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MCLE SELF-STUDY

A Severe Yet Treatable Illness: The Crisis Facing Mental Health Regulation at the County Level

*By Ginetta L. Giovinco, Esq.**

Despite strategic decisions crafted to give local governments increased flexibility in the design and delivery of mental health services, and a public that is increasingly receptive to mental health issues, counties face several challenges in effectively addressing the needs of their mentally ill populations. Budget constraints hinder efforts to provide consistent, high-quality and effective mental health care. Concern for mental health clients' civil rights looms over policy decisions about the extent, if any, to which local governments should employ involuntary treatment. Additionally, the longstanding "criminalization" of mental illness poses a significant hurdle to, and drain on, the resources of both county mental health services providers and their criminal justice counterparts. These three often-overlapping issues – funding, involuntary treatment, and the criminalization of mental illness – account for some of the toughest problems currently facing mental health policymakers and providers.

I. FUNDING

A. Realignment

In 1991 the Legislature comprehensively overhauled the public mental health, social services, and health systems when it enacted "realignment."[1] Realignment shifted the bulk of responsibility for these services from the state to counties, thus allowing each county to design and target its programs to the specific unmet needs of its individual community. Concurrently, realignment provided a dedicated stream of funding to partially pay for services; in theory, counties would no longer be dependent on the vagaries of annual budget negotiations for funds. Realignment dollars came mostly from sales tax revenues, vehicle license fees, and vehicle license fee collections.

Realignment has encouraged a more narrowly tailored approach to mental health care, and has promoted community-based, voluntary programs at the local level. However, the portion of realignment funds provided to counties for mental health programs has not kept pace with population growth, service rates, and inflation.[2] Further, federal matching funds (provided for some programs such as Medi-Cal and Healthy Families), additional state funds, and grants have not filled the gap.

Realignment funds for mental health have not kept pace for several reasons. First, any growth in or "extra" realignment funds from sales tax revenues first go to social services.[3] Second, limited transfers among the three categories (mental health, social services, and health) are allowed, which has led to mental health services receiving a reduced share of the funds as more money gets transferred to social services.[4] Finally, an increase in the Medi-Cal population that receives mental health services, along with an overall increase in medical costs, has contributed to the strain on mental health funding.

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This shortage has resulted in an inability to fully fund systems that provide integrated services, including voluntary mental health services (with medication), vocational rehabilitation, housing assistance, and other non-medical services. Further, as gains are made in eradicating the stigma associated with mental illness, the need for preventive services grows. Although cost-effective in the long run due to reducing indirect costs such as lost productivity, preventive programs are often simply not funded. Instead, emphasis is placed on those suffering from severe and persistent mental illness – commonly the most debilitating but also the most costly to treat.

In short, counties are hard-pressed to provide sufficient services. Counties frequently cannot maintain programs that have been found to work, nor can they try new programs or "best practices" from other areas. While providing a more stable source of funding than the annual legislative budget, realignment has not created the steady, fully-funded stream of revenue necessary for mental health services to flourish at the local level.

B. The Mental Health Initiative

One possible bright spot in the rather bleak budget situation is the Mental Health Initiative on the November 2004 ballot. Modeled after AB 34 (Steinberg), which was enacted in 1999 to provide counties with grants for a combination of preventive and integrated services, the measure would expand preventive and early intervention programs. Funding would come from a 1% tax on each dollar earned over $1 million, a figure that is projected to raise approximately $600 million per year in dedicated mental health dollars.[5] Additionally, the measure would establish an oversight and accountability commission to supervise these new programs.[6]

While still subject to fluctuations in revenues, the Mental Health Initiative would provide an additional source of sorely needed funding for mental health programs that have proven to be effective. Further, the measure's emphasis on prevention and early intervention is expected to save money in the long term. Along the lines of the adage "an ounce of prevention is worth a pound of cure," the measure would focus on treating clients before they reach the point of needing hospitalization or institutionalization, both costly prospects. Early intervention would also spare mental health clients and their families the pain and emotional exhaustion that comes with mental illness in acute stages.

II. INVOLUNTARY TREATMENT

A. The LPS Act

Provision of mental health services has long been fraught with difficult questions about exactly how far service providers can, and should, go before concerns arise about a patient's civil rights.

Under the Lanterman-Petris-Short Act[7] (commonly known as the LPS Act), a court may order involuntary inpatient commitment for a person who "as a result of a mental disorder, is a danger to others, or to himself or herself, or gravely disabled."[8] The first step in the process is an initial 72-hour hold for treatment and evaluation pursuant to Welfare and Institutions Code Section 5150. If at the end of that time the person still presents a danger, an additional 14-day hold is permitted.[9] However, if at any time during the commitment period the person is deemed no longer to fit the involuntary commitment criteria, release is required.[10] Additionally, the LPS Act provides for the right to judicial review of the need for involuntary commitment.[11] Further, the statute presumes that a patient has the right to refuse psychotropic medication, and forced medication may only occur under certain defined conditions.[12] A patient who remains gravely disabled as a result of a mental illness may, after further hearings, wind up in a conservatorship.

In many ways the LPS Act has not met the needs of those who clearly suffer from mental illness, but for whom long-term commitment or a conservatorship is not legally justified. Similar to the problem with the criminal justice system, discussed below, the statute allows for a "revolving door" effect: patients are initially held, subsequently no longer meet the involuntary commitment criteria and are released, and then get re-detained pursuant to Section 5150, thereby never really receiving effective and comprehensive care. Thus, the LPS Act may not be doing enough to serve those it is designed to help, and may not at all be serving those who do not fall within its scope but who may still benefit from mental health services.

B. AB 1421

Concern over the effectiveness of this system has led to a call for the reform of the LPS Act. Already the Welfare and Institutions Code has been amended to allow families to participate in the commitment hearings, and to require a person's medical records and past history of mental illness to be considered during the hearing.[13] Further, in 2002 the Legislature passed AB 1421 (Thomson), a bill that creates a comprehensive "assisted outpatient treatment" (AOT) program with counties participating on a voluntary basis. This program stresses treatment of the mentally ill while they are in the community, and is designed to reduce the need for acute hospitalization or deterioration to the point of contact with the criminal justice system. However, in contrast to the general idea of the Mental Health Initiative programs, AOT would be court-ordered.

AB 1421 sets forth a long list of criteria that a person must meet before becoming the subject of an AOT petition. Among other items, the person must have a history of lack of compliance with treatment for mental illness, have a condition that is "substantially deteriorating," and be likely to benefit from AOT.[14] Family members may request that an AOT petition be filed,[15] but a licensed mental health provider must have examined the potential subject no more than 10 days prior to the court hearing and must testify in person at the hearing.[16] Subjects of AOT petitions are guaranteed significant safeguards, including notice of AOT hearings, copies of court documents, the right to counsel and the right to present evidence, call witnesses, and cross-examine witnesses at hearings.[17]

Nonetheless, the AOT program presents a dilemma. It is clear that those who support AOT want nothing more than assistance for mentally ill people (often family members) who may be so sick that they cannot recognize their need for help. Proponents of AOT see it as a way to get assistance for those with mental illness before they become victims of crime, are charged with a crime, or are subject to restrictive inpatient hospitalization. Instead, under AOT, they can remain in the community while still receiving treatment.

Yet there is a real concern about the effects on the civil rights of the mentally ill. In

practice, might AB 1421 impose some people's ideas of how those with mental illness should live, at the expense of the right to choose one's own lifestyle? Some persons with mental illness reject conventional medications not out of ignorance, but due to their substantial and serious side effects. Will AOT sufficiently allow for these choices? Further, will prior voluntary hospitalizations be used to justify imposition of AOT under the standards for petitioning the court? This could discourage voluntary efforts at seeking help.

Due to its recent enactment, AOT has not yet had time to prove either its proponents or detractors right, or perhaps to find that some elements work while others need to be adjusted.

III. CRIMINALIZATION OF MENTAL ILLNESS

A. Prevalence

There has long been an overlap between the mental health system and the criminal justice system. At the state level, the California Department of Corrections has estimated that as of July 2002, approximately 14% of California's prison population receives mental health services.[18] And in local jails – where most of the mentally ill who are convicted of minor crimes serve their sentences – approximately 10 to 15 percent of inmates, or between 8,000 and 12,000 people, suffer from a mental illness.[19]

This infusion of the mentally ill into prisons and jails places a heavy financial burden on an already strained criminal justice system. Additionally, judges have been constrained from alleviating this weight by criminal justice policies such as "mandatory minimum" sentences and "Three Strikes," which hamper sentencing discretion by precluding full consideration of the specific circumstances of the crime or the individual. Further, due to insufficient discharge planning and a dearth of services available after release, many mentally ill offenders simply wind up in prison or jail again.[20]

Although it is true that some of these costs are due to those who commit violent felonies and would be processed through the criminal justice system anyway, a large portion of resources are also spent on the mentally ill who are charged with relatively minor crimes such as loitering, public intoxication and disturbing the peace. The criminal justice system is clearly ill-equipped to deal with this population for good reason. The purpose of the traditional criminal justice system is to punish criminals, not to house and treat the mentally ill. Thus, there exists the problem of a large number of mentally ill people who cycle in and out of local jails for relatively minor and non-violent crimes.

B. Mental Health Courts

In an effort to address the prevalence of the mentally ill in the criminal justice system, some communities, including San Bernardino County and Los Angeles County in California, have recently begun experimenting with mental health courts (MHCs).[21] MHCs seek to provide an alternative to the traditional criminal justice process for those who meet the eligibility criteria – usually including a diagnosis of a mental illness,[22] a charge of committing a misdemeanor (or possibly a non-violent, low-level felony) that is attributable to the mental illness, and voluntary consent to adjudication through this system.

Diversion into an MHC may come at different points depending on how the court is structured; it may come immediately after arrest (as in the original MHC), or it may come only after a plea has been entered and sentencing is at hand. However, in either form, the MHC is designed to be far less adversarial than a traditional court, and greater emphasis is placed on obtaining effective treatment for a defendant and preventing recidivism than on proving a crime and administering punishment. To this end, the same judge, prosecutor, and public defender (unless the client chooses to retain private counsel) are assigned and often collaborate to determine an outcome that will be most effective.

Once before an MHC the defendant receives a treatment plan, issued as a court order. When faced with non-compliance, some MHCs simply modify the treatment plan, whereas others (such as the one in San Bernardino County) more frequently impose stricter treatment conditions or jail time. Successful completion of the court order may result in the conviction being expunged from the defendant's record.

Due to the relative newness of MHCs, there is little data relating to their efficacy in reducing recidivism. However, the fact that an underlying mental illness is now being recognized as a contributing factor in the crime is a beneficial aspect of MHCs. Further, the fact that participation in MHCs is voluntary means that clients experience some freedom and control over the adjudication process, as well as that they are in an environment designed to be less threatening than a traditional court.

However, tension between values exists: the criminal justice system needs to process cases efficiently and further traditional criminal justice goals (such as protecting the public), while the mental health system stresses patience with a time-consuming rehabilitation process and the necessity for individualized treatment plans. Additionally, there is concern about how voluntary MHCs really are. If the alternative to participating in an MHC is a trip through the traditional criminal justice system, are mentally ill defendants really freely choosing to abide by their treatment plans, which may include taking regular medication as a component?

Many of these issues will depend on the structure of individual MHCs and the funds that are devoted to them. Fortunately, Congress appears to be prioritizing innovation in the mental health subset of the criminal justice system. The Mentally Ill Offender Treatment and Crime Reduction Act of 2003,[23] which would provide grants to eligible state and local governments for pilot MHCs and other programs, has passed the Senate and now resides in committee in the House of Representatives.

CONCLUSION

Program effectiveness, constitutional rights, and fiscal concerns all shape mental health policy, both at the state and local levels. These factors are interwoven, creating a situation where inadequate funding prevents the implementation of potentially effective programs, civil liberties affect what can and should be done in those programs, and shortages in the mental health system cause a spill-over effect of clients into the criminal justice system. However, possibilities exist. Increases in funding may allow counties to try innovative programs. A focus on outpatient treatment (whether court-ordered or voluntary) means that more people have the opportunity to remain in their communities and avoid isolating hospitalizations. Carefully designed

mental health courts allow for compassion and a focus on treatment, not punishment. While the mental health system still struggles, counties increasingly have opportunities to make significant strides ahead.

ENDNOTES

1. Cal. Welf. & Inst.C. §§ 5600-5791, 5900.
2. California Dept. of Mental Health, "AB 328 Realignment Data," February, 2003 (http://www.dmh.ca.gov/press/ab328-data.asp).
3. Id. at p. 6.
4. In FY 1991-92 mental health programs received approximately 34.3% of realignment funds. In FY 2000-01 these programs received 30.5% of realignment funds, while social services enjoyed slightly greater than a 6% increase in the percentage of total realignment funds that they received. California Dept. of Mental Health, "AB 328 Realignment Data," February, 2003, p.24 (http://www.dmh.ca.gov/press/ab328-data.asp).
5. Campaign for Mental Health, "Basic Facts About the Mental Health Initiative," available at http://www.mentalhealthcampaign.org/facts.tpl?dsp=1&factid=1061146596128201.
6. Id.
7. Cal. Welf. & Inst.C. § 5000 et. seq.
8. Id. § 5150.
9. Id. § 5250.
10. Id. § 5257.
11. Id. § 5275 et. seq.
12. Id. §§ 5325.2 and 5332; see also Riese v. St. Mary's Hospital & Medical Center, 209 Cal.App.3d 1303 (1987).
13. A.B. 1424, amending Cal. Welf. & Inst.C. § 5008.2 (among other sections).
14. A.B. 1421; this section is codified at Cal. Welf. & Inst.C. § 5346.
15. A.B. 1421; codified at Cal. Welf. & Inst.C. § 5346(b)(2)(B).
16. A.B. 1421; codified at Cal. Welf. & Inst.C. § 5346(d)(2).
17. A.B. 1421; codified at Cal. Welf. & Inst.C. § 5346(d)(4).
18. Human Rights Watch, "Ill-Equipped: U.S. Prisons and Offenders with Mental Illness," 2003 (http://www.hrw.org/reports/2003/usa1003/), p.18, referencing a California Department of Corrections report.
19. Marcus Nieto, "Mentally Ill Offenders in California's Criminal Justice System," California Research Bureau, February 1999, p. 3.
20. See, Derek Denckla and Greg Berman, "Rethinking the Revolving Door: A Look at Mental Illness in the Courts," Center for Court Innovation, 2001, p. 3 (noting that advocates for the mentally ill have initiated lawsuits in an attempt to improve these conditions).
21. The first known Mental Health Court began in Broward County, Florida, in 1997.
22. Usually restricted to those suffering from an "Axis I" diagnosis per the Diagnostic and Statistical Manual of Mental Disorders, 4th Ed., American Psychiatric Association, 1994 (commonly referred to as the DSM-IV); these are "severe and persistent" mental illnesses, and include schizophrenia, bipolar disorder, and several mood disorders, among others.
23. S. 1194; H.R. 2387.

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MCLE SELF-ASSESSMENT TEST

1. The Legislature's 1991 comprehensive overhaul of the public mental health, social services, and health systems was called "restructuring."

   ❑ True ❑ False

2. Realignment dollars came mostly from property tax revenues.

   ❑ True ❑ False

3. State law promotes community-based, voluntary programs at the local level for mental health care.

   ❑ True ❑ False

4. Realignment funds must be divided equally among the mental health, social services, and health systems.

   ❑ True ❑ False

5. Preventive programs often are not funded due to emphasis on persons suffering from severe and persistent mental illness.

   ❑ True ❑ False

6. The Mental Health Initiative will appear on the November 2004 ballot.

   ❑ True ❑ False

7. Passage of the Mental Health Initiative will result in a 3% tax on each dollar earned over $1 million to fund mental health programs.

   ❑ True ❑ False

8. The LPS Act allows involuntary inpatient commitment of a person who is gravely disabled as a result of a mental disorder.

   ❑ True ❑ False

9. There is no statutory presumption that a patient has a right to refuse psychotropic medication.

   ❑ True ❑ False

10. The LPS Act allows for a "revolving door" effect that precludes patients from receiving effective and comprehensive care.

    ❑ True ❑ False

11. Families can participate in commitment hearings.

    ❑ True ❑ False

12. It is mandatory under AB 1421 that counties participate in the statute's AOT program.

    ❑ True ❑ False

13. A licensed mental health provider need not testify in person at a court hearing regarding a potential subject of the AOT program.

    ❑ True ❑ False

14. Subjects of AOT petitions have the right to call and cross-examine witnesses at hearings.

    ❑ True ❑ False

15. Ignorance is the only reason persons with mental illness reject conventional medications.

    ❑ True ❑ False

16. Approximately 14% of California's prison population receives mental health services.

    ❑ True ❑ False

17. A large number of mentally ill persons cycle in and out of jail for relatively minor and non-violent crimes.

    ❑ True ❑ False

18. The first mental health court began in San Bernardino, California in 1997.

    ❑ True ❑ False

19. Participation in a mental health court is voluntary.

    ❑ True ❑ False

20. Mental health courts utilize rotating judges, prosecutors, and public defenders.

    ❑ True ❑ False

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Paper Terrorism: The Impact of the "Sovereign Citizen" on Local Government

By David Fleishman, Esq.*

Some people believe with great fervor preposterous things that just happen to coincide with their self-interest.[1]

In 1994, members of a group known as the Juris Christian Assembly attacked the Stanislaus County Recorder in her home, repeatedly firing an empty gun at her head, because she refused to file bogus liens against Internal Revenue Service agents. In 1997, Margaret Elizabeth Broderick, who referred to herself as the "Lien Queen," was sentenced to more than 16 years in prison for running a check scam based on liens she filed against private corporations and government agencies. In 2002, a man refused to roll down his window when stopped for a traffic violation in Pacific Grove, California, asserting that the police officers had no authority over him.

Though occurring over a period of many years and in different geographic areas, these events have a common thread. All have their roots in the so-called "Sovereign Citizen" movement. Stated simply, adherents of the Sovereign Citizen ideology believe that at one time in United States history every individual was "free," a "sovereign" unto himself or herself, unburdened by governmental regulation. In many cases, this manifests into a distinctive disdain and contempt for governmental authority. Confronting people with these beliefs, therefore, can pose serious challenges for those engaged in governmental service, particularly those at the local levels of government. This article briefly outlines the history of the Sovereign Citizen movement, the tactics used by its followers, the impact of such tactics on local government, and possible responses by local government agencies to deal with the phenomenon.

I. HISTORY

While the Sovereign Citizen movement cannot be attributed to any single event or proponent, it may have its origins in the Posse Comitatus movement founded in California and Oregon in the early 1970s by William Potter Gale and others.[2] The followers of this ideology accepted no governmental authority higher than the sheriff of the county in which they resided. Beyond this experience, however, there is no real historical record of similar groups, but individual incidents are continually occurring and documented. Indeed, to label the Sovereign Citizen movement a "movement" may be to assign it more cohesion than actually exists. The variations and offshoots of the "movement" are numerous, with adherents taking those aspects of Sovereign Citizen ideology that suit the believer's particular needs and rejecting those that do not.

A. Citizenship Contract Theory

Despite the general rejection of governmental authority, some Sovereign Citizens use various state and federal laws as a basis for their novel interpretations of the relationship between themselves and governmental authorities. As one example, many Sovereign Citizens look to the Fourteenth Amendment of the United States Constitution as evidence of their "sovereign" status. Specifically, the Fourteenth Amendment provides in relevant part: "All persons born or naturalized in the United States, *and subject to the jurisdiction thereof*, are citizens of the United States and of the State wherein they reside."[3] Sovereign Citizens read this language as making United States citizenship optional and indeed, contractual, subject to their consent to be "subject to the jurisdiction" of the United States.

In order to remain outside of any governmental jurisdiction, Sovereign Citizens will reject any evidence of a "contract" between themselves and governmental entities, including driver's licenses, license plates, Social Security cards, hunting licenses and other documents issued by branches of a federal, state or local government. They resort, instead, to documentation issued by "common law courts" or other para-governmental entities deriving their authority from the consent of the Sovereign Citizens.[4]

Believers in the ideology will also refuse to use zip codes on correspondence or to accept correspondence containing a zip code, believing that the use of zip codes constitutes acceptance of United States jurisdiction over the individual.[5] Some insist on strange punctuation in their names on any documents sent by governmental agencies, rejecting those that do not precisely conform.[6] Others refuse to recognize the authority of judges whose courtrooms contain a United States flag trimmed in gold fringe.[7] Still others refuse to use paper money, or "Federal Reserve Notes," the ultimate hallmarks of governmental jurisdiction, preferring instead to use self-issued "public office money certificates."[8]

The case reporters are filled with cases involving Sovereign Citizens claiming that they cannot be subjected to the authority of governmental agencies without their consent. In U.S. v. Lorenzo,[9] Lorenzo claimed that he was a "sovereign heir" entitled to occupy and possess Hawaiian crown lands. After the state evicted Lorenzo from the land, he filed false tax forms showing payment of compensation to various individuals, including the governor of Hawaii, the state attorney general, and other state employees. He then filed a federal tax return seeking a refund of over $700,000. The IRS issued a refund check for over $450,000, which was intercepted from Lorenzo's mailbox after the agency realized the tax return was fraudulent. On prosecution for various federal crimes, Lorenzo argued that he was a citizen of the Sovereign Kingdom of

Hawaii, and therefore the courts had no jurisdiction to hear his case. Rejecting his claim of alternative citizenship, Lorenzo was convicted and sentenced to prison.

In U.S. v. Hilgeford,[10] Hilgeford was evicted from his farm, after a foreclosure by a bank to which he owed more than $1 million. Hilgeford then began a legal odyssey of frivolous lawsuits and other actions, including the filing of a falsified judgment against the bank. Hilgeford found no recourse in his lawsuits, so he began sending invoices to the bank, to the new owners of his farm, and others, demanding payment of large sums of money allegedly owed to him. Hilgeford then claimed that he had paid more than $10 million in "non-employee" compensation to local government employees, and he sought tax refunds of over $30 million. When prosecuted for tax fraud, Hilgeford disclaimed United States citizenship, and asserted he was a citizen of the Indiana State Republic. The Seventh Circuit Court of Appeals quickly disposed of the argument and affirmed Hilgeford's conviction, citing several similar cases in which the defendant claimed similar fictional citizenship.

B. Targeting Government Lawyers

Sovereign Citizens have attacked the persons they often see as most directly responsible for their ills – attorneys in government service. One of the reasons for this particularized contempt is the belief held by the movement's followers that the United States Constitution originally contained a Thirteenth Amendment prohibiting attorneys from holding public office, since that amendment would have barred the granting of titles of nobility, of which "Esquire" was one.[11] This amendment was allegedly removed, perhaps naturally, by lawyers.[12] As an outgrowth of their suspicion of lawyers, and the legal system in general, Sovereign Citizens have established "common law courts" that pass judgment on the activities of governmental officials, often through the use of "arrest warrants" and "subpoenas" directed to government officials. In some instances, these common law courts have handed down death sentences against public officials.

II. TACTICS

The tactics of Sovereign Citizens against governmental entities are as varied as the differing constitutional theories espoused by such individuals. Some common themes emerge, however, such as the massive and generally frivolous filings of paperwork against local officials. Indeed, a name has been coined for this practice: paper terrorism. While in most instances, the end result of this form of terrorism is not death or injury, Sovereign Citizens cannot reliably be counted upon to exercise physical restraint in disputes with local government agencies.[13] Thus, local agencies must be prepared at any time to deal with the issues raised by these contacts.

A. Liens

It appears that many of the tactics, such as the filing of liens, have their basis in existing statutory or constitutional law, but only so much of the law as is convenient to the situation facing the Sovereign Citizen. For example, one tactic used by Elizabeth Broderick, the "Lien Queen," was the recording of liens against the property of corporations, public agencies and public officials. Broderick learned her trade from seminars held by the Montana Freemen, and she in turn passed on the knowledge to others.

Described briefly, an aggrieved Sovereign Citizen sends to the offending government official a "confession" or "admission" form that asks the government official to admit that he or she has committed wrongful acts against the Sovereign Citizen. The form may contain language asserting that the government official's silence or refusal to respond constitutes an admission of the alleged wrongful acts. Then, after the passage of a brief, designated time, the Sovereign Citizen will prepare a lien notice, in an amount equal to "whatever you feel your freedom is worth," and provide a copy to the government official. The lien is then filed in the county clerk/recorder's office. Very shortly after filing the lien, the Sovereign Citizen files a notice of foreclosure on the lien, and then, when the government official fails to respond to the notice, takes the default of the government official. Finally, the Sovereign Citizen may take copies of the lien documents to a bank and instruct the bank to deposit the liens in a bank account as an asset, and to establish a line of credit based on the lien.[14]

Using a variant of this procedure, Elizabeth Broderick sold blank "comptroller's warrants," ostensibly backed by billions of dollars in government liens.[15] Broderick is believed to have taken in more than $1 million in "real" money before she was sentenced to prison. Broderick by no means invented the bogus lien. In 1979, a branch of the Posse Comitatus in Carroll County, Maryland placed property liens against several county officials. When state officials challenged the liens in court, members of the Posse filed liens against every judge in the state to disqualify them from hearing the state's challenge to the original liens. The Posse missed one judge, however, who heard the case and expunged the liens.[16]

B. UCC and Civil Suits

In another variant of the reasoning behind lien filings, Sovereign Citizens borrow liberally from the Uniform Commercial Code to reject governmental authority. In Barcroft v. Texas,[17] Sherri Ann Barcroft was stopped and cited for speeding. Barcroft was fined a total of $311. She appealed the conviction, and on appeal, alleged that the trial court erred in failing to apply the UCC, specifically Section 1.103, to her case. According to Barcroft, the common law provided that there could be no criminal act unless there was damage. She then argued that since the UCC requires that contract law be in harmony with common law, and the state was assuming jurisdiction under a treaty (a form of contract), the state was bound by the UCC. Barcroft then concluded that because there was no damage as a result of the alleged speeding violation, she had committed no crime under Texas law. The court rejected her arguments and affirmed the conviction.

In another case out of Texas, Kimmell v. Leoffler,[18] Kimmell filed a $5 million civil suit against the judge who found him guilty of speeding and against the county attorney who prosecuted the case. Kimmell argued that because the judge and police officers acted in a "commercial capacity" by accepting the currency of the United States, only the federal courts had jurisdiction to hear his traffic case. Kimmell further argued for disqualification of the county attorney and judge. He asserted that because they were members of the judicial department of government, and also members of the state bar, they were all disqualified from prosecuting and adjudicating his case because they had an interest in the proceedings, and because they were all related by an affinity or consanguinity within the third degree.

III. RESPONSE

Because the tactics used by Sovereign Citizens have, at least on their face, some basis in statute, local government officials can be tricked or intimidated into submission to the demands of the Sovereign Citizen. Even a cursory review of the documents and arguments put forth by these individuals, however, usually reveals that the Sovereign Citizen has no legitimate legal position. Nonetheless, they must be processed under existing laws, and defending against the voluminous legal filings generated by these individuals can try even the most patient government employees.

A. Combating Liens

The Legislature, in recognition of the problems faced by all levels of government in dealing with Sovereign Citizens, has provided some tools with which to combat the problems. As to bogus liens, Government Code Section 6223 prohibits the filing of lawsuits, liens or other encumbrances against a public officer or employee, where the filing party knows the lien is false, and where the filing party intends to harass the public officer or employee, or intends to hinder the public officer or employee in the discharge of official duties. This section further provides for a civil penalty of up to $5000.

In addition, Code of Civil Procedure Section 765.010 provides for expedited "show cause" hearings for public officers or employees whose property becomes subject to a bogus lien. If the court finds that the lien was filed in violation of Government Code Section 6223, the court may order the lien to be stricken and award attorney's fees and costs to the affected officer or employee. The Judicial Council has prepared a form petition for government employees to seek the striking of such a lien.[19] Government agencies may provide counsel for affected officers or employees.[20] There are also criminal penalties for filing false liens.[21] Similar legislation has been introduced at the federal level.[22]

B. Other Remedies

With respect to lawsuits brought by Sovereign Citizens, there are similarly powerful tools available to government agencies. The so-called "vexatious litigant" statutes, beginning at Code of Civil Procedure Section 391, provide some protection against Sovereign Citizens who have consented to the authority of the court system solely for the purpose of litigating against public agencies and their employees. Under Section 391, a "vexatious litigant" is very generally defined as a self-represented person who files and loses at least five lawsuits in a seven-year period; or one who attempts to re-litigate, in propria persona, the validity of a prior adverse determination. A vexatious litigant is also one who, while acting in propria persona, repeatedly files unmeritorious motions, pleadings or other papers, conducts unnecessary discovery or engages in other tactics that are frivolous or solely intended to cause unnecessary delay. The latter definition is probably the most useful to government officials addressing issues involving a Sovereign Citizen, since it imposes a lower standard than the "five in seven" rule applicable to lawsuits.

The remedies available under the vexatious litigant statute are strong too. A person declared a vexatious litigant can be forced to post financial security as a condition of maintaining litigation.[23] Even worse, the court may impose a sanction of requiring a vexatious litigant to obtain permission from the presiding judge of the court before initiating any further litigation.[24]

In addition, individual employees of a public agency can petition the courts for a temporary restraining order to prevent harassment, which is defined as a "knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose."[25] Finally, in those instances where the local government agency can demonstrate a credible threat of violence against its employees, the agency can petition the courts for a temporary restraining order to prevent the harassment of its employees.[26]

These judicial remedies are effective tools because the papers filed by Sovereign Citizens in opposition to any of these approaches are often voluminous, unintelligible, and filled with passages demonstrating contempt for the legal system, lawyers, and government in general. This assumes the Sovereign Citizen even recognizes the authority of the courts, which many do not. Thus, it is frequently easy for the courts to make the necessary findings to grant public agencies the relief they seek. The difficult step for public agencies, however, is making the decision to spend the resources to challenge the Sovereign Citizen.

CONCLUSION

Calculating the precise financial impact of Sovereign Citizens on governmental agencies is impossible. In one instance, however, involving Richard McLaren, who believed himself a citizen of the "Republic of Texas," a federal judge estimated that a private corporation spent at least $450,000 defending against bogus liens filed by McLaren. Another private party involved in the fray spent 12 years and more than $100,000 fighting McLaren.[27] Similarly, a private attorney who represented a bank in a foreclosure spent a year in court and $14,000 in legal fees trying to expunge a lien placed on his home by the subject of the foreclosure.[28]

One court has noted that the keeping of time and expense records and the preparation of affidavits supporting requests for attorney's fees incurred defending against frivolous lawsuits is, in itself, an avoidable cost.[29] Moreover, the court imposed sanctions under the Federal Rules of Civil Procedure, recognizing that even the sanctions could not cover the indirect costs of the litigation, including the costs that were incurred by legitimate litigants in waiting for their cases to receive judicial attention.

Local government agencies face tremendous burdens, both in terms of monetary expenditures and of staff psychological stress, from Sovereign Citizens and like-minded individuals. Even a simple traffic stop can ripen into years of legal battles with parties who do not recognize the authority of local government.[30] The courts and the Legislature have provided some tools by which public agencies and officials can begin to address the issue, but frequently the use of these tools only inflames the hatred for governmental entities that caused the problem in the first place. Local authorities who use these tools to protect themselves against Sovereign Citizens must recognize that the path of dealing with such persons can often be long, expensive and filled with potholes, not to mention possible physical risk to those who stand in the way. Nonetheless, doing nothing, or worse, acceding to the demands of such individuals, can often tax local agencies to the breaking point and take away valuable resources intended for those persons who accept the social contract of living under a government of laws.

ENDNOTES

1. Coleman v. C.I.R., 791 F.2d 68, 69 (7th Cir. 1986).
2. "Posse comitatus" means "[t]he power or force of the county. The entire population of a county above the age of fifteen, which a sheriff may summon to his assistance in certain cases, as to aid him in keeping the peace, in pursuing and arresting felons, ..." People v. Wells, 175 Cal.App.3d 876, 878 n. 1 (1985) (citation omitted); See also Cal. Pen.C. § 150 (imposing penalties for refusal to join posse comitatus upon being required to so join by a peace officer). Gale was a retired army colonel. In 1987, he was convicted of threatening the lives of IRS agents and a Nevada state judge. Gale died in prison in April 1988.
3. Italics added.
4. The Anti-Defamation League maintains a pictorial exhibit of bogus driver's licenses, vehicle registrations and other Sovereign Citizen documents at its web page at http://www.adl.org/mwd/gallery.asp.
5. See Sussman, Idiot Legal Arguments: A Casebook for Dealing with Extremist Legal Arguments (1999), published by the Anti-Defamation League at http://www.adl.org/mwd/suss1.asp. Professor Sussman's publication contains an extensive listing of legal citations and rulings related to the various arguments raised by Sovereign Citizens and other like-minded litigants.
6. See U.S. v. Weatherley, 12 F.Supp.2d 469 (E.D.Pa. 1998). Weatherly threatened to sue various governmental officials if they failed to mail his paperwork to a very strange and long description of him with his name interrupted by a colon and his street address without a zip code.
7. State v. Whalen, 961 P.2d 1051 (Ariz.App.1997).
8. Pyne v. Meese, 172 Cal.App.3d 392 (1985). In Pyne, the plaintiff brought a Section 1983 action against various public officials who seized his vehicle and a trailer when he refused to pay his vehicle registration fees of $145. Pyne asserted that he was willing to pay the fees, but wished to pay them in public office money certificates. The court noted that a public office money certificate was a type of promissory note, valid for 120 days or until an official determination was made as to what type of currency has been authorized as a substitution for gold and silver as the money of the United States. Those who use POMCs believe that only gold and silver are legal currency. Id. at 399, fn. 3.
9. 995 F.2d 1448 (9th Cir. 1993).
10. 7 F.3d 1340 (7th Cir. 1993).
11. Jol A. Silversmith, "The 'Missing Thirteenth Amendment': Constitutional Nonsense and Titles of Nobility," 8 S. Cal. Interdisc. L.J. 577 (1999).
12. The "history" of the missing Thirteenth Amendment was exhaustively discussed in David Dodge, The Missing 13th Amendment, "Titles of Nobility" and "Honor" (1991). This polemic appeared in the publication Anti-Shyster, published by Alfred Adask, who claims to write the magazine as a "Christian Ministry." Information on both Adask and Dodge are widely available on the Internet. Adask is alleged to have offered a $10,000 reward for any five attorneys to prove in a debate that they are both honorable human beings and proud to be members of their state bar association. Edwards, "Texan Dissenters Create Own Courts," San Antonio Express-News, Mar. 3, 1996.
13. In April 1992, a Michigan resident wrote a letter to state officials, stating he was no longer a "citizen of the corrupt political corporate State of Michigan and the United States." He asserted he was subject only to the "common laws," and he expressed his desire to revoke his signature on any hunting or fishing licenses. See Sovereign Citizen Movement, published by the Anti-Defamation League, available at http://www.adl.org/learn/ext_us/SCM.asp. That man was Terry Nichols, later sentenced to life imprisonment for his role in the 1995 bombing of the Murrah Federal Building in Oklahoma City that killed 168 people and injured over 500 more.
14. This procedure was published originally in a Montana Freeman newsletter entitled Taking Aim. The procedure was recounted in a report prepared by Gregory deGiere of the California Senate Office of Research, September 1997, available at http://www.sen.ca.gov/sor/reports/REPORTS_BY_SUBJ/PUBLIC_SAFETY_JUDICIARY/TACTICS_ANTIGOV_EXTR.HTM.
15. A scanned image of one of Broderick's comptroller warrants is printed at http://www.adl.org/mwd/gallery.asp. In Sonoma County, another student of the Montana Freemen lien seminar attempted to bail his son out of jail using a check drawn on bogus liens like those established by Broderick. His son had been arrested for threatening two judges.
16. See Pitcavage, Paper Terrorism's Forgotten Victims: The Use of Bogus Liens Against Private Individuals and Businesses (1998) published by the Anti-Defamation League at http://www.adl.org/mwd/privlien.asp.
17. 900 S.W.2d 370 (Tex.App.1995).
18. 791 S.W.2d 648 (Tex.App.1990).
19. Judicial Council Form MC-100.
20. Cal. C.C.P. § 765.060.
21. Cal. Pen.C. § 115.5.
22. In April 2000, Representative Gary Condit introduced H.R. 4166 in the House of Representatives, entitled the "Karen Mathews Act of 2000," named after the Stanislaus County Recorder beaten by members of the Juris Christian Assembly for refusing to record their bogus liens. The Act would have amended 18 U.S.C. Section 1513 to prohibit the malicious or repeated frivolous filing of legal process or liens against the person or property of a victim. The bill was referred to the Committee on the Judiciary, but did not become law.
23. Cal. C.C.P. § 391.3.
24. Id. § 391.7.
25. Id. § 527.6.
26. Id. § 527.8.
27. Pitcavage, supra note 16.
28. Id.
29. Coleman, supra note 1.
30. In the Pacific Grove traffic stop noted at the beginning of the article, the defendant failed to appear for his arraignment and a bench warrant issued. When arrested on the warrant, the defendant served, via U.S. Mail, large packets of unintelligible documents on a number of city employees involved in his original traffic stop, all of which bore his name, with strange punctuation, and which did not bear zip codes. He also subpoenaed many city employees to his arraignment, along with the judge who had originally issued the bench warrant on his failure to appear at the original arraignment. Both the city and lawyers for the judge filed motions to quash the subpoenas as invalid. The defendant was later sentenced to six months in the county jail.

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Holding the Fort: Open Government Laws in the Homeland Security Era

By Rufus Calhoun Young, Jr., Esq.*

The United States, Spain, England and Indonesia have been attacked by terrorists. In addition to the recent railway bombing in Spain, bus bombings have been carried out in Greece, Israel and Turkey. In London, authorities seized a thousand pounds of ammonium nitrate and eight British citizens have been arrested on suspicion of being involved in terrorism. In the United States, terrorists initially struck the World Trade Center in New York with a truck bomb and ultimately destroyed it with fuel-laden commercial aircraft. The Murrah Federal Office Building in Oklahoma City was destroyed by a truck bomb. The Hart Senate Office Building in Washington, D.C., the corporate headquarters of American Media, Inc., in Boca Raton, Florida, and a number of postal facilities have been attacked by anthrax.

The threat of terrorist attacks is clear. As with most risks, there are steps that can be taken to reduce the likelihood and mitigate the impact of such attacks. Among the steps taken by the federal government is the requirement that community water systems, ports and transportation terminals prepare a "vulnerability assessment." This requirement is likely to be imposed on wastewater treatment plants in the near future.

There are other proactive Homeland Security steps that can be taken to protect the ability of local governments, including school and special districts, to function in the event of a terrorist attack. These steps include preparing vulnerability assessments and response plans for public facilities and critical infrastructure. Other prudent steps include reviewing the security aspects of terrorist-sensitive facilities, including building designs and lighting and landscaping plans, and imposing new standards for the protection of heating, ventilating and air conditioning systems and parking facilities, to name a few.[1]

This article reviews new Homeland Security[2] requirements and how traditional (i.e., pre-9/11) approaches to open government have evolved in the Homeland Security era. The review focuses on the federal Freedom of Information Act,[3] the California Public Records Act,[4] the Ralph M. Brown Act[5] and the California Environmental Quality Act.[6] An understanding of new Homeland Security measures, what they require, and how they have impacted open government laws is essential for local government officials, attorneys and staff, law enforcement officials, water and wastewater utility managers, and, of course, the media and the public.

Every bit as important as understanding and taking steps to reduce the vulnerability of critical infrastructure is taking steps to prevent vulnerability assessments and related documents from falling into the wrong hands. This article recommends adoption of robust and detailed protocols for the security of vulnerability assessments and critical infrastructure information.

I. VULNERABILITY ASSESSMENTS

The basic elements of site-specific vulnerability assessments include:

1. Identifying the mission of the facility or system;
2. Identifying the sensitive vulnerable areas;
3. Assessing the likelihood of terrorist or other criminal acts;
4. Identifying avoidable events;
5. Identifying possible defensive measures; and
6. Developing and implementing plans for the prudent reduction of risks.

A framework for site-specific vulnerability assessments includes proactive questions:[7]

1. Who are the intended users of the site (staff, service crews, visitors)?
2. What types of activities do the users perform at the site (tasks, recreation, deliveries of benign or hazardous materials)?
3. When do users of the site arrive and leave (schedules for public access, typical working hours)?
4. Where on the site do users go and where can users enter (doors, lobbies, windows, outdoor walking paths)?
5. How do users get to the site (methods of access, circulation of roadways approaching the site) and are there other, less vulnerable methods, such as off-site parking?

Federal statutes requiring steps to be taken to reduce vulnerability to attack pre-date the Homeland Security era and date back to the Cold War era.[8] Title 12 U.S.C. Section 1701n provides:

"The Department of Housing and Urban Development, and any other departments or agencies of the Federal Government having powers, functions, or duties with respect to housing under any law shall exercise such powers, functions, or duties in such manner as, consistent with the requirements thereof, will facilitate progress in the reduction of the vulnerability of congested urban areas to enemy attack."

The more recent Emergency Planning and Community Right-to-Know Act of 1986[9] requires the establishment of state commissions, planning districts and local committees to prepare emergency plans to address releases of extremely hazardous chemicals.[10]

For community water systems,[11] Title IV of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002[12] ("Bioterrorism Act") amended the Safe

Drinking Water Act[13] by adding new Section 1433, requiring assessments of the vulnerability to terrorist attack of community water systems serving more than 3,300 persons.

- Systems serving 100,000 or more were required to complete their vulnerability assessments by March 31, 2003, and their emergency response plans by September 20, 2003.
- Systems serving 50,000 – 99,999 persons were required to complete their vulnerability assessments by December 31, 2003, and are required to review and revise their emergency response plans by June 20, 2004.
- Systems serving 3,301 – 49,999 persons are required to complete their vulnerability assessments by June 30, 2004, and their emergency response plans by December 31, 2004.

These vulnerability assessments are to be submitted to the United States Environmental Protection Agency (EPA). A community water system that prepares a vulnerability assessment is required to maintain a copy for five years.[14]

The EPA has prepared a "Protocol to Secure Vulnerability Assessments Submitted by Community Water Systems to EPA."[15] The EPA Protocol describes the security measures to be observed by EPA to protect submitted vulnerability assessments from disclosure. Community water systems should use parallel procedures.

Water utilities that are required to prepare and submit vulnerability assessments also are required to amend or prepare emergency response plans based on their results.[16] Vulnerability assessments are also required for ports and transportation terminals.[17] Parallel legislation that would require vulnerability assessments for wastewater treatment plants was pending in Congress[18] at the time this article was submitted.

II. PUBLIC RECORDS LAWS

New restrictions on state and local public records access policies are being imposed to limit public access to information about sensitive facilities in light of Homeland Security concerns.

A. Federal Law

New Section 1433(a)(3) of the Safe Drinking Water Act exempts community water system vulnerability assessments from disclosure under the Freedom of Information Act. The Bioterrorism Act did not create "FOIA events" at the state and local level. It provides that the requirement to submit a vulnerability assessment to the EPA (and to keep a copy) insulates the community water system from any obligation under state and local law to submit a copy of the document to any other governmental authority.

In addition to the exemptions from disclosure of water system vulnerability assessments, under the federal Homeland Security Act of 2002,[19] "critical infrastructure information" is exempt from disclosure under the Freedom of Information Act. Enacted as part of the Homeland Security Act, the Critical Infrastructure Information Act[20] exempts critical infrastructure information submitted voluntarily to the Department of Homeland Security.[21] "Critical infrastructure information" is defined as information related to the security of critical infrastructure or protected systems.[22] A proposed regulation[23] would further define the term as information not customarily in the public domain and related to the security of critical infrastructure or protected systems.

State and local procedures that require disclosure of a record that the Department of Homeland Security considers to be critical infrastructure information are preempted. By virtue of federal preemption, state courts have no power to release or order the release of such information.[24] Thus, to gain protection from disclosure under state open government laws, information can be designated as critical infrastructure information and submitted to the Department of Homeland Security.

B. State Law

The California Public Records Act was amended in 2002 by SB 1643 to add a disclosure exemption for documents prepared by an agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt its operations and that are for distribution or consideration in a closed session.[25]

But SB 1643 did not cure all problems of public access to terrorist-sensitive information. Health and Safety Code Sections 19850-53 require the building departments of every city and every county to maintain an official copy of the plans of every building for which a permit was issued, except for one and two-story residential, appurtenant garages, and ranch and farm structures, and to make the copies of the building plans available for inspection as "public records." This requirement exempts only the plans of banks, other financial institutions and public utilities.[26]

C. Recommendations

Do not wait until a member of the public, or the media, appears at your agency's counter asking to inspect your vulnerability assessment or your agency's file copies of building plans for critical infrastructure.

- The agency's attorney (or special counsel for Homeland Security legal issues) and clerk should review the provisions of the Bioterrorism Act, the Homeland Security Act and state laws that can be invoked to deny a request to inspect vulnerability assessments or other critical infrastructure information.
- Staff should be trained so that they understand and can apply the legal and physical security protections afforded to vulnerability assessments and other critical infrastructure information.
- The agency's attorney (or special counsel for Homeland Security legal issues) should establish contact with the United States Attorney's office and discuss procedures and points of contact for seeking federal intervention and removal to federal court of any public records access lawsuit, as a matter presenting federal question jurisdiction (under the Bioterrorism Act and the Homeland Security Act) and the possibility of motions to dismiss, based on federal preemption.
- Be aware of and be prepared to use the form for reporting to the FBI suspicious requests for inspection and copying of vulnerability assessments or critical infrastructure information.[27]

Each employee, officer and contractor with access to a vulnerability assessment, emergency response plan, documents on which they are based or critical infrastructure information should be required to sign a confidentiality agreement. The agreement should prohibit disclosure of the vulnerability assessment and other sensitive data necessary to protect the community water system or critical infrastructure from terrorist attack.

The agreement should state that the confidentiality obligation will survive and continue to bind the signer after termination of employment so long as the subject information remains classified as vulnerability assessment information. The agreement also should contain a provision notifying the signer that disclosure of vulnerability assessment confidential information may be prosecuted under federal and state laws and can result in civil liability.

III. OPEN MEETING LAWS

SB 1643 also amended the Ralph M. Brown Act to limit the requirement to publish notice of, and to open, meetings at which terrorist-sensitive information is to be discussed. The Brown Act now authorizes emergency meetings to address a terrorist act or threatened terrorist activity.[28] Additionally, the statute now authorizes a closed session at an emergency meeting to discuss threats to the security of public buildings and essential public services, including vulnerability assessments.[29]

IV. ENVIRONMENTAL IMPACT ANALYSIS LAWS

The California Environmental Quality Act requires public agencies to analyze the environmental impact of proposed projects for which a government permit or approval is required. For projects that require federal permits, the National Environmental Policy Act[30] imposes similar requirements. Homeland Security considerations must now play a part in analysis under CEQA and NEPA. While CEQA, for example, does not strictly require a "worst case scenario" analysis, compliance does require that significant effects be discussed "with emphasis in proportion to their severity and probability of occurrence."[31] The CEQA Guidelines also require that "an agency must use its best efforts to find out and disclose all that it reasonably can."[32]

Site-specific Homeland Security vulnerability assessment techniques and protocols should be utilized as part of the NEPA/CEQA process as consideration now must be given to the evaluation of the threat of terrorist attacks. However, care must be taken to avoid inclusion of specifics of vulnerability assessments in NEPA or CEQA documents to avoid providing terrorists with "how-to" manuals.

CONCLUSION

An overlay of new Homeland Security laws has been put in place. These laws require water, port and transportation terminal (and likely soon, wastewater) managers to conduct vulnerability assessments and to adopt or revise response plans. An understanding of new federal Homeland Security measures, as well as new state laws, what they require, how they impact and how they are exempt from, open government laws, is now essential for federal, state and local government officials, the media and the public. Once vulnerability assessments have been prepared, they of course must be safeguarded.

Local government officials, land use planners, architects, developers and building owners who fail to take proactive Homeland Security steps for the protection of critical infrastructure, public and private, such as reviewing building design, lighting and landscaping plans and providing for the protection of heating, ventilating and air conditioning systems, mail rooms, delivery docks and parking facilities, do so at considerable risk. The full extent of the liability risk is unknown but, after the recent *In Re September 11 Litigation* decision,[33] the clear concern is that the risk could increase and past actions and failures to act will form the basis for liability. This seems to be indeed a case of better to be safe than sorry.

Local governments, including cities, counties, school and other special districts, and especially water districts (which are required by federal law to do so) should conduct vulnerability assessments of critical infrastructure facilities. The need for that is obvious, and in the case of community water systems, it is required by federal law. But more is to be done. Local governments should also revise their land development review and permitting processes to incorporate Homeland Security considerations. Checklists and processing steps will require revisions. Ordinances and codes may have to be revised. Local governments might also consider audits or inspections by law enforcement personnel and building inspectors for compliance with defensive Homeland Security steps.

Land use planners, architects, developers and building owners also must take Homeland Security measures into consideration in the planning phase. Due diligence in the acquisition of existing structures also requires consideration of Homeland Security factors. Homeland Security considerations must also be a factor in retrofit and remodeling decisions.

New laws protect vulnerability assessments from inappropriate disclosure. But it is essential to think beyond legal shields. Adoption of rigorous protocols for the security of vulnerability assessments is essential to prevent these sensitive documents from falling into the wrong hands.

It is also critically important to take a comprehensive approach to the protection of critical infrastructure. Other documents and plans, for example, HVAC plans for sensitive facilities, also must be protected.

A new awareness of threat analysis and threat reduction steps, coordination and cooperation must now be the norm for effective Homeland Security measures. Failure to implement new procedures will be difficult to explain in the investigation that will follow any future terrorist attack.

ENDNOTES

1. For an article on the broader topic of the consideration of Homeland Security factors in land use and development, see "Homeland Security Begins at Home: Local Planning and Regulatory Review to Improve Security" by Rufus Calhoun Young, Jr., and Dwight H. Merriam, FAICP, Land Use Law & Zoning Digest, November, 2003, at 3, available at http://www.planning.org/PEL/pdf/Nov03.pdf.
2. "Homeland security, particularly in the context of critical infrastructure and key asset protection, is a shared responsibility that cannot be accomplished by the federal government alone. It requires coordinated action on the part of federal, state, and local governments; the private sector; and concerned citizens across the country." The National Strategy for the Physical Protection of Critical Infrastructures and Key Assets, February, 2003, at vii. ("National Strategy"), available at www.dhs.gov/interweb/assetlibrary/Physical_Strategy.pdf.
3. 5 U.S.C. § 552.
4. Cal. Gov.C. § 6250 et seq.
5. Id. § 54950 et seq.

6. Cal. Pub.Res.C. § 21000 et seq.
7. A helpful 36-page facility security checklist is available at the United States Department of Agriculture website: http://www.usda.gov/da/physicalsecurity/physicalcheck.pdf.
8. See generally, National Strategy, supra note 2.
9. 42 U.S.C. § 11001 et seq.
10. See also Cal. Labor C. § 3211.9 and Cal. Gov.C. §§ 8557 and 8610 (disaster councils).
11. On the supply side, the primary focus of critical infrastructure protection efforts is the nation's 170,000 public water systems. National Strategy, supra note 2 at 39.
12. P.L. 107-188.
13. 42 U.S.C. § 300f et seq.
14. Guidance on the preparation of water system vulnerability assessments may be found in "Instructions to Assist Community Water Systems in Complying with the Public Health Security and Bioterrorism Preparedness and Response Act of 2002," EPA Office of Water EPA 810-B-02-001, January 2003, available at http://www.epa.gov/safewater/security/util-inst.pdf. See also, GAO Report GAO-04-29, "Drinking Water: Experts' Views on How Future Federal Funding Can Best Be Spent to Improve Security," December 1, 2003, available at www.gao.gov/atext/d0429.txt.
15. See http://www.epa.gov/safewater/security/info_protect_11-30-02.pdf.
16. See www.epa.gov/safewater/security.
17. See, e.g., Department of Transportation Hazardous Materials Regulations, HMR, 49 C.F.R. Parts 171-180; 68 Fed.Reg. 23831, May 5, 2003 (Interim rule).
18. H.R. 866, S. 1039.
19. Pub. L. No. 107-296.
20. Id. §§ 211-215, 116 Stat. 2150.
21. Id. § 214. See Notice of Proposed Rulemaking, "Procedures for Handling Critical Infrastructure Information," 68 Fed.Reg. 18253, April 15, 2003. See also proposed 6 C.F.R. §29.8(g)(1).
22. 6 U.S.C. § 131.
23. See proposed 6 C.F.R. § 29.2(b).
24. 6 U.S.C. § 133(a).
25. Cal. Gov.C. § 6254(aa).
26. While it could be argued that Section 6255(a) of the California Public Records Act would authorize withholding of sensitive building plans, especially those involving critical infrastructure information, it is not certain that building department personnel are familiar with this section.
27. The American Institute of Architects and the National Society of Professional Engineers have developed a form for reporting to the FBI requests that are unusual due to the structures identified or type of information solicited. It is available at www.aia.org/letter/buildingplanform.pdf.
28. Cal. Gov.C. § 54956.5.
29. Id. §§ 54956.5(c), 54957(a).
30. 42 U.S.C. § 4321 et seq.
31. 14 Cal.Code of Regs. § 15143.
32. Id. § 15144.
33. See In Re September 11 Litigation, USDC, SD, NY, Opinion and Order Denying Defendants' Motions to Dismiss, (No. 21 MC 97 (AKH), Sept. 9, 2003) 2003 US DIST LEXIS 15522 (denying building owner's and other defendants' motions to dismiss based on argument that the terrorist attack was a supervening cause relieving them of tort liability).

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A Message from the Chair

*By Fazle Rab Quadri, Esq.**

You learn about some "improper governmental activity" during the course of performing your duties as a public lawyer. You are seriously disturbed and you ask yourself, what should I do? While still pondering over your question, you rather quickly conclude that the attorney-client confidentiality rules will control what you may or may not be able to do.

If AB 2713 (Pavley) is enacted into law you will be authorized, under certain circumstances, to request reconsideration of the wrongdoing, report the wrongdoing up to the highest authority within your agency, and then – under specified circumstances – report to law enforcement outside your agency, all without losing your license to practice law. Assembly Bill 2713 is a reintroduction of AB 363 (Steinberg) of the last biennial session.

The proposal to carve out an exception from the confidentiality requirement and allow a government lawyer to report specified governmental wrongdoings has a long history. It was developed with the input of literally hundreds of California lawyers and participation of various segments of the California State Bar. After much debate and many compromises, the exception was proposed as a change to Rule 3-600 of the Rules of Professional Conduct. As you know, the California Supreme Court must approve these administrative rules that govern our professional conduct. Our high court refused to approve the rule change on grounds that it conflicted with Business and Professions Code Section 6068(e).

Following that unsuccessful administrative attempt, the proposal was introduced in 2001 as AB 363 to make the necessary statutory change, but Governor Gray Davis vetoed the bill. In the veto message, the Governor said that, "it chips away at the attorney-client relationship which is intended to foster candor between an attorney and client." He went on to say that, "clients know they can disclose in confidence so they can receive appropriate advice from counsel. The effective operation of our legal system depends on the fundamental duty of confidentiality owed by lawyers to their clients."

The California State Bar has written a letter of opposition seeking an amendment of AB 2713 that will narrow the exception and mitigate some concerns. If the bill is amended as recommended, the Bar would withdraw its opposition.

As a public lawyer, you would want to know if AB 2713 becomes law and, more importantly, the final language. Members and advisors of the Public Law Section Executive Committee are also keenly interested and closely following the proposal. The Committee will review and discuss the proposal again at its June 18th meeting in Oakland. The status, text and any legislative committee analysis of the proposal, when written, can be seen at this California Legislature website – http://www.assembly.ca.gov/acs/acsframeset2text.htm. Those words of a great Jurist would apply equally to the development of the law in a democracy, the legislative wheel "grinds slowly but it grinds exceedingly fine."

* Fazle Rab Quadri (quadri@mdaqmd.ca.gov) is General Counsel of the Mojave and Antelope Air Quality Management District in southern California. He is Chair of the Public Law Section Executive Committee.

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