way would be a necessary starting point for an ordinance to be narrowly tailored. Even with that, prohibiting day labor solicitation from curbs or streets without barring all other kinds of solicitation in the same areas is probably not workable.

The "alternative channels of communication" prong is also difficult to satisfy, and the *Glendale* and *Redondo Beach* cases give little guidance on that issue. As noted above, Glendale had provided a publicly funded hiring site; Redondo Beach had not. The cases leave open the question of whether Glendale, having satisfied other prongs of the test, would have failed the "alternative channels" prong without a hiring center and whether Redondo Beach would have survived the other prongs had it provided a hiring center.

III. PERMISSIBLE DAY LABOR REGULATIONS

While Glendale, Redondo Beach and other cities have struggled in court with their day laborer ordinances, other cities have fared better with alternatives. These alternatives track generally the *Redondo Beach* court's suggestion that regulations will fare better in court if they directly proscribe traditional crimes or offenses that might be associated with day labor solicitation, rather than regulating the solicitation itself. Some examples follow.

A. City of Vista

The City of Vista took a unique approach to day laborer regulation by focusing on persons who employ day laborers, rather than the day laborers themselves. The Vista ordinance is closer to a business license or occupational safety regulation than to a zoning ordinance or a time, place and manner restriction on speech. Vista's stated policy for enacting the ordinance was to protect day laborers from "various types of workplace dangers and abuses."[38] Specifically, Vista Municipal Code Section 5.90.030 provides:

A. It is unlawful for a person to make an offer of day labor employment, cause an offer of day labor employment to be made, or to hire a person to perform day labor employment unless the person making the offer or causing the offer to be made assures that each of the following is satisfied:

1. The employer which will hire the day laborer holds a valid registration certificate.

2. Any person making an offer of day labor employment shall physically possess a valid registration certificate and be listed on it as either the employer or an authorized agent.

3. At the time an offer of day labor employment is made, a valid registration certificate shall be attached to the passenger side window of any vehicle to be used to transport a day laborer from an uncontrolled location to a work site. The certificate shall remain posted until all day laborers offered employment at a particular location have entered the vehicle. The certificate shall be removed from the window prior to commencing operation of the vehicle.

4. Any person making an offer of day labor employment shall provide the day laborer with a complete and executed term sheet immediately following the day laborer's acceptance of day labor employment and prior to operation of the vehicle transporting the day laborer.

Following the City's adoption of this ordinance in 2006, the ACLU sued Vista for declaratory and injunctive relief. The ACLU claimed that the ordinance violated the First Amendment by curbing freedom of speech. Specifically, the ACLU alleged that the ordinance required *employers* "to obtain a permit before engaging in lawful speech, without providing for adequate procedural safeguards or preventing Vista officials or employees from retaining unbridled authority to deem a permit application complete or incomplete and thus to grant or deny a permit in their arbitrary and unbridled discretion."[39] The ACLU also alleged that the ordinance violated the Equal Protection Clause because "a substantial or motivating factor in its adoption was unlawful discrimination against persons...on account of race, ethnicity, gender, national origin, alienage, and/or immigration status."[40]

The District Court denied the ACLU's request for declaratory and injunctive relief, finding that the ACLU failed to demonstrate: 1) a likelihood of success on the merits and 2) irreparable harm.

The District Court did not address Vista's purpose in passing the ordinance (protecting laborers from workplace dangers and abuses) because the "argument [was] raised for the first time in the reply brief, to which the City did not have an opportunity to respond."[41]

The court found that the ordinance advanced this purpose. Plaintiffs in the case had argued that the ordinance did not materially advance its stated purpose because it did not require employer registration certifications or term sheets to be printed in

Spanish. Since many laborers would be Spanish-speaking, they reasoned, the ordinance did not materially further worker protection. The District Court found that a companion Vista policy requiring materials to be printed in Spanish to allow Spanish-speaking day laborers to understand the hiring terms cured any potential defects in this area.[42]

Based on these findings, the District Court denied the ACLU's request for declaratory and injunctive relief. However, on May 10, 2007 the ACLU filed a First Amended Complaint for Declaratory and Injunctive Relief in the U.S. District Court for the Southern District of California. The First Amended Complaint alleged a violation of the First Amendment and a violation of the Equal Protection Clause. The City and the ACLU recently reached a settlement, allowing the ordinance to remain in effect with some modifications. An employer stopped for the first time for failing to register before hiring a day laborer may register in the field instead of facing an immediate fine. Additionally, the City may not include the name or contact information of a registered employer without allowing the employer's attorney the opportunity to seek a court order to prevent the release of the information.

B. City of Lake Forest

The City of Lake Forest has pursued a program that regulates day laborer activities that directly violate traditional private trespass laws, not the mere act of solicitation.[43] Specifically, Lake Forest worked with local property owners to draft an ordinance that made it easier for the owners, or their designated representatives, to remove unwanted persons from their private property.[44]

Lake Forest approached this through a trespass ordinance focusing on solicitation that encroached on private, not public, property. Property owners desiring to take advantage of the ordinance are required to post "No Trespassing" signs on their property. The signs are posted at each corner of their property and at each entrance to their property.[45] The signs are three feet above normal ground level and are composed of wood, metal or equally substantial material. The signs have a white background with black legible letters not less than two inches in height that read, "PRIVATE PROPERTY—NO TRESPASSING." The sign may contain other words indicating that trespassers are subject to prosecution. Many property owners posted the signs in English and Spanish.

Every participating property owner is required to designate in writing a person or position (e.g., property manager, security guard, etc.) authorized to act as a designated agent on behalf of the property owner to identify trespassers to the Sheriff's Department.[46] The property owner must notify the City, in writing, of said designated agents and keep such designation current.

Once an owner or owner's designated agent identifies a suspected trespasser, the property owner or agent is required to telephone the Sheriff's Department,[47] clearly identify the trespasser to the satisfaction of Sheriff's Department personnel, and request that the suspected trespasser be removed. The owner or agent must physically be present at the property when reporting a suspected trespasser, and may be required to provide the Sheriff's Department photo identification (e.g., driver's license, etc.) demonstrating that he is, in fact, the designated agent for the property. Owners in some areas have pooled their resources to hire a security guard as designated agent. The Sheriff's Department will not remove a person when removal would "otherwise violate the law."[48]

Lake Forest's ordinance regulates private property, not public property, thus removing many of the potential pitfalls associated with regulation of public forums.[49] Traditional no-stopping rules still apply on major City thoroughfares. However, such rules are applied uniformly to all drivers. To date, the Lake Forest trespassing ordinance has proven very successful at curbing trespassing and associated crime on private property, while simultaneously respecting the rights of day laborers to solicit employment on public property.[50]

CONCLUSION

Given the increased discussions and pending cases surrounding day laborers, balancing day laborer rights with residents' concerns is likely to remain complicated. Greater guidance may be forthcoming as the Ninth Circuit Court of Appeals reviews the *Glendale* and *Redondo Beach* decisions. In the meantime, preliminary results in the Vista and Lake Forest cases suggest that cities may fare better by regulating traditional areas such as worker safety and private trespass, rather than the act of solicitation itself.

ENDNOTES

1. Abel Valenzuela Jr. *et al, On The Corner: Day Labor in the United States*, UCLA Center for the Study of Urban Poverty, January 2006, page 4
2. *Comite De Jornaleros De Rendondo Beach v. Redondo Beach* (2006) 475 F. Supp. 2d 952, 966
3. Glendale Ordinance 9.17.030(A)
4. City of Glendale, Brief of Appellant, 2005 WL 3569217, page 8. Glendale Municipal Code Section 9.17.010 further provides, "[t]he purpose of this chapter is to protect the health and welfare of the general public and promote safer and more efficient traffic flow in industrial and commercial zones by reasonably regulating the time, place and manner of the solicitation of employment and/or business from pedestrians and occupants of vehicles on the public right-of-way and in public and private parking areas. These regulations are content neutral and are not intended and do not restrict the right of free speech or alternative channels of communication."
5. Glendale Municipal Code Section 9.17.030
6. City of Glendale, Brief of Appellant, 2005 WL 3569217, page 6
7. City of Glendale, Brief of Appellant, 2005 WL 3569217, page 8
8. *Acorn v. Phoenix* (1986) 798 F.2d 1260, 1264
9. *Perry Education Assn. v.* Perry *Local Educators' Assn.* (1983) 460 U.S. 37, 45

[10] *Hague v. Committee for Indus. Org.* (1939) 307 U.S. 496, 515

[11] *Acorn* at 1265 citing *United States v. Grace* (1983) 461 U.S. 171, 177

[12] *R.A.V. v. City of St. Paul* (1992) 505 U.S. 377, 382

[13] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* (1983) 460 U.S. 37, 45

[14] City of Glendale, Brief of Appellant, 2005 WL 3569217, page 13

[15] City of Glendale, Order re Response to Order to Show Cause, p. 8

[16] Id.

[17] *Hill v. Colorado* (2000) 530 U.S. 703, 732

[18] Jan. 14, 2005 Ord. Granting Mot. for Prelim. Inj., p. 22; May 13, 2005 Ord. re Response to Order to Show Cause, pp. 6-7

[19] Jan. 14, 2005 Ord. Granting Mot. for Prelim. Inj. p. 23; May 13, 2005 Ord. re Response to Order to Show Cause, p. 7

[20] 4-27-06 Order, pp. 9-16

[21] 4-27-06 Order, p. 16.

[22] 4-27-06 Order, p. 17

[23] 4-27-06 Order, p. 17

[24] 4-27-06 Order, p. 17

[25] 4-27-06 Order, p. 17

[26] 4-27-06 Order, pp. 18-25

[27] 4-27-06 Order, p. 19

[28] 4-27-06 Order, p. 20

[29] 4-27-06 Order, p. 21

[30] 4-27-06 Order, p. 25

[31] 4-27-06 Order, pp. 22-25

[32] *Acorn* at 1264 quoting *Hague v. CIO* (1939) 307 U.S. 496, 515

[33] *Perry Educ.* Ass'n *v. Perry Local Educators' Ass'n* (1983) 460 U.S. 37, 45

[34] *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 791

[35] *S.O.C., Inc. v. County of Clark* (1998) 152 F.3d 1136,1148

[36] *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 797

[37] *Lim v. City of Long Beach* (2000) 217 F.3d 1050, 1054

[38] ACLU Complaint Against the City of Vista, U.S. District Court Case No. 06CV1443L, July 17, 2006

[39] ACLU Complaint Against the City of Vista, U.S. District Court Case No. 06CV1443L, July 17, 2006

[40] ACLU Complaint Against the City of Vista, U.S. District Court Case No. 06CV1443L, July 17, 2006

[41] ACLU Complaint Against the City of Vista, U.S. District Court Case No. 06CV1443L, July 17, 2006

[42] Much of the Application for Temporary Restraining Order was about the Ordinance's delegation of authority to City personnel to review and approve employer permits. The court found it likely that the City's companion policy adequately limited staff discretion and that other offending clauses were severable from the Ordinance.

[43] The City of Lake Forest was sued by the ACLU in March 2007 for a solicitation ordinance that was on the books but not enforced. However, the case was rendered moot by repealing the solicitation ordinance as part of an unrelated routine Municipal Code revision.

[44] The ordinance was codified as Lake Forest Municipal Code Section 11.24.030 *et seq*.

[45] Where the area of property exceeds one acre, the notice shall also be posted at intervals of not more that three-hundred (300) feet along or near the boundaries thereof.

[46] The City of Lake Forest contracts with the Orange County Sheriff's Department for police services.

[47] The City contracts with the Sheriff's Department for law enforcement services.

[48] Pursuant to Lake Forest Municipal Code Section 11.24.030(D) this section shall not apply to trespassers in any of the following instances:

(1) Where its application results in or is coupled with an act prohibited by the Unruh Civil Rights Act or any other provision of law relating to prohibited discrimination against any person on account of sex, race, color, religion, creed, ancestry, national origin, disability, medical condition, marital status, or sexual orientation;

(2) Where its application results in or is coupled with an act prohibited by Section 365 of the California Penal Code or any other provision of law relating to duties of innkeepers and common carriers;

(3) Where its application would result in an interference with or inhibition of peaceful labor picketing or other lawful labor activities;

(4) Where its application would result in an interference with or inhibition of any other exercise of a constitutionally protected right of freedom of speech such as (but not limited to) peaceful expressions of political or religious opinions, not involving offensive personal conduct; or

(5) Where the person who is upon another's private property or business premises is there under claim or color of legal right. This exception is applicable (but not limited to) the following types of situations involving disputes wherein the participants have available to them practical and effective civil remedies: marital and post-marital disputes, child custody or visitation disputes, disputes regarding title to or rights in real property, landlord-tenant disputes, disputes between members of the same family or between persons residing upon the property concerned up until the time of the dispute, employer-employee disputes, business-type disputes such as those between partners, debtor-creditor disputes, and instances wherein the person claims rights to be present pursuant to order, decree or process of a court.

[49] The ordinance was based on a similar ordinance in the City of San Rafael that was upheld by the California Supreme Court in *In re Theodore William Cox* (1970) 3 Cal.3d 205

[50] The ACLU has filed a lawsuit against Lake Forest alleging that law enforcement has indirectly prohibited use of the sidewalks for solicitation. In an early round, the District Court denied the ACLU's application for a temporary restraining order.

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MCLE SELF-ASSESSMENT TEST

Earn one hour of MCLE Self Study Credit by reading the article titled "**Regulation of Day Laborers: Between the Street and a Hard Place**" on pages 1-7 and answering the below questions, choosing the one best answer to each question. This MCLE Test is valid for one year from the date of publication.

1. Identifying the type of forum in which a First Amendment activity takes place is the first step a court will take to determine the degree of protection that activity should receive under the law. ❑ True ❑ False

2. The U.S. Supreme Court has held that government property falls into four categories with respect with expressive activity. ❑ True ❑ False

3. A city may only prohibit speech in a traditional public forum if the regulation serves a rational purpose and is narrowly tailored to achieve that purpose. ❑ True ❑ False

4. Streets and sidewalks are traditional public forums. ❑ True ❑ False

5. The City of Glendale believed that a valid time, place and manner restriction on day laborer solicitation in a public forum must be content-neutral, narrowly tailored to serve a significant government interest, and leave ample alternative channels of communication. ❑ True ❑ False

6. In *Comite de Jornaleros de Glendale et al. v. City of Glendale*, the district court held that the city's interests underlying its day laborer ordinance - reducing traffic congestion, assuring the safety of drivers and pedestrians and preserving and improving the quality of life for residents and business owners - were significant government interests. ❑ True ❑ False

7. An ordinance is vague only if it does not provide people of ordinary intelligence with the reasonable opportunity to understand what conduct is prohibited. ❑ True ❑ False

8. The *Glendale* district court held that the City of Glendale's ordinance, prohibiting solicitation of employment from streets and curbs, but not sidewalks, was not vague because there is a distinction between solicitation on a sidewalk and solicitation on a curb. ❑ True ❑ False

9. In *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, the district court found the city's interest in reducing public drunkenness and littering, as a result of day laborer congregation, was not a significant government interest. ❑ True ❑ False

10. Promoting more efficient traffic flow is a significant government interest, according to the district court in *Redondo Beach*. ❑ True ❑ False

11. The Redondo Beach ordinance, prohibiting anyone in a stopped vehicle from attempting to hire a person, was overbroad because it could apply to vehicles: (1) parked in areas where traffic congestion is not a problem; or (2) parked in areas without the dangerous conditions that the City sought to limit. ❑ True ❑ False

12. The district court in *Redondo Beach* held that the city's ordinance, prohibiting a person standing on a street or sidewalk from soliciting work, left open ample alternative venues for expression, such as shopping center parking lots. ❑ True ❑ False

13. Public forums are those places that have immemorially been used by citizens for assembly and debate. ❑ True ❑ False

14. If a city regulates speech because it disagrees with the speaker's message, the regulation is content-neutral. ❑ True ❑ False

15. The *Redondo Beach* Court held that the ordinance in question was not directed at the content or message of the day laborers' speech. ❑ True ❑ False

16. A time, place and manner restriction on expression is narrowly tailored if there is a reasonable fit between a legitimate interest and the means of serving that interest. ❑ True ❑ False

17. A valid time, place and manner restriction on expression is narrowly tailored if it regulates expression using the least restrictive or least intrusive means. ❑ True ❑ False

18. The plaintiff challenging a time, place and manner restriction must prove no alternative channels of communication exist. ❑ True ❑ False

19. To avoid First Amendment lawsuits, the City of Vista enacted an ordinance that regulates the actions of employers of day laborers, not the day laborers themselves. ❑ True ❑ False

20. By using a private property trespass ordinance to discourage day laborer solicitation, the City of Lake Forest has avoided First Amendment challenges associated with regulating public forums. ❑ True ❑ False

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The Public Law Section Extends Student Writing Competition Deadline to December 1, 2007

$500 cash prize and article published in *Public Law Journal*

The Public Law Section of the State Bar of California is pleased to announce the First Annual Public Law Section Law Student Writing Competition.

In the furtherance of its mission and goals, the Public Law Section invites papers for possible publication in the *Public Law Journal*. Such papers should consider an aspect of public law written in the 2006-2007 or current academic year by a student currently enrolled in an accredited California law school's J.D. program. The paper may be specifically prepared for this contest or based on a paper submitted in a class, seminar, or as an independent study program. The paper should, however, be the work of the submitting student without substantial editorial input from others. A student need not be a member of the Public Law Section to participate in this writing contest.

Papers should be limited to between 2,500 and 3,000 words of double-spaced typed text and include citations in either Bluebook or California Style Manual format.

The mission of the Public Law Section is to ensure that laws relating to the function and operation of public agencies are clear, effective and serve the public interest; to advance public service through public law practice; and to enhance the effectiveness of public law practitioners. Comprised of over 1,300 members, including law students, the Section focuses on addressing issues related to administrative law, constitutional law, municipal law, open meeting laws, political and/or election law, education law, state and federal legislation, public employment, government contracts, tort liability and regulations, land use/environment issues, and public lawyer ethics.

The Section provides topical educational programs, seminars and resource materials; works to enhance the recognition of, and participation by, public law practitioners in the State Bar; presents its annual "Public Lawyer of the Year" award to public law practitioners who have made significant and continuous contributions to the profession; and publishes the quarterly *Public Law Journal*.

Award

The author of the winning student paper will receive a $500 cash prize from the Public Law Section and have his or her paper published in the Winter 2008 edition of the *Public Law Journal*.

Deadline/Method of Submission

Papers must be received by midnight (PST) on December 1, 2007 to be eligible for consideration in this writing contest. Please submit papers by email in either Word or WordPerfect format to Leslie.Dufresne@bbklaw.com.

Judging

Papers will be judged based on the following criteria, though not necessarily in this order:

- complexity of topic
- relevancy to one or more areas of public law
- timeliness of topic to current developments in public law
- originality
- quality of writing

It is expected that a member of the Section's Executive Committee will notify the winner by January 7, 2008.

Please direct any questions regarding this contest to Leslie.Dufresne@bbklaw.com.

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A Message from the Chair

Announcing the Public Law Section California Elections Code Project

By Betty Ann Downing, Esq.

Many Public Law Section members have experience researching, interpreting and advising clients regarding the California Elections Code. *It can be a challenging endeavor.*

In the Elections Code you will find:

- provisions with perplexing gaps where parallel language between similar procedures should logically exist, but does not
- frustratingly ambiguous language, and
- seemingly conflicting provisions

Of course, practitioners understand that the types of flaws found in the Elections Code are no different than any other area of statutory law. However, one unique difficulty with the Elections Code is that appellate level case law addressing these issues is sparse. Elections Code matters can become moot very quickly due to the timing of the relevant election. Moreover, courts are understandably reluctant to wade into a political fray, or to affect the course or outcome of an election.

The Public Law Section, as a service to the public and public agencies, has established a committee that will begin to tackle Elections Code issues. We are pleased to have the support of Secretary of State Debra Bowen and her office in this effort.

We expect to begin with a review of laws affecting local initiatives, referendums and charter changes, and ask for your assistance. Do you have any war stories to share? Do you have any legal analyses regarding issues encountered with local initiatives, referendums and charters to share? We'll take your information in any form including pleadings, letters to elections officials, memos or advice letters. If you wish to serve on the committee as a member or advisor, please let me know – we welcome your involvement.

Please forward your questions and offers of help to me:

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The USA Patriot Act:

When Surveillance Means Never Having to Say Probable Cause or Reasonable Suspicion

By Gary Williams*

I. INTRODUCTION

The USA Patriot Act[1] ("Patriot Act") substantially expanded the power of the federal government to conduct surveillance of American citizens without warrants or a showing of probable cause or reasonable suspicion. During the hurried Congressional debate on the Patriot Act[2] the public was assured the government's use of this power would be limited, and carefully monitored to protect civil liberties.[3]

This article chronicles how the government has used two sections of the Patriot Act granting this power - Section 215, which allowed the FBI to obtain access to private records without a showing of probable cause or reasonable suspicion, and section 505, which expanded the ability of the FBI to use "National Security Letters" (NSLs). The article then surveys the recently enacted statutes that added limited safeguards to the provisions allowing these forms of surveillance.

II. SECTION 215 - "THE LIBRARY" PROVISION[4]

Section 215 of the Patriot Act allows the FBI to obtain a court order requiring disclosure of "...any tangible things (including books, records, papers, documents, and other items)" of any person upon a declaration by the FBI that the items were needed for an investigation ". . . to protect against international terrorism or clandestine intelligence activities."[5] Section 215 requires no showing of probable cause or reasonable suspicion that the target is engaged in international terrorism or clandestine intelligence activities. While the application must be submitted to a judge or magistrate, that judge or magistrate is instructed, in subsection (c)(1), that "...the judge **shall** enter an ex parte order as requested, or as modified, approving the release of records if the judge finds the application meets the requirements of this section."[6] (Emphasis added.) Recipients of a section 215 order were, under the original Patriot Act, placed under a strict and sweeping gag order: "No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section."[7]

As the public became aware of the breadth and potential reach of section 215, a groundswell of opposition emerged. Librarians, libraries and booksellers objected that the FBI might use section 215 to demand patron records.[8] Some public libraries adopted policies of destroying patron records immediately or soon after books and other items were returned,[9] while others posted warnings to patrons that their borrowing records were subject to FBI surveillance.[10] Booksellers and bookseller associations protested the potential use of section 215 to obtain purchase records of their patrons.[11] The American Library Association issued a policy statement that section 215 is "... a present danger to the constitutional rights and privacy rights of library users."[12] Seven states and 400 cities and counties passed resolutions condemning section 215 and other provisions of the Patriot Act.[13] And in 2003, Representative Bernie Sanders of Vermont introduced legislation to repeal section 215 of the Patriot Act.[14]

In 2002, Assistant Attorney General Daniel Bryant, in response to an inquiry from Senator Patrick Leahy about section 215, wrote that a person who gives personal information to a library or bookstore ". . . assumes the risk that entity may disclose it to another. . . ," and opined that an individual's right to privacy in such information is limited, and the government's need for the information in an investigation involving alleged terrorism outweighs any remaining privacy interest.[15]

According to an FBI report to Congress in early 2006, section 215 had been used 155 times since its enactment.[16] In an illustration of the potential reach of a section 215 order, Mary Lieberman, executive director of Bridge Refugee & Sponsorship Services in Knoxville, Tennessee, described how she was ordered to appear in U.S. District Court in Knoxville in response to a federal subpoena demanding production of all Bridge files on its Iraqi born clients. These files contained names, addresses, telephone numbers and personal information, including records about health, mental health, domestic violence, abortion, divorce, depression, family, and non self sufficiency. After Ms. Lieberman moved to quash the subpoena, the judge ordered her and the government to negotiate an agreement about the subpoenaed information. While they did reach agreement, the government insisted the agreement be non-binding because the FBI had the authority to subpoena the information under section 215, a subpoena Bridge would not be able to move to quash.[17]

That lesson moved Ms. Leiberman's organization to join an ACLU lawsuit challenging the constitutionality of section 215. That lawsuit, filed in July of 2003, argued section 215 violates the First Amendment free speech guarantee and the Fourth Amendment prohibition of unreasonable searches and seizures.[18] The lawsuit was dismissed in 2007 in light of the revisions to section 215 discussed in section IV.[19]

III. SECTION 505 - NATIONAL SECURITY LETTERS, OR "NSLS"

NSLs are written directives to third parties, including telephone companies, financial institutions, internet service providers (ISPs), libraries, bookstores and consumer credit agencies, ordering them to provide records and information about a target without a warrant or judicial review.[20]

Section 505 of the Patriot Act expanded the reach of four pre-existing statutes that authorized the Federal Bureau of Investigation to use NSLs. When enacted in 1986, these statutes allowed the FBI to use NSLs to obtain records related to persons suspected of being agents of a foreign power without a warrant.[21] In 1993, the four statutes were amended to apply to records of anyone suspected of communicating with foreign agents about terrorism or espionage.[22] The Patriot Act expanded the FBI's authority to use NSLs to obtain documents related to any person, including a United States citizen, for use in "...authorized counterintelligence, counter terrorism, and foreign computer intrusion cyber investigations."[23]

The NSL statutes allow the FBI to demand production of e-mail, historical information on telephone calls, subscriber information associated with specific telephone numbers and e-mail addresses, financial information concerning open and closed checking and savings accounts, safe deposit box records, credit card records and consumer credit information including all financial institutions where a consumer maintains an account, and consumer reports including all information in a consumer's file ("Full credit reports").[24]

Recipients of NSLs were, like recipients of section 215 orders, subject to a broad gag order that effectively prevented them from speaking to anyone about those orders - including attorneys who might assist in filing challenges to NSLs.[25] A recipient of an NSL described the effects of the gag order:

"Living under the gag order has been stressful and surreal. Under the threat of criminal prosecution I must hide all aspects of my involvement in the case - including the mere fact that I received an NSL - from my colleagues, my family and my friends. When I meet with my attorneys I cannot tell my girlfriend where I am going or where I have been. I hide any papers related to the case in a place where she will not look. When clients and friends ask if I am the one challenging the constitutionality of the NSL statute, I have no choice but to look them in the eye and lie. I resent being conscripted as a secret informer for the government and being made to mislead those who are close to me . . ."[26]

Due to their broader application, section 505 NSLs proved far more popular than section 215 orders. The Inspector General of the FBI reported that the number of NSLs issued grew from 8,000 in 2000 (pre- Patriot Act) to 56,000 in 2004. In a three-year period, the FBI issued 143,074 such letters.[27] In a survey of four field offices, the Inspector General discovered that 22% of the NSLs issued were improper. Projected over the 56,000 NSLs issued in 2004, that means it is likely that as many as 12,320 American citizens may have had their financial, medical, telephone, reading and/or travel records scrutinized by the government without any evidence of wrongdoing, and in violation of the cursory limits imposed by the Patriot Act.[28]

The NSL provisions, including the gag order, were challenged in a case captioned *Does v. Ashcroft*. The plaintiffs argued the NSL provisions requiring the production of records violate the First, Fourth and Fifth Amendments to the Constitution by allowing the government to conduct unreasonable searches and seizures. The suit further alleged the gag order provisions violated the First Amendment to the Constitution.[29] On September 28, 2004, the District Court of the Southern District of New York held the NSL provisions violated the Fourth Amendment because the statute effectively barred judicial review of the propriety of an NSL request, and the First Amendment because the permanent ban (gag order) operated as a prior restraint on speech.[30] The Second Circuit recently vacated the decision, though, on the ground it was rendered moot by the revisions to the Patriot Act.[31]

IV. 2006 AMENDMENTS TO THE PATRIOT ACT

Sixteen of the most controversial provisions of the Patriot Act carried a sunset clause. Section 224 provided that without Congressional action those measures would expire on December 31, 2005.[32] Fourteen of those sixteen measures, including section 215, were retained through passage of the USA Patriot Improvement and Reauthorization Act of 2005 ("Reauthorization Act"). As part of a compromise, Congress also passed the USDA Patriot Act Additional Reauthorizing Amendments Act of 2005 ("Reauthorization Amendments"), which added civil liberties safeguards not included in the Reauthorization Act.[33]

One of those safeguards increased Congressional oversight of the use of section 215. Section 106 of the Patriot Act directed the Attorney General to submit an annual report to Congress, including information on the number of applications made for section 215 orders and the total number of orders granted. The Reauthorization Act added a requirement that the Attorney General include in this annual report information on the number of section 215 orders granted, modified or denied for library circulation records, library patron lists, book sales records, book customer lists, tax return records, educational records, and medical records containing information that identifies a person.[34] The amendment also requires an audit by the FBI Inspector General to determine the effectiveness of the use of section 215 orders for the years 2002-2006, and to identify any abuses of that authority.[35]

Procedural safeguards were also added concerning the use of section 215. Section

106 (a)(2) of the Reauthorization Act provides that applications for section 215 orders seeking records concerning library, bookstore, tax return, educational, medical, and firearms sales records must be approved by the FBI director, deputy director or the executive assistant director for national security. A section 215 application now must include a "statement of facts" demonstrating there are reasonable grounds to believe the items sought are "relevant" to an authorized or preliminary investigation to protect against international terrorism or espionage, and there is a procedure for judicial review that allows the recipient of a section 215 order to challenge its legality. And the gag order was modified so that a recipient may disclose the order to an attorney for the purpose of obtaining legal advice and representation.[36]

The most drastic features of the NSL statutes were also modified. Section 4 of the Reauthorization Amendments added language providing that a gag order attaches to an NSL only if the FBI certifies that disclosure may endanger an individual or the national security of the United States, or will interfere with a criminal or intelligence investigation, or diplomatic relations.[37] In those instances where a gag order is attached, the recipient is expressly allowed to consult with counsel to seek advice or representation, and does not require the recipient to notify the FBI he or she is disclosing that information to his or her attorney.[38] The Reauthorization Amendments also exempt libraries "performing in their traditional role" from being required to turn over records pursuant to an NSL.[39]

V. CONCLUSION

While the revisions of the Patriot Act do make substantial improvements in the areas of privacy and oversight, the Patriot Act still allows the government to demand sensitive personal information about an American citizen without a showing of probable cause or reasonable suspicion that person is engaged in terrorism or espionage. And while the recipients of 215 orders and 505 NSLs are now able to challenge those demands for information with the assistance of counsel, the targets of these demands for personal information are kept in the dark about the demands and have no way to know, much less challenge, assertions they are engaged in or related to "international terrorism or clandestine intelligence activities." Is that consistent with the Constitution's guarantee of the right of the people to be secure in their persons, houses, papers and effects from unreasonable searches and seizures?[40] Is it consistent with the right to privacy that resides in the penumbra of the Bill of Rights?[41] Only time and future litigation will tell.

ENDNOTES

[1] Pub. L. No. 107-56, 115 Stat. 272 (2001)

[2] The Patriot Act was 342 pages long. It was introduced on September 19, 2001, and signed into law on October 26. It is suspected that many members of Congress, confronted with a sense of fear and urgency, did not read the proposed legislation. See e.g. J. Scott Orr, *After 9/11, a swift and powerful change in the law of the land*, THE STAR LEDGER, July 10, 2005, at 1; Paul Rush, *Patriot Act Forges Unlikely Alliance*, INSIGHT ON THE NEWS, Sept. 29, 2003, at 26.

[3] See, e.g. Eric Pianin & Thomas Edsall, *Civil Liberties Debate Revived Amid Efforts to Fight Terrorism*, WASH. POST, Sept. 14, 2001, at A11; Ebony Reed, *Debate over civil liberties heats up as lawyers raise concerns as US detains material witnesses, non-citizens*, PLAIN DEALER, Sept. 30, 2001, at A7; Robin Toner & Neil Lewis, *A Nation Challenged: Security and Liberty*, N.Y. TIMES, Oct. 26, 2001, at A5.

[4] Section 215 has often been referred to as "the library provision" because of librarians' concerns about its potential applicability to patron records. See e.g. Peter Schworm, *Librarians Fight Search Law*, THE BOSTON GLOBE, Aug. 21, 2003, at 1; Richard Schmitt, *Was Focus of Patriot Act Debate a Dodge?*, L.A. TIMES, Dec. 11, 2005, at 29; Editorial, *How to Fix the Patriot Act*, DALLAS MORNING NEWS, Jan. 8, 2006, at 2P.

[5] The complete language of the relevant section of section 215 as enacted in 2001:

SEC. 501. ACCESS TO CERTAIN BUSINESS RECORDS FOR FOREIGN INTELLIGENCE AND INTERNATIONAL TERRORISM INVESTIGATIONS.

(a)(1) The Director of the Federal Bureau of Investigation or a designee of the Director (whose rank shall be no lower than Assistant Special Agent in Charge) may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.

[6] Section 215(c)(1) reads: "Upon an application made pursuant to this section, the judge shall enter an ex parte order as requested, or as modified, approving the release of records if the judge finds that the application meets the requirements of this section."

[7] Section 215 (d) reads: "No person shall disclose to any other person (other than those persons necessary to produce the tangible things under this section) that the Federal Bureau of Investigation has sought or obtained tangible things under this section."

[8] Bob Egelko & Maria Gaura, *Libraries Post Patriot Act Warnings*, S. F. CHRON., Mar. 10, 2003, at A1.

[9] Rene Sanchez, *Librarians Make Some Noise Over Patriot Act*, WASH. POST, April 10, 2003, at A20; Matt Gunderson, *Fewer Library Records Kept As Patriot Act Raises Privacy Fears,* BOSTON GLOBE, Sept. 14, 2003, at 1.

[10] Egelko & Gaura, *supra*, at A1.

[11] Carole Goldberg, *Library Privacy Backed*, HARTFORD COURANT, Feb. 22, 2004, at

G3; Oren Teicher, *The FBI shouldn't be reading over our shoulders*, NEWSDAY, Aug. 9, 2004, at A31.

[12] David Mehegan, *Reading Over Your Shoulder*, BOSTON GLOBE, Mar. 9, 2004, at E5.

[13] Dan Eggen & Charles Babington, *Senators Propose Curbs on Patriot Act*, WASH. POST, July 14, 2005, at A23.

[14] Dan Webster, *Patriot Act causing nationwide revolt*, SPOKANE SPOKESMAN REVIEW, May 11, 2003, F5; Judith Graham, *Libraries protest potential snooping*, CHICAGO TRIBUNE, April 4, 2003, 18.

[15] Egelko & Gaura, *supra*, at A1.

[16] Gail Russell Chaddock, *FBI and the USA Patriot Act in the spotlight as Congress considers how to fight terror*, CHRISTIAN SCIENCE MONITOR, May 3, 2006, at 10.

[17] Dwight Lewis, *A knock at the door, and Patriot Act becomes frighteningly real*, THE TENNESSEAN, Nov. 16, 2003, at 25A.

[18] Niraj Warikoo, *Suit opposes FBI's secret search powers*, DETROIT FREE PRESS, July 31, 2003, at 6B; Lewis, *supra*, at 25A.

[19] Edward Cardenas, *ACLU drops Patriot Act suit*, THE DETROIT NEWS, Oct. 28, 2006, at A6.

[20] Office of the Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters* (2007) at 7-8.

[21] Id.

[22] Richard Schmitt, *FBI Abuses May Lead to Limits on Patriot Act*, L.A. TIMES, Mar. 10, 2007, at 1.

[23] The Patriot Act also added a fifth statute authorizing the use of NSLs. *A Review of the Federal Bureau of Investigation's Use of National Security Letters, supra*, at 8-9.

[24] Id. at 10. The Inspector General's report notes the statutes do not authorize the FBI to collect the content of telephone calls and e-mail. Id. at 2, n. 5.

[25] The portion of the statute applicable to electronic service providers reads: "... No wire or electronic communication service provider, or officer, employee, or agent thereof, shall disclose **to any person** that the Federal Bureau of Investigation has sought or obtained access to information or records under this section." (Emphasis added.) It should be noted this provision was in the four pre-existing statutes.

[26] Anonymous, *My National Security Letter Gag Order*, WASH. POST, Mar. 23, 2007, at A17.

[27] In a May 2007 report to the House of Representatives, the FBI disclosed it issued more than 9,200 NSLs in 2006. When questioned about that figure, FBI Director Robert Mueller conceded that the actual number of NSLs issued was, in fact, greater because the report did not include NSLs issued for telephone and internet records. Chaddock, *supra*, at 10.

[28] The Inspector General discovered that in three instances the FBI avoided the NSL provisions altogether by arranging with telephone companies to obtain 3,000 phone numbers and calling records without even issuing NSLs. *A Review of the Federal Bureau of Investigation's Use of National Security Letters, supra*, at 71-72.

[29] *Does v. Ashcroft*, 334 F. Supp. 2d 471, 475 (SD NY 2004).

[30] Id., at 475.

[31] *Doer v. Gonzalez*, 449 F.3d 415 (2nd Cir. 2006).

[32] Section 224 reads:

SEC. 224. SUNSET.

(a) IN GENERAL Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 203(c), 205, 208, 210, 211, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.

(b) EXCEPTION With respect to any particular foreign intelligence investigation that began before the date on which the provisions referred to in subsection (a) cease to have effect, or with respect to any particular offense or potential offense that began or occurred before the date on which such provisions cease to have effect, such provisions shall continue in effect.

[33] Congressional Research Service, *USA PATRIOT Improvement and Reauthorization Act of 2005: A Legal Analysis* (2006) Summary.

[34] Id., CRS-5.

[35] Id., CRS-5-6.

[36] Id., CRS-7-8.

[37] Id., CRS -12.

[38] Id., CRS-12-13.

[39] Id., CRS-15-16.

[40] U.S. CONST., amend. IV.

[41] *Schmerber v. California*, 384 U.S. 757 (1966); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

* Gary Williams joined the faculty of Loyola Law School in 1987, where he teaches Evidence, Ethical Lawyering and Civil Rights Litigation. Before coming to Loyola Law School, Professor Williams was a staff attorney, and then Assistant Legal Director, of the ACLU Foundation of Southern California. Professor Williams is a member of the Board of Directors of the ACLU of Southern California and the National ACLU.

Dan Curtin, the Rule of Law and Municipal Attorneys

Address by Justice María P. Rivera* to League of California Cities City Attorneys' Conference, May 3, 2007 at Monterey, California

I am truly honored to be among you. You are an extraordinary group. Your work is fraught with difficulties, not the least of which are the rocks and shoals of political drama. You work with fewer resources than your counterparts in the private sector, and for less pay. And you are held to a higher standard. As Eleanor Roosevelt once said, "A good public servant becomes so at a high cost of personal sacrifice. We need such men [and women]; when we find them we owe them our gratitude and, above all, our respect." I could not agree more, and I'm here to offer my gratitude and respect. I congratulate and honor all of you for your decision to serve the public. Please give yourselves and each other a hand.

Today, I will talk to you about Dan Curtin, the Rule of Law and Municipal Attorneys. The inter-relatedness of these three subjects may not be readily apparent, but I hope by the end of my remarks you will see the inexorable connection.

As some of you may know, I worked with Dan at the McCutchen firm for nearly twelve years. He was my mentor in the arena of land use law, and over the years, he became a close and beloved friend. His daughter, Pattie, who is also a close and dear friend, walks proudly and ably in Dan's footsteps, being a superb land use lawyer in her own right.

Dan had those true-blue Irish eyes that always held a hint of a mischievous twinkle. Although Dan was not a jokester in the Tom Curry sense, he knew how to laugh at himself and how to use humor to maintain his perspective. Not long ago, he told one of his partners this story about a visit to Albania.

Dan was meeting with the mayor and other dignitaries of a village that was experiencing rapid growth. He was there to make a presentation about urban land use planning. Dan, of course, explained that all land use regulation and planning begins with the constitution, the General Plan, and then waxed eloquent about all the fine things that flow from developing a general plan and the related municipal benefits. At the end of the presentation the Mayor said: "Yes, yes, a General Plan. This sounds good. Very good. But Mr. Curtin, do you think you could get us a truck?"

In a recent article about Dan in the California Planning & Development Report, Bill Fulton said this:

> "At the podium Dan often seemed professorial, but in retrospect a better description might be priestly. Curtin's Irish Catholic background gave him great reverence for authority and he conveyed that reverence in a straightforward and unvarnished way. When discussing an appellate court ruling, he rarely identified the individual court that issued the decision or the individual justice who wrote it. He simply stated: 'The court said . . .' To Dan, it didn't really matter which court or which justice . . . The court's imprimatur was enough for him. He was only delivering the message from on high. [¶] And the core of the message was primacy of the general plan."

Now, *anyone* who has heard Dan speak has heard about the General Plan being the "constitution that governs the direction of future land use." Hearing it, one is struck by the almost missionary zeal with which Dan spread the General Plan gospel. Dan's fervor was such that there must have been something else, something more fundamental behind that message. Here's what I think that was: Dan understood that municipal law – typified by the hierarchical structure of land use planning laws and regulations – was a powerful symbol of the principle of government by the Rule of Law. I say that here, and now, because, as I will explain, I believe that you – each of you – are also powerful symbols of the Rule of Law, and are the first line of defense around it.

Let us first briefly explore what is meant by "the Rule of Law."

It was Aristotle who first distinguished the Rule of Law from the Rule of Men. "He who bids the law rule," Aristotle said, "may be deemed to bid God and Reason alone rule. But he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men." So, for Aristotle, law in its highest form is "reason unaffected by desire."

Centuries later, Montesquieu famously expanded upon the notion of the Rule of Law and focused upon its value as providing to the citizenry a sense of security—a freedom from the fear that those holding power over military force could at any time turn it upon the people. The Rule of Law as expressed by Montesquieu, Judith Shklar explains, "is the one way ruling classes had of imposing controls upon each other." And, it was in Montesquieu's discourses that one could see the beginnings of the idea that checks and balances would serve to protect the Rule of Law.

A recent essay describes the Rule of Law as an "autonomous legal order" that has three basic components: First, it limits the power of government – both elected officials and majoritarian power. Second, it demands that all be treated equally before the law, from the lowliest citizen to those at the highest

echelons of power. And third, it requires both procedural and formal justice – that is, there must be fair, consistent rules that are pre-announced, and transparently and consistently applied.

At the core of this "autonomous legal order" is the idea that the laws themselves must be founded upon basic moral principles that protect fundamental human rights. In this way the Rule *of* Law can be distinguished from the Rule *by* Law. Under a Rule *by* Law, there is no such moral grounding. Under Rule *by* Law, any laws that are legally enacted are to be enforced. So, for example, this reliance on the pure "formal rationality" of the law served to justify the judicial enforcement of the anti-semitic laws in Nazi Germany.

Recently, the phrase "Rule of Law" has pervaded the political lexicon and is being cited and recited willy-nilly to serve all sorts of political ends. As a result, some would argue, its meaning may have lost all coherence. "It would not be difficult to show," writes Judith Shklar, "that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter."

Shklar seems to be suggesting that the term "Rule of Law" has become what is called in political theory an "essentially contested concept," that is, a concept about which there is general agreement on the abstract idea, but endless arguments as to what are the true manifestations or realizations of the idea. In an interesting exercise meant to test whether Shklar was right, Jeremy Waldron studied the rhetoric that was tossed around during the Florida election debacle.

Waldron writes: "One of the remarkable features of the turmoil surrounding the counting and recounting of votes in Florida in the 2000 presidential election was the frequency with which 'the Rule of Law' was invoked. Let me count the ways." He goes on to catalogue how both sides, at each stage of the process, invoked the principle either in support of its own position or to attack what the opponents were doing. "People appealed to the Rule of Law [both] to defend and to criticize legally authorized exercises of discretion by political partisans; to defend and to criticize the use of rules rather than standards as a basis for recounting votes; [and even] to defend and to criticize innovative judicial decisions."

Thus, while the party who lost, Al Gore, took the line that the Rule of Law precluded any criticism of the justices' decision in *Bush v. Gore*, the justices themselves had no hesitation in invoking the Rule of Law in their criticism of the majority opinion. In the now famous words of Justice Stevens, "[a]lthough we may never know with complete certainty the identity of the winner of this year's presidential election, the identity of the loser is perfectly clear. It is the Nation's confidence in the judge as an impartial guardian of the Rule of Law."

So, the meanings and expressions of the Rule of Law can perhaps be endlessly debated. But as one commentator has said, "[t]he Rule of Law does not inhabit some rationalistic universe nor can it withstand rigorous intellectual scrutiny; it has to be experienced and lived. . . The Rule of Law is a maxim of political action and not a precept of ethical reflection." In fact, Waldron ends up concluding that the Rule of Law *is* an essentially contested concept, but unlike Shklar, also concludes that this is, *itself* a manifestation of the Rule of Law. The Rule of Law, Waldron writes, "is actually *served* by people asking and arguing about what counts as the Rule of Law . . . A society ruled by laws, not men, is bound to be a society in which there is constant debate about what the Rule of Law means." In short, both because of and in spite of all the rhetorical flourishes, the Rule of Law *principle* is alive and well.

Moreover, of late it has gained much traction in the international sphere. As explained in a speech by Kristen Boon, the "Rule of Law has become a particularly prominent theme since 9/11, and is now being addressed as a topic in its own right by the Security Council. It is routinely included in the mandate of UN peace-keeping operations, and billions of dollars in development assistance is tied annually to assessments of whether nations enforce the Rule of Law at home." And why, you may ask, has this concept gained "such moxie" in international affairs? Ms. Boon responds: "The short answer is that the Rule of Law is considered to be fundamental to three things: the exercise of civil liberties, a market economy and global peace and security."

Which brings us back to Dan Curtin, traveling attorney with a brief.

Dan ventured around the world to Kyrgyzten, Romania, Azerbaijan, the Ukraine, Armenia, Moldavia, Belarus, Bulgaria, and points east as part of the ABA's Rule of Law Initiative, to instruct burgeoning democracies on the subjects of local governance and land use regulation. Dan understood the importance of building confidence in government from the ground up. In essence, the General Plan became the metaphor for the notion that a constitution – and not arbitrary decisions by those in power – should govern decision-making. The impact of Dan's efforts cannot now be measured – it is too soon. But there can be no question that he – like a modern-day Johnny Appleseed – was sowing the *idea* of a municipal regulatory structure as a basic building block to development of a regional, and then a national Rule of Law.

This ground-up approach to nurturing democracy is imbedded in our political identity. As de Tocqueville observed more than 150 years ago, "It is incontestably true that the love and habits of republican government in the United States were engendered in the townships and in the provincial assemblies. [I]t is this same republican spirit, it is these manners and customs of a free people, which are engendered and nurtured in the different states, to be *afterward* applied to the country at large." And, indeed, the League of California Cities' first "Core Belief" trenchantly articulates this principle, stating that "local self-governance is the cornerstone of democracy."

Which brings me to you. Not everyone has the time or energy to travel around the world and promote the Rule of Law in emerging republics. But the Rule of Law is at risk at home as well, and, as the old saying goes, "all politics is local." That means you are the first line of defense for the Rule of Law. It is your sacred trust, every day. Every action you take as a *government* attorney should be a transparent example that the Rule of Law applies to governments and not just citizens, to elected officials as well as to the folks who elect them.

The League's excellent Ethical Manual for City Attorneys makes clear where your loyalties must lie. In several places it reminds you "the *city* is the client." And while it is true that the city generally acts through its "highest officer, employee, body or constituent overseeing the particular engagement," if a conflict develops among those officials or between what those officials want and a higher law, the attorney's loyalty is to *the city*. And what is the city? In ancient Rome, the very word for city – civitas – meant "a unity of citizens." Your loyalty is to the citizens, and therefore to the Rule of Law that protects them. It falls to the *government* attorney to be the voice that keeps faith with the people.

Happily, conflicts between the Rule of Law and your elected officials rarely develop. When they do, as you well know, it can be, shall we say, a career-defining event. We judges, though not as vulnerable as appointed city attorneys, occasionally feel the same heat. Indeed, this is why Aristotle's ideal emphasized that the "*single most important condition* for the Rule of Law is the character one must impute to those who make legal judgments." And this is why it seems the greatest betrayal is a public servant who has sworn to uphold the law, but then chooses loyalty to the appointing authority over loyalty to the Rule of Law.

I know this is not news to you, and you will forgive me, I trust, for preaching to the choir. But in Dan's memory, I could not resist this opportunity for a short refresher on what was Dan's – and must be your – guiding light. So in closing, let me paraphrase Justice Stevens: The city, he would say – the unity of citizens – must have confidence in the city attorney as the impartial guardian of the Rule of Law.

In large decisions or in small, that – and nothing less – is your daily charge, and in the tradition of Dan Curtin, I know you will all continue to fulfill that charge with honor.

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The Public Law Section Establishes an *Amicus Curiae* Policy

*By Mark L. Mosley**

Public entities and their counsel sometimes find themselves litigating issues of substantial public concern before the California Supreme Court and the courts of appeal. When they do, they typically look for *amicus curiae* support from entities such as the County Counsels' Association and the League of California Cities. Now there is another source of support: the Public Law Section itself.

In July 2003, the State Bar's Board of Governors adopted a resolution authorizing individual State Bar sections to participate as *amicus curiae* in their own names. Historically, the Bar itself has, on rare occasions, filed *amicus curiae* briefs in cases that are pending before the State's appellate courts. However, until now individual State Bar sections could not do so in their own names. Therefore, if an issue of interest to a particular section came to the attention of that section's executive committee, the committee would have to refer the applicant on to the Board of Governors. With the adoption of the new resolution, however, individual sections are now permitted to weigh in as *amicus curiae* whenever issues arise in the appellate courts that are of particular interest to their members.

In April 2005, the Public Law Section responded to the passage of the State Bar's resolution by adopting a formal policy and procedures for responding to applicants seeking *amicus curiae* support from the Section. This article describes the Section's policy and explains what litigants need to do if they wish to apply to the Section for *amicus* support for an issue of concern.

The first step is to make sure the issue in question will qualify as appropriate for *amicus* support from the Section. The State Bar is a judicial branch agency. Consequently, neither the Bar nor its sections take partisan positions in pending lawsuits except in very exceptional situations. The typical cases where the Section is likely to participate involve the validity and/or the interpretation of the State Bar Act or rules, or of legislation sponsored by the Bar or by the Section itself. However, the Section may also choose to participate in cases that involve legislation of judicial acts that can seriously affect the administration of justice and attorney-client relationships.

The July 2003 resolution expressly limits the Bar's and the sections' participation to cases pending before the highest court where the issue in question is likely to be determined. The Bar or section must make a determination that its participation as *amicus curiae* is likely to "constitute a significant contribution to the determination of" that issue, and that the position it intends to take is either "consistent with previous policy of the State Bar" or "of compelling public interest which the Board of Governors then adopts as policy of the State Bar."

In addition, the sections are allowed to participate only upon the request of the court where the matter is pending or of the State Bar's Board of Governors, or where "[t]he special knowledge, training, experience or technical expertise of the section would assist the court in deciding the matter and the section's *amicus curiae* brief would bring to the attention of the court relevant matter not already raised or adequately addressed."

Public entities such as the State, counties, cities, and special use districts may wish to explore the possibility of having the Public Law Section participate in order to improve their chances of obtaining a favorable outcome in a matter in which they either are a litigant or have a special interest in the outcome. In order to solicit the Section's participation, the public entity or its counsel must present a written application to the Section's Amicus Curiae Subcommittee of the Executive Committee. The application must identify with precision the legal issue or issues for the proposed *amicus* brief and clearly set forth the position the applicant wishes the Committee to take. The application must also include a copy of the final decision or order that is the subject of appeal, and it may (and should) include any other documents that are necessary or useful to help the Section's Executive Committee fully understand the issue and the proposed position.

The Section's Amicus Subcommittee screens each application to confirm that the application is complete and makes an initial determination whether it is worthy of the Section's consideration. The Subcommittee forwards all approved applications on to each member of the Executive Committee, which has a minimum of one week (longer if the briefing schedule allows) to accept or reject the application.

The Executive Committee's decision is by simple majority vote. The Executive Committee decides either to reject the application or to forward it on for further action. During this process, the Executive Committee may invite the applicant to present additional or supplemental information or answer questions prior to its consideration of the application.

If the Executive Committee decides to accept the application, it forwards the application on simultaneously to the Board of Governors Committee on Operations ("BOPS") and to the Executive Committee chairs of each of the other State Bar sections. Any Executive Committee of any other section may submit written comments on the application to the BOPS. BOPS will then review the application along with any comments received from any of the sections, and often will work directly with the applicant and the Amicus Subcommittee to address and resolve any adverse comments received.

If BOPS approves the application, which it may do in spite of any unresolved adverse comments, the applicant must then draft the proposed *amicus* brief. Members of the Section's Executive Committee may, but are not required to, participate in the brief drafting process. The chair of BOPS and the General Counsel of the State Bar (or his/her designee) then review the draft of the brief, working with the applicant at their discretion, and permit the applicant to file the *amicus* brief in the name of the Section.

The foregoing procedures contain implicit guidelines for public entities and their counsel interested in securing *amicus* support from the Public Law Section. First, submit the application as early as possible to give the Section enough time to obtain the necessary approvals. Second, present the issue as narrowly and as precisely as possible, and make sure it is an issue of compelling public interest to which the Section can lend its specialized expertise. And third, please be prepared to do most of the "heavy lifting" in terms of research and drafting as the time constraints of Executive Committee members will usually preclude their active participation during the research and/or drafting phase.

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The Work of the State Bar's Rules Revision Commission: A Progress Report

By Kevin Mohr*

At a recent conference, I had the good fortune to attend a presentation featuring Frank Armani, one of the lawyers involved in the notorious "buried bodies" case from the early 1970's in upstate New York. Most of us are probably familiar with the case, a mainstay of the professional responsibility curriculum. Armani and Francis Belge represented a defendant charged with murder. The defendant, Garrow, informed the lawyers he had murdered two other young women and disclosed the location of the bodies. As Garrow was a suspect in those murders, the lawyers were under pressure in the community to disclose anything he might have told them about the missing girls. For Armani, the pressure was enormous. One set of parents lived in his neighborhood, attended the same church and had another daughter in school with his daughter. Moreover, the father worked at the courthouse where Armani appeared daily. Yet despite intense pressure, Armani never buckled. Only when Garrow confessed his crimes did the full extent of the lawyers' knowledge become known. Mr. Armani explained it was a difficult decision, but ultimately, preservation of his client's secrets – and trust – were to him the higher moral good. He admitted he never consulted the then-governing New York ethics code, relying instead on his New York State attorney's oath: to protect the Constitutions of the United States and New York – *and* to maintain inviolate the secrets of his clients.

You might wonder why I'm beginning an article concerning the work of the State Bar of California's Commission for the Revision of the Rules of Professional Conduct ("Commission" or "RRC") by recounting the buried bodies case. It is simple. The story highlights the fact that Mr. Armani's employment of his lawyer's oath as moral compass is a touchstone that emphasizes how complex legal ethics has become since the 1970's. It is only by understanding just how varied the field has become that one can appreciate the Commission's work.

In the early 1970's, there were at most a handful of legal scholars specializing in ethics; today, scores of law professors write regularly on the subject. Few lawyers then specialized in legal ethics; today, thousands of lawyers prosecute or defend other lawyers within state disciplinary systems, file or defend legal malpractice cases, appear as expert witnesses, or volunteer on state committees that collectively issue several hundred ethics opinions annually. Thousands of judicial opinions are issued each year on conflicts, confidentiality and other ethics issues. Moreover, Enron, WorldCom and other corporate debacles led to the passage of the Sarbanes-Oxley Act and SEC regulations that govern lawyer conduct in the public corporation sphere. In short, there are multiple streams of law governing lawyers' ethics. The days are past when a lawyer might rely solely on the lawyer's oath to illuminate a path through an ethical quandary. A working knowledge of the ethics rules – and other regulations governing ethical conduct – is a must for any lawyer practicing in the 21st Century.

This article is intended to foster an appreciation of the different sources of lawyer regulation and how the Commission is working to draft a set of ethics rules that will permit lawyers to understand their duties and better serve – and protect – their clients. First, I will briefly summarize the different sources of law informing the Commission's work. Second, I will describe the Commission's charge. Third, I will explain the process by which the Commission attempts to ensure a transparent rule-making process with repeated opportunities for public input. Finally, I will discuss some of the rules that have been through the public comment process and which, if adopted by the Supreme Court, may alter current obligations.

I. SOURCES OF THE LAW OF LAWYERING

By the early 1970's, most state courts (including New York) had adopted some version of the American Bar Association's Model Code of Professional Responsibility ("ABA Code") as their ethics rules. After a series of legal scandals during the 1970's, the ABA Code was replaced by the 1983 ABA Model Rules. In the late 1990's, the ABA president appointed the Ethics 2000 Commission (also known as "E2K") to review the Model Rules and make necessary changes. In 2002, the House of Delegates largely followed E2K's recommendations and adopted revised Model Rules. In 2003, the House also adopted changes to the confidentiality rule (Model Rule 1.6) and the rule governing organizations as clients (Model Rule 1.13), both occasioned by the aforementioned corporate debacles. During the 1990's, the American Law Institute had also worked on the Restatement of the Law Governing Lawyers ("Restatement"); the final version was approved in 2001. Although not binding authority in any state, it is, like other Restatements, highly persuasive. Finally, in 2002, the ABA House adopted model rules intended to facilitate multijurisdictional practice ("MJP"), i.e., the ability of lawyers in good standing to temporarily practice in jurisdictions in which they had not been licensed.

California is one of only two states (Maine is the other) that had never adopted either the ABA Code or Model Rules as its governing ethics rules. In addition, unlike every other state where the state's highest court alone is charged with regulating the legal

profession, California lawyers are specifically regulated by the legislature through the Business and Professions Code and other statutes. This then was the legal ethics landscape in 2001 when then State Bar President Palmer Madden appointed the RRC to review the California Rules of Professional Conduct and make recommendations for change.

II. THE RULES REVISION COMMISSION'S CHARGE

The RRC was given a four-point charge:

1. Assure adequate protection to the public in light of developments that have occurred since the rules were last reviewed and amended in 1989 and 1992;

2. Promote confidence in the legal profession and the administration of justice;

3. Facilitate compliance with and enforcement of the rules by eliminating ambiguities and uncertainties in the rules; and

4. Eliminate and avoid unnecessary differences between California and other states, fostering the evolution of a national standard with respect to professional responsibility issues.

In carrying out its charge, the Commission was directed to consider the E2K recommendations and the Restatement. The Commission was "specifically charged to also consider the work that has occurred at the local, state and national level with respect to Multi-Disciplinary Practice ('MDP'), Multi-Jurisdictional Practice ('MJP'), unauthorized practice of law ('UPL'), court facilitated *propia persona* assistance, discrete task representation, and to other subjects that have a substantial impact upon the development of professional responsibility standards."

Thus, the Commission was to include in the calculus of the California Rules of Professional Conduct not only legal ethics developments in California, but also any developments in the United States.

III. THE PUBLIC COMMENT PROCESS

The deliberative and public comment processes the Commission has pursued are intended to ensure a transparent process that provides interested persons with ample opportunity to review and comment on its work product. First, the Commission has 10 day-long meetings annually; all are open to the public. They take place at the State Bar offices in either Los Angeles or San Francisco, with a video hookup to the other office.[1] The agenda is posted on the State Bar web site in advance of each meeting.[2]

Second, when the Commission approves a rule, it is typically posted to the web site to permit review and comment.[3] This "informal" comment process is separate from the official public comment period.

Third, the Commission also holds informal "Town Meetings," usually at the State Bar's Annual Meeting, to solicit further input.

Fourth, the official public comment process is multifaceted. Because of local bars' concerns that there was insufficient time to review proposed rules during the last round of rules revision, the Commission recommended, and the Board of Governors approved, a formal public comment process in which every rule is considered at least twice by the Board of Governors, the public and the Supreme Court. The rules have been divided into four "batches" of approximately equal complexity, with each batch going through a separate public comment process. After a batch is completed, it is finalized and sent for Board of Governors' approval of a formal public comment period. At the end of each period, the Commission holds a public hearing, reconsiders the rules in light of the public comment and, if warranted, makes further revisions. After reconsideration and revision, the rules are packaged with a report to the Supreme Court for an informal review. This process is conducted for each batch.

After all four batches have been through the process, the Commission will again review the work product, make any necessary revisions, and then submit the entire set of proposed rules for Board of Governors' approval for a final public comment process. After that final public comment period, the Commission will again make further changes, if warranted, then resubmit the rules to the Board of Governors. Upon review and adoption by the Board, the rules will be sent to the California Supreme Court for final review, possible revision and approval. If approved, the Supreme Court will set a date on which the rules will become effective.[4]

Public comment is a lengthy process but is necessary to ensure that different constituencies within the public and profession are afforded an adequate opportunity for input.

IV. GENERAL APPROACHES AND RULES DRAFTED TO DATE

The first batch of rules have been out for public comment, brought back and further revised by the Commission. At time of writing, an informal report to the Supreme Court was being prepared. Before discussing specific rules, however, it would be helpful to identify some of the general approaches to its task the Commission has taken.

A. General Approaches

First, the Commission has proposed California use the same numbering and format conventions as the ABA Model Rules. If approved by the Supreme Court, California will be the last state to adopt that numbering system. This does not mean the substance of the rules or even the organization within any given rule will be the same as its Model Rule counterpart. Nevertheless, California's migration to the Model Rule numbering and format systems would be a boon to lawyers and scholars in other states, particularly those practicing under California's multijurisdictional practice rules. Lawyers familiar with their state's rule numbers will readily be able to find the corresponding rule governing their ethical conduct in California, enhancing ethical compliance. California courts will have new sources of authority to consult – opinions from other states – and courts and scholars in other states will no longer shy away from California authority.

Second, the Commission has proposed revisions to the scope and purpose of the rules. Proposed Rule 1.0, revising current rule 1-100, identifies four *purposes* of the rules:

"(1) To protect the public; (2) To protect the interests of clients; (3) To protect the integrity of the legal system and to promote the administration of justice; and (4) To promote respect for, and confidence in, the legal profession." As to scope, although the focus of the rules may continue to be as bases for the discipline, they would also be intended to expressly bind and regulate the conduct not only of members of the State Bar but also of "all other lawyers practicing law in [California]." In this regard, in place of the generally sparse "discussions" that follow the current rules, the proposed rules will contain a richer set of comments intended to provide guidance to practitioners in conforming their conduct to the law.[5]

Finally, to reflect the applicability of the rules to all lawyers, the Commission has proposed substituting the word "lawyer" for the word "member" (as in "member of the State Bar") throughout the rules.

B. Specific Rules in Batch One

What follows is a discussion of some of the rules the Commission has recommended for adoption. The current California rule counterpart is listed in brackets. Please note that the public comment versions of these rules are available on the State Bar's website at www.calbar.ca.gov.[6]

Rule 1.1 [Cal. Rule 3-110]. Competence. Proposed Rule 1.1 remains largely unchanged from current Cal. Rule 3-110. Unlike Model Rule 1.1, which permits discipline whenever a lawyer fails to render competent legal services, the California Rule requires a finding that lawyers' alleged lack of competence results from intentional, reckless, or repeated acts.

Rule 1.4 [Cal. Rules 3-500 & 3-510]. Communication. Proposed Rule 1.4 combines current Cal. Rule 3-500 (communication of significant developments to client) and Cal. Rule 3-510 (duty to communicate a settlement offer to client). Aside from incorporating the structure of Model Rule 1.4 and several additional requirements (e.g., a lawyer must reasonably consult with a client about the means to accomplish the client's objectives), the rule amends the current California standard for provision of significant documents to the client by permitting inspection of documents in the lawyer's possession or provision of copies through electronic means.

Rule 1.5.1 [Cal. Rule 2-200]. Fee splitting with other lawyers. California is one of several states that permit "pure" fee referrals, i.e., the referring lawyer may claim a referral fee even if he or she does no work on the matter. This contrasts with Model Rule 1.5(e), which permits a referring lawyer to receive a fee only in proportion to the services actually provided in the matter *or* if the referring lawyer has assumed joint responsibility with the other lawyer. The Commission, however, has recommended two substantive changes. First, written client consent must be obtained *when* the lawyers enter into their agreement to divide fees or as soon thereafter as reasonably practicable; and second, the agreement between lawyers must be in writing. The former change is intended to improve the client's ability to make a meaningful decision. The latter change is intended primarily to avoid subsequent disputes between lawyers.

Rule 1.8.8 [Cal. Rule 3-400]. Limiting liability to client. This rule will remain largely unchanged from current Cal. Rule 3-400. Unlike Model Rule 1.8(h), proposed Rule 1.8.8 would continue to absolutely prohibit client agreements to *prospectively* limit malpractice liability. Proposed Rule 1.8.8, however, would continue to permit malpractice settlements with both current and former clients, and expressly would exclude from the rule's coverage any situation in which the client is represented by independent counsel.

Rule 5.1 [Cal. Rule 3-110, Discussion]. Responsibilities of Partners, Managers, and Supervisory Lawyers. Proposed rule 5.1 has no counterpart in the current California Rules. Although the Discussion to current rule 3-110 recognizes a lawyer's "duty to supervise the work of subordinate attorney and non-attorney employees and agents," the proposed rule articulates the duty to supervise in a way that should give lawyers helpful guidance. Currently, lawyers must look to case law to determine their duties in this area. Proposed Rule 5.1 should be read in concert with proposed rules 5.2 and 5.3.

Rule 5.2 [no Cal. Rule counterpart]. Responsibilities of a Subordinate Lawyer. Proposed Rule 5.2 sets out duties concerning supervision from the perspective of the subordinate lawyer. On the one hand, it recognizes that even a lawyer who is acting under the direction another lawyer must still comply with his or her duties under the ethics rules and State Bar Act. Nevertheless, when an ethical dilemma raises an *arguable* question of professional duty, the subordinate lawyer may follow the lead of the supervising lawyer. Although some commentators have referred to this rule as the "Nuremberg defense" of lawyer ethics, the rule is carefully drafted to permit a subordinate to follow the lead of a supervisory lawyer only in situations where the issue of professional duty is "arguable." Where lawyers' duties are manifest, the subordinate must act ethically regardless of direction from above.

Rule 5.3 [Cal. Rule 3-110, Discussion]. Responsibilities Regarding Non-lawyer Assistants. Proposed Rule 5.3 is similar in structure and content to proposed Rule 5.1. It addresses supervision of non-lawyer assistants.

Rule 5.5 [Cal. Rule 1-300]. Unauthorized Practice of Law; Multijurisdictional Practice of Law. Proposed Rule 5.5 amends current rule 1-300. It continues to prohibit assisting the unauthorized practice of law or practicing law in a jurisdiction where the lawyer is not authorized, and adds paragraph (b), which prohibits a non-admitted lawyer's systematic presence in California or improper holding out to the public. Paragraph (b) is based on Model Rule 5.5(b). The Commission did not recommend the inclusion of Model Rule 5.5(c) and (d), both of which address multijurisdictional practice, because California already addresses that issue in Rules of Court.[7]

Rules 7.1 to 7.5 [Cal. Rule 1-400]. Various Rules Regulating Advertising. In part because the Internet does not recognize state boundaries, the Commission thought it important to contribute to the uniform regulation of lawyer web pages, which are advertising, by amending Cal. Rule 1-400 to parallel the structure and, to some extent, the content of Model Rules 7.1 to 7.5. Each rule addresses a different aspect of lawyer commercial communication (e.g., Rule 7.2 regulates advertising and Rule 7.3 addresses direct contact with prospective clients, whether in-person, by telephone or by real-time electronic contact such as chat rooms or instant messaging.) Some of the differences

between the proposed rules, on the one hand, and current rule 1-400 or the Model Rules, on the other, are worth highlighting. For example, unlike Model Rule 7.1, proposed rule 7.1 would not require that a prohibited misrepresentation be "material." Of the definitions currently found in rule 1-400, only that for "communication" is carried forward. Finally, the Commission recommends the repeal of the current requirement to retain commercial communications for two years.

Rule 8.3 [no Cal. Rule counterpart]. Reporting Professional Misconduct. The Commission has recommended that California remain the only state without a rule that mandates reporting a rules violation by another lawyer "that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer." Nevertheless, proposed rule 8.3 would provide that, except for information protected by confidentiality, a lawyer "may, but is not required to, report to the State Bar a violation of these Rules or the State Bar Act."

C. Other Rules Not in Batch One

The Commission has also considered other rules that will be circulated for public comment in the near future. These include a counterpart to Model Rule 1.14, which provides guidance on representing clients with diminished capacity. As baby boomers age, the guidance provided will help lawyers to better protect their clients. Also included is the rule on communications with represented persons, several rules concerning conflicts of interest, and a lawyer's duties when representing an organization, whether governmental or private. All of these rules necessarily implicate the duty of confidentiality, which in California resides in Bus. & Prof. Code § 6068(e) and, which requires the Commission to work in concert with the legislature to effectuate any changes. In addition to the foregoing, the Commission will also be reviewing rules that address trial conduct, including the duty of candor owed a tribunal, pre-trial publicity, and a possible rule concerning prospective clients.[8]

SUMMARY

As noted, the work of the Commission is complex. Since the California Rules last underwent revision, the body of ethics law has grown exponentially. There are the ABA Model Rules (and state variations), the Restatement, and initiatives designed to facilitate the kind of multijurisdictional practice that modern law practice now entails. Any revisions to the rules must consider these various sources. Yet at the core of a lawyer's duties are, as Frank Armani recognized years ago, confidentiality and the trust the client places in his or her lawyer. Regardless of how complex the rules framework may become, the twin obligations of confidentiality and loyalty will be at its core.

ENDNOTES

1. See http://www.calbar.ca.gov/state/calbar/calbar_extend.jsp?cid=10117&id=1030&filter=Commissions2 (last visited June 24, 2007).
2. See http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129&id=2841 (last visited June 24, 2007).
3. See http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10129&id=7682 (last visited June 24, 2007).
4. See CAL. BUS. & PROF. CODE § 6077 (West 2007).
5. See Proposed Rule 1.0(c).
6. Http://www.calbar.ca.gov/calbar/pdfs/public-comment/2006/Discussion-Draft.pdf (last visited June 24, 2007).
7. See CAL. RULES OF COURT, Rules 9.45 to 9.48.
8. See Model Rule 1.18.

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Litigation & Case Law Update

*Compiled by Richard C. Miadich**

The purpose of the Litigation & Case Law Update is to alert the *Journal's* readers to recent judicial decisions touching areas of public law.

LAND USE/MUNICIPAL POLICE POWER

California Supreme Court clarifies "ambiguous" language in lower court land-use decisions, holds that cities may enact zoning laws intended to restrict competition for purpose of facilitating economic vitality in specified commercial districts.

The City of Hanford created a new commercial district known as the "Planned Commercial" ("PC") district to accommodate its growing need for a large mall in which several department stores and other retailers would be located. In order to protect the economic vitality of its commercial downtown district – home to several locally-owned retail furniture stores that are well-regarded in the region – the City enacted a zoning ordinance prohibiting the sale of furniture in the PC district. Notwithstanding this ordinance, several of the department stores located in the PC district continued to offer "ready-to-assemble" furniture that they maintained differed from the type of furniture sold by retailers in the downtown district. The City then amended the zoning ordinance to provide a limited exception permitting the department stores within the PC district to display and sell furniture, provided they did so in a single location within the store measuring no more than 2,500 square feet.

Owners of a "stand-alone" furniture store within the PC district who wished to sell furniture but did not fall within the exception challenged the validity of the zoning ordinance. Plaintiff-owners contended that the ordinance was invalid because 1) it was enacted for the unlawful primary purpose of restricting competition, and 2) it violated the equal protection clauses in the federal and state constitutions. After the trial court rejected their contentions, the plaintiffs appealed. On appeal, the Court of Appeal reversed on the basis that, while the ordinance was founded on a permissible primary purpose, the ordinance's exception for department stores – but not other PC district retailers – bore no rational relationship to the City's goal of protecting the economic viability of the downtown district and thus violated federal and state equal protection guarantees.

The California Supreme Court granted certiorari and reversed the Court of Appeal's decision on plaintiff's equal protection claim in a decision styled as *Hernandez v. City of Hanford* (2007) ~ Cal.Rptr.3d ~, 2007 WL 1629830.

Before addressing the equal protection issue, however, the Supreme Court clarified what it termed "some arguably ambiguous language" in lower court decisions concerning extent of a city's authority under the police power to enact zoning regulations that regulate or restrict economic competition." In so doing, the Court stated that it is within a city's police power to enact a zoning ordinance that has the intended effect of directly regulating or restricting economic competition so long as "the primary purpose of the ordinance or action . . . is not the impermissible private anticompetitive goal of protecting or disadvantaging a particular favored or disfavored business or individual, but instead is the advancement of a legitimate public purpose – such as the preservation of a municipality's downtown business district for the benefit of the municipality as a whole." To the extent language in *Van Sicklen v. Browne* (1971) 15 Cal.App.3d 122, *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467 and *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273 suggests otherwise, it is disapproved. Finally, the Court found that, contrary to the decision of the Court of Appeal, the department store exception in the zoning ordinance was rationally related to the City's separate goal of attracting department stores to the PC district and therefore did not violate the federal or state equal protection guarantees.

PUBLIC SCHOOL SYSTEM/ CONSTITUTIONAL LAW

State legislation transferring power over school district from local governing board to city mayor and other entities not expressly designated as part of the public school system in the state Constitution violates article IX, sections 6 and 16 of the California Constitution.

The mayor of the City of Los Angeles ("the Mayor"), a charter city, sought from the state legislature expanded control over the Los Angeles Unified School District ("LAUSD"). The state legislature responded by enacting AB 1381, known as the "Gloria Romero Educational Reform Act of 2006" ("the Romero Act"), which made two main changes in the governance of LAUSD. First, it transferred substantial power from the LAUSD Board of Education ("the Board") to the LAUSD District Superintendent ("District Superintendent"), whose appointment was made effective only upon ratification by the Mayor. Second, it transferred complete control over three low-performing LAUSD high schools (and their feeder schools) from the Board to "The Los Angeles Mayor's Community Partnership for School Excellence" ("the Mayor's Partnership"), a newly-created entity controlled by the Mayor.

LAUSD and several interested organizations thereafter petitioned for a writ of mandate challenging the constitutionality of the Romero Act. Petitioners based their challenge on several grounds, including that the Romero Act violated article IX, section 16 of the California Constitution, which grants charter cities the right to determine whether their boards of education are elected or appointed, and article IX, section 6 which prohibits the transfer of control over any part of the public school system to any authority not included in the public school system. Additionally, petitioners asserted that the Romero Act violated the "home rule" provision in article XI, sections 3 and 5, and the Equal Protection guarantee of article I,

section 7 of the state Constitution. After the trial court held the Romero Act unconstitutional under all the bases asserted by petitioners, the State and the Mayor appealed.

In *Mendoza v. State* (2007) 149 Cal.App.4th 1034, the Court of Appeal affirmed, holding that the Romero Act was an unconstitutional attempt by the state legislature to circumvent the provisions in sections 6 and 16 of article IX of the California Constitution.[1] The Court of Appeal explained that while the state constitution does not require that the legislature delegate any powers to local governing board of education, local governing boards are the only entities to which the state constitution permits the legislature to delegate power regarding local education. At the same time, the state Constitution vests charter cities with the plenary power to decide whether local governing bodies are elected or appointed. The Romero Act intruded upon this latter power of charter cities by transferring the Board's power to another entity (e.g., both the District Superintendent and the Mayor's Partnership) and then denying the City the power to determine the selection and/or composition of the same because it was not a board of education. In the absence of a "looming constitutional crisis," the Court of Appeal concluded that the legislature could not lawfully deprive the City's voters their right under article IX, section 16 to have their school district run by an elected board.

Turning to petitioners' article IX, section 6 claim, the Court of Appeal framed the "critical issue" as whether the entities to which Romero Act transferred the Board's power could "be deemed to be part of the public school system for any reason *other* than the Legislature's bald declaration that they are." It then determined the "only entities" authorized under article IX to govern the public school system are the State Superintendent and Board of Education, County Superintendents and Boards of Education, and local school districts with governing boards. The Court of Appeal then held that section 6 was violated by the Romero Act's transfer of complete control over certain LAUSD functions from the Board to the Mayor's Partnership. Although a somewhat closer question, it also found that the transfer of authority from the Board to the District Superintendent violated section 6 since ultimate control over the District Superintendent's actions was subject to the Mayor's power to hire, fire or retain him or her.

*****Special Note:*** *On September 28, 2007, the Public Law Section is hosting a program entitled "AB 1381 Litigation: Public Law and the Mayor's Plan for the L.A. School District" at the 80th Annual Meeting of the State Bar of California, in Anaheim, California. Please join us to learn more about the public law issues addressed in this case.*

VOTING RIGHTS/ CONSTITUTIONAL LAW

California Voting Rights Act ("CVRA") does not, on its face, violate the federal and/or state equal protection guarantees.

Latino voters in the City of Modesto brought an action against the City alleging that because of racially polarized voting in city elections, the City's use of at-large city council elections resulted in vote dilution in violation of the California Voting Rights Act ("CVRA"). Plaintiffs prayed for an order requiring the City to institute a district-based system of elections. The City moved for judgment on the pleadings asserting that the CVRA was facially unconstitutional because it uses "race" to identify the type of polarized voting that triggers a cause of action for vote dilution in violation of federal and state equal protection guarantees. The trial court granted the City's motion and plaintiffs' appeal. The Court of Appeal reversed in *Sanchez v. City of Modesto* (2006) 145 Cal.App.4th 660.[2]

The Court of Appeal first addressed plaintiff's challenge the City lacked standing under the rule that subordinate political entities may not challenge state action on due process or equal protection grounds. It noted that prior decisions had established an exception to the no-standing rule in situations where a claim by a city or county is best understood as a practical means of asserting the individual rights of its citizens. This exception applied, the court explained, when a city otherwise satisfied the usual tests for third-party standing – e.g., that the city's pursuit of the litigation is "inextricably bound up" with the rights of its citizens and that genuine obstacles exist which prevent citizens from asserting those rights themselves. Noting that Modesto voters had recently rejected an ordinance to establish district-based elections by referendum and that individual voters would probably not be able to mount a facial challenge to the CVRA until after a court-ordered remedy requiring the City to establish district-based elections, the Court of Appeal found that the City had standing to pursue its challenge to the CVRA.

Turning to the merits of the City's motion, the Court of Appeal began by discussing the nature of the burden litigants bear in mounting facial challenges. Under the United States Supreme Court's decision in *United States v. Salerno* (1987) 481 U.S. 739, facial challenges are the most difficult to mount successfully because they require a litigant to establish that "no set of circumstances exists" under which the challenged action may be valid. The City asserted that *Salerno* should not apply and that the proper standard was the lower standard for facial challenges that the U.S. Supreme Court has applied in First Amendment overbreadth and abortion cases. The Court of Appeal rejected this entreaty, holding that "there is no warrant for refusing to apply *Salerno* outside [these contexts] until a majority of the Supreme Court gives clear direction to do so."

Under the *Salerno* standard, the Court of Appeal then held that the City had failed to establish that the CVRA – on its face – violates equal protection principles. The fact that the CVRA relies on race-conscious factors – namely racially polarized voting – in defining a cause of action for vote dilution does not mean it is automatically subject to strict scrutiny. U.S. Supreme Court jurisprudence provides that strict scrutiny applies only when a statute classifies individuals by race and then imposes a burden or confers a benefit based on that classification. This is not what the CVRA does because a claim for vote-dilution may be asserted under the CVRA by members of any racial group.

However, the Court of Appeal acknowledged that the potential did exist that plaintiffs' prayed-for remedy – an order requiring the City to establish district-based elections – could trigger strict scrutiny. Under

the U.S. Supreme Court's decision in *Bush v. Vera* (1996) 517 U.S. 952 concerning review of districts created as a remedy to vote-dilution claims, strict scrutiny is triggered where race is the "predominant factor" in creating the districts. Whether any remedy plaintiffs ultimately obtain with respect to their vote-dilution claim triggers strict scrutiny is a question that the court may properly consider in the context of an as-applied challenge, but not in the City's facial challenge to the CVRA.

FREE SPEECH/EDUCATION LAW/CONSTITUTIONAL LAW

Public statement by school district characterizing student-authored opinion piece published in school newspaper as unprotected speech under the state and federal constitutions or the Education Code violated student's free-speech rights.

Plaintiff/appellant was a student in the Novato Unified School District ("the District") who wrote an opinion piece about illegal immigration that was published in the editorial section of the school newspaper with the approval of the school principal and the journalism teacher. The op/ed piece, "Immigration," received widespread criticism. In response, the school principal and the District superintendent wrote a letter of apology to parents and students in which they asserted that plaintiff's piece was not protected speech, offered to hold assemblies to discuss the piece, and to delay the publication of two of plaintiff's subsequent op/ed pieces. Plaintiff thereafter commenced an action against the District alleging that its response to his op/ed piece violated constitutional and statutory free speech guarantees. After the trial court granted the District's summary judgment motion, plaintiff appealed.

In *Smith v. Novato Unified School Dist.* (2007) ~ Cal.Rptr.3d ~, 2007 WL 1469428 (Cal.App. 1 Dist), the Court of Appeal held that the District's response to plaintiff-student's opinion editorial violated the state and federal constitutional free speech guarantees, as well as statutory protections for speech in the Education Code. The Court of Appeal reviewed the trial court's determination as to whether "Immigration" was protected speech under Education Code, Section 48907 and 48950, and, if so, whether the District's response infringed on Smith's free speech rights. It also considered whether individually the District and its superintendent were immune under Government Code Section 820.2, and whether the District's speech policies were facially valid.

The Court of Appeal found that section 48907 provided broader protection for speech rights than the relevant federal and state case law interpreting the First Amendment to the federal Constitution. The court also found that section 48907 mandated free speech protection for speech that merely presents controversial ideas, but does not incite disruption, and held that "Immigration" was protected speech under the statute. Interpreting preceding case law and legislative history behind section 48907, the Court of Appeal found that the standard for whether the District's response violated the statute was the same as the standard to be applied under First Amendment-based challenges. Although the District's attempt to invite responsive speech did not violate plaintiff's free-speech rights, the pronouncement that "Immigration" was not protected speech did.

In the unpublished portions of the decision, the Court of Appeal also held that the District did not infringe on plaintiff's free speech rights regarding his subsequently published op/ed pieces, that the District and its superintendent were not entitled to immunity under Government Code section 820.2, and that the District's policies regarding student free speech rights were not void for overbreadth or vagueness.

MUNICIPAL TAXING AUTHORITY (PROPOSITION 218)

City's decision to reinterpret existing cell phone use tax to apply to expanded base of customers pursuant to federal Mobile Telecommunications Sourcing Act was subject to voter approval per Proposition 218.

In 1993, the City of Los Angeles amended its municipal code to create a tax on cell phone use ("cell tax"). Although the cell tax expressly applied to all airtime by carrier-plaintiffs' customers, its interpretation was made subject to those limits imposed by the federal Constitution. Under *Goldberg v. Sweet* (1989) 488 U.S. 252, local taxes do not violate the Commerce Clause where, among other things, the taxing city has a "substantial nexus" to the activity taxed. Consistent with *Goldberg*, the cell tax was interpreted to apply only to those calls by a carrier's customers that originated or terminated in the City.

In 2000, however, Congress enacted the Mobile Telecommunications Sourcing Act ("MTSA") that authorizes cities to levy cell taxes based on a customer's primary place of use, regardless of where a call originated or ended. Following the MTSA's enactment, the City informed carriers that its cell tax was to be interpreted, consistent with the MTSA, to apply to all airtime by the carriers' customers, regardless of its place of origin or termination. Plaintiff-carriers thereafter filed a petition for writ of mandate and complaint for declaratory relief on the basis that the City had failed to submit the tax increase for voter approval pursuant to Proposition 218. The trial court granted the writ and entered judgment for plaintiff-carriers, but the judgment was silent as plaintiffs' claim for declaratory relief. The City appealed and plaintiffs cross-appealed on the issue of declaratory relief.

In *AB Cellular LA, LLC v. City of Los Angeles* (2007) ~ Cal. Rptr. ~ 3d, 2007 WL1346505 (Cal.App.2 Dist.), the Court of Appeal held that the City's "unilateral decision to impose the cell tax on all airtime" violated Proposition 218 and the trial court should have granted plaintiff's request for declaratory relief. The City had asserted that it had not revised its methodology for calculating the cell tax. As enacted in 1993, the cell tax was to be applied consistent with federal constitutional limitations on calculating the cell tax base that had been lifted by the MTSA. The Court of Appeal rejected this contention, however, explaining that by altering the equation carriers were required to use to calculate the cell tax to include calls not originating or terminating within its jurisdiction, the City had "revise[d] the methodology" for calculating the cell tax within the meaning of Government Code section 53750. "Methodology," under section 53750, refers to the "mathematical equation for calculating taxes that is officially sanctioned by a local taxing entity." The City's post-MTSA interpretation of how the cell tax base is to be calculated could not, therefore, be imposed on carriers without voter approval.

PUBLIC HEALTH/COUNTY GENERAL ASSISTANCE PROGRAMS/ELIGIBILITY FOR MEDICAL SERVICES

Income cap governing eligibility for county-provided indigent medical services is void where it fails to take into account the ability of individuals whose income slightly exceeded the cap to pay for medical services.

The County of San Diego provides medical care to the indigent through its County Medical Services program (CMS) pursuant to the requirements of Welfare and Institutions Code, Section 17000. In 1987, the County changed the eligibility requirements under CMS such that any individuals exceeding its income cap were ineligible for care. After an administrative hearing officer ruled against them, plaintiffs/appellants brought suit in superior court requesting a writ of mandate and seeking injunctive and declaratory relief that the income cap violated Section 17000's requirement that the County provide certain necessary medical care to indigent patients. The court issued a peremptory writ of mandate invalidating the income cap.

Seeking to comply with the court's judgment, the County issued a new, higher income cap for eligibility in CMS. Plaintiffs/appellants, now as a certified class of individuals who had been denied or who would be denied coverage under the income cap, contested the sufficiency of the County's return writ. The superior court approved the return writ and the new higher income cap, suggesting that though it could be reversed on appeal, the court was bound by the decisions of the legislature and the higher courts.

In *Alford v. County of San Diego* (2007) ~ Cal.Rptr.3d ~, 2007 WL1489313 (Cal.App. 4 Dist.), the Court of Appeal held the new income cap was invalid because it did not take into consideration the ability of individuals to pay for care whose income slightly exceeded the cap. The Court of Appeal analyzed the policy behind section 17000, noting that the purpose of the statute was to provide care for the medically indigent, including working poor. It found that the mandatory cap was contrary to the statutory purpose of encouraging self-reliance and self-respect because patients whose income was slightly higher than the cap would be encouraged to quit work and allow their situations to worsen in order to receive care.

CALIFORNIA PUBLIC RECORDS ACT/GOVERNMENT LAW

City and its City Attorney entitled to obtain public records from school district pursuant to California Public Records Act.

Citing the California Public Records Act ("CPRA") (Gov. Code §§ 6250 *et seq.*), the Long Beach City Attorney requested that the Los Angeles Unified School District ("the District") provide the City with copies of certain public records relating to the District's plan to construct a public high school within the City's western boundary that would serve students from the neighboring City of Carson. The District refused. Although conceding that the records being sought by the City were public records under the CPRA, the District maintained that neither the City nor the City Attorney were entitled to inspect them because they were not "persons" or "members of the public" within the meaning of Gov. Code § 6252.

The City then petitioned the superior court for an order compelling the District to turn over the requested public records, which the superior court granted. The District thereafter sought and obtained review in the Court of Appeal.

In *Los Angeles Unified School District v. Superior Court* (2007) ~ Cal. Rptr.~, 2007 WL 1548998 (Cal.App. 2 Dist.) the Court of Appeal held that the City and City Attorney were entitled to obtain public records from the District pursuant to the CPRA. The court explained that the purpose of the CPRA was to facilitate governmental accountability by entitling the public to access governmental files. Following the voters' adoption of Proposition 59 at the November 2004 general election, the public's right of access to government files was enshrined in Article I, §3 of the California Constitution. Section 3 expressly provides that it be "broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."

Against this backdrop, the Court of Appeal found it consistent with the purpose and intent of Article I, § 3 and the CPRA to interpret "persons" in Gov. Code § 6252 to include municipal corporations like the City. In so finding, the Court of Appeal concluded that any costs incurred by the District in providing the records were insignificant in light of its constitutionally–mandated obligation to permit access to government records. Moreover, to deny the City access to the District's records under the circumstances presented would impede the City's sovereign duty to assess the impact of the District's plan on the City. Finally, the Court of Appeal concluded that the City Attorney was also entitled to request public records from the District pursuant to the CPRA based on his status as a "natural person" under Gov. Code § 6252 and an "elected [ ] officer" of the City under Gov. Code § 6252.5.

ENDNOTES

[1] Based on this holding, the Court of Appeal found it unnecessary to address the trial court's ruling that the Romero Act was unconstitutional on the other grounds asserted by petitioners.

[2] On March 21, 2007, the California Supreme Court declined to grant certiorari. The City has recently indicated that it intends to seek certiorari in the United States Supreme Court.

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Legislation Update

*Compiled by Richard C. Miadich**

The purpose of the Legislation Update is to alert the *Journal's* readers to recent legislation touching areas of public law.

EMINENT DOMAIN

The Legislature is currently considering two measures concerning eminent domain law in California. Assembly Bill 887 (De La Torre) ("AB 887") would require redevelopment agencies to comply with certain notification requirements prior to adopting a resolution of necessity for the purposes of acquiring property by eminent domain, and within a specified time prior to taking certain action relating to redevelopment. AB 887 would also require the redevelopment agency to provide certain relocation assistance to small businesses that are displaced by redevelopment and do not participate in the redevelopment project.

Assembly Constitutional Amendment 8 (De La Torre) ("ACA 8") would amend the California Constitution to require the public use for which private property is taken pursuant to be stated in writing, prior to commencement of eminent domain proceedings. ACA 8 would, subject to certain exceptions, prohibit the state and local governments from acquiring by eminent domain an owner-occupied residence, or real property on which a small business is operated, for purpose of conveying that property to a private person. ACA 8 would also provide the former owner with the right to reacquire the property if it ceases to be used for the stated public use, and provides for procedures to govern the reacquisition process.

COMPENSATION OF LOCAL LEGISLATIVE BODIES

Assembly Bill 701 (De La Torre) ("AB 701") would raise the maximum compensation of city council members established by the compensation schedule set forth in section 36516 of the Government Code. AB 701 would also authorize city councils to raise the salary in even-numbered years, based on the increase in the cost-of-living as measured by the Consumer Price Index for persons residing in the city.

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