

STATE & LOCAL LAW NEWS

The Section serves as a collegial forum for its members, the profession, and the public to provide leadership and educational resources in urban, state, and local government law and policy.

State/Local Government Employees Face Possible Federal Prosecution in Wake of Chicago City Hall Hiring Investigation

By Patrick E. Deady, J. Michael Tecson, and Katherine E. Rengel

It has been well-established that officials who work for the state, a county, a city, for municipal corporations, or other public employers (collectively “Public Employers”) subject themselves and the entity for which they work to liability and penalties when they base the firing, hiring, or promotion of other public employees, or potential employees, on their political affiliations. Such “patronage” decisions have been generally held to violate the employee’s or job applicant’s First and Fourteenth Amendment rights to freedoms of belief and association. Until recently, offending public officials feared only civil suits seeking damages and reinstatement for such patronage practices. Now, after the government’s successful prosecution in *United States v. Sorich*, No. 05-CR-664, 2006 WL 3347555 (N.D. Ill. Nov. 15, 2006), the same patronage violations could result in criminal convictions and federal jail sentences.

In *Sorich*, the defendants, who worked for the City of Chicago (the “City”), were convicted of mail fraud under 18 U.S.C. §§ 1341 and 1346. The indictment in *Sorich* alleged that the four defendants engaged in a scheme to rig the City of Chicago’s hiring and promotion process, granting favorable consideration to particular job applicants who had engaged in political activities on behalf of various campaign coordinators and politicians. The defendants received sentences that ranged from eighteen months to forty-seven months.

Prior to *Sorich*, public officials or employees were, for all intents and purposes, immune from criminal prosecution for engaging in such patronage hiring. In fact, it took years for the judiciary to create a uniform application of the civil

penalties for alleged constitutional violations. In 1976, the U.S. Supreme Court decided the case of *Elrod v. Burns*, 427 U.S. 347 (1976). In *Elrod*, the Cook County sheriff, a Democrat, systematically replaced employees in the Sheriff’s Office who were unwilling to pledge their allegiance and support to the Democratic Party. Employees dismissed or threatened with dismissal because they did not support the Democratic Party brought a class action lawsuit against the sheriff. The lawsuit alleged that the sheriff had violated the employees’ First Amendment rights. *Id.* at 347. The Supreme Court agreed with the employees that the sheriff’s partisan-based dismissals were unconstitutional. First, the dismissals violated the employees’ First Amendment freedoms of belief and association by conditioning the employee’s job upon confor-

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Patrick E. Deady is a partner, J. Michael Tecson an associate, and Katherine E. Rengel a law clerk in the Chicago, Illinois, office of Hogan Marren, Ltd.

CHAIR'S MESSAGE

Chair's Message

By Edward J. Sullivan

About three-quarters of the states have adopted some version of the Standard State Zoning Enabling Act, which was drafted in 1926 by a blue-ribbon committee under the then Secretary of Commerce, Herbert Hoover, and set out the broad outlines by which local governments could adopt and administer zoning regulations. That same committee also drafted the Standard City Planning Enabling Act in 1928, which was adopted by three-quarters of the states. While the benefits of uniformity were apparent, the Standard Acts suffered from a number of deficiencies.

Among those deficiencies was a lack of detail on local procedures. First, it was unclear as to whether a zoning map change was, like the adoption of the overall map, a legislative act to which judicial deference was owed. Second, the Standard Zoning was vague, outdated, and was a problem to those seeking court assistance in assuring fair procedures. As a result, applicants found themselves in the midst of multiple layered hearings, facing inadequate procedures before local boards and commissions that were not always competent to handle decision making in a discretionary environment. Judicial review was uncertain, uneven, and costly.

On top of all this statutory confusion was the fact that the only U.S. Supreme Court cases in the land use field before 1972 were a quartet decided between 1926 and 1928, that used the now discredited doctrine of substantive due process, which has virtually disappeared in federal jurisprudence since 1940. Nevertheless, lawyers and state and lower federal courts all looked to, cited, and used this precedent, keeping substantive due process alive in the land use field when it had become a museum piece elsewhere.



Edward J. Sullivan is Chair of the Section and a member of the Portland, Oregon, firm of Garvey Schubert Barer.

There have been two major efforts to revise the Standard Acts, the first being that of the American Law Institute in its Model Land Development Code in the 1970s, which was used only by Florida. The second was the American Planning Association's Growing Smart™ project, which has been adopted by several states.

Building on these efforts, the Section, along with our colleagues in the Section of Administrative Law and Regulatory Practice, has concentrated on local land use procedures and judicial review of land use actions. Under the leadership of Professors Daniel Mandelker of Washington University of
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STATE & LOCAL LAW NEWS

Public Law Produces Public Benefit

State & Local Law News (ISSN: 0195-7686) is published quarterly, as a service to its members, by the Section of State and Local Government Law of the American Bar Association, 321 North Clark Street, Chicago, IL 60610-4714.

State & Local Law News provides information concerning current developments in the law of interest to state and local government lawyers, news about the activities of the Section, and other information of professional interest to Section members.

Any member of the ABA may join the Section by paying its annual dues of \$40. Subscriptions to *State & Local Law News* are available to nonlawyers for \$44.95 a year (\$49.95 for foreign subscribers).

The views expressed herein are not necessarily those of the American Bar Association or its Section of State and Local Government Law.

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The Editors invite submissions of articles for publication in *State & Local Law News*. Articles should be no longer than 2,000 words and lightly footnoted.

Address corrections should be sent to the American Bar Association Service Center.

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SECTION NEWS

Call for Nominations: Tenth Annual Jefferson Fordham Awards

The ABA Section of State and Local Government Law established the Jefferson B. Fordham Awards Program in 1998 to recognize and honor the accomplishments of practitioners and institutions active in the varied areas of practice associated with state and local government law. The awards honor outstanding attorneys and law offices that have achieved professional excellence within this area of the profession. Awards may be presented in the following categories on an annual basis: (1) Law Office Accomplishment, (2) Lifetime Achievement, (3) Advocacy, and (4) Up & Comers.

Who Was Jefferson Fordham?

The Fordham Awards commemorate the career of Jefferson B. Fordham, who was elected the first Chair of the Section of Local Government Law in 1949. During his years of outstanding service, the Section became the distinguished national resource for the advancement of state and local government law practice. His local government law case book, in which he addressed planning and finance, housing and blight, transportation and congestion, in short, the entire range of urban problems whose solutions required a larger concept of community, revolutionized the teaching of this field. He pioneered the concepts of home rule and the landmark decisions sustaining interdisciplinary studies under bar sponsorship. He was a visionary in teaching that the tough problems of local government did not lend themselves to simplistic solutions.

Submission of Nominations

Nominations must be received on or before **April 30, 2007**, by the ABA Section of State and Local Government Law. The Section's Awards Committee will select recipients by July 6, 2007, and the awards will be presented at the ABA Annual Meeting at a special luncheon in San Francisco, California, on Friday, August 10, 2007.

Detailed Criteria for Selection

Below is a list of the four different areas for which the Jefferson Fordham Award may be presented on an annual basis and a brief description of the criteria used to select recipients in each category.

Law Office Accomplishment Award—Recognizes sustained outstanding performance or a specific extraordinary accomplishment by a state and local government law office. Eligible candidates include all state and local government public sector law offices, including departments or units within such offices.

Lifetime Achievement Award—Recognizes outstanding

Nominating Committee Appointed

At the Midyear Meeting in Miami, Florida, Section Chair Edward J. Sullivan, with the approval of the Section's Executive Committee, named the following members to the Nominating Committee:

Benjamin E. Griffith, *Chair*
Cleveland, Mississippi
662/843-6100

Terrence Welch
Dallas, Texas
214/747-6100

Peter Buchsbaum
Flemington, New Jersey
908/237-5940

Keith H. Hirokawa
Vancouver, Washington
360/696-1012

Dorothy Yee
Los Angeles, California
213/830-1104

At the Annual Meeting in August, the Nominating Committee will submit the names of nominees for Section Officers and Council for the 2007–08 Association year. Section members who would like to suggest potential nominees should contact Benjamin E. Griffith, Griffith & Griffith, 123 South Court Street, P.O. Drawer 1680, Cleveland, MS 38732, 662/843-6100, or any other member of the Nominating Committee by **April 27, 2007**.

contributions to the practice of state and local government law by an individual over an entire career. This award is given for contributions over a number of years.

Advocacy Award—Recognizes outstanding advocacy or legal writing within the area of state and local government law. This award fosters and encourages excellence in advocacy, both written and otherwise, in state and local government law.

Up & Comers—Presented to a young practitioner (thirty-six or under) as defined by the ABA who, through his or her efforts and accomplishments, shows great promise to continue these contributions for future achievements.

Guidelines for Submission

Nominations for recipients in each of the four categories must be submitted in the following format with all the information requested:

1. Full name, addresses, and telephone numbers of the nominee.
2. Name of the law office's director or manager for the Government Law Office Award, including the size and mission of the office.
3. Summary of nominee's or office's achievements (brief explanation of outstanding or extraordinary public and/or

professional services rendered (50 to 100 words)).

4. An explanation of the nominee's performance and service; information regarding the time frame for the services described; accomplishments or superior contributions over a number of years; outstanding advocacy or legal writing; qualifications as a young lawyer for the Up & Comers Award whose past efforts and accomplishments show great promise to continue contributions for future achievement; assessment of the impact of the service for which you are nominating the individual or office (no more than two typed pages).
5. Names, titles, and phone numbers of three other persons (including at least one lawyer or jurist), who are familiar with the nominee's performance, achievements, etc.
6. A brief statement about the nominator's background that would assist the Awards Committee in evaluating the nominations.

Submit All Materials to:

Jackie Baker, ABA Section of State and Local Government Law, 321 North Clark Street, Chicago, IL 60610, fax 312/988-5121, or e-mail jlhbaker@staff.abanet.org.

Presentations and Proposals in Miami



During the ABA Midyear Meeting in Miami, Professor Michael Asimow (from left to right) of the University of California at Los Angeles, Professor Daniel R. Mandelker of Washington University of St. Louis, and Section Chair Edward J. Sullivan, Portland, Oregon, report to the Administrative Law and Regulatory Practice Section Council on the work of the Joint Task Force on Land Use Procedures.



Panelists for the "Promoting Diversity in the Practice of State, Local Government, and Public Sector Law" session, cosponsored with the Government and Public Sector Lawyers Division, included (from left to right): Lysia Bowling, State Attorney's Office, 11th Judicial Circuit, Miami; Jorge L. Fernandez, City Attorney, Miami; and Iris Jones, Akin Gump and former president, International Municipal Lawyers Association, Washington, D.C.

Forgotten Colleagues

By Michael S. Greco

There was a time, not long ago, when outstanding lawyers who happened to be women, or of color, found doors to employment shut tight. While those doors need further opening, they have opened significantly for members of those groups.

Regrettably, that is not true for outstanding lawyers who happen to have a disability. Overlooked as a minority group, these forgotten colleagues are struggling to find or retain positions in law offices and corporate legal departments across America. Their struggle has nothing to do with qualifications.

Instead, it stems from the reality that legal employers are not doing enough to recruit and retain lawyers with disabilities. This situation is depriving opportunity not only to the lawyers themselves, but also to law offices and clients that could benefit from their skills, the legal profession, and society. The American Bar Association is taking steps to address the situation.

The first-ever National Conference on the Employment of Lawyers with Disabilities, which I hosted in Washington, D.C., last May as President of the American Bar Association, challenged legal employers to hire and retain lawyers with disabilities. The historic conference was sponsored by the ABA Commission on Mental and Physical Disability Law, the ABA Office of the President, and the Equal Employment Opportunity Commission, and was attended by several hundred lawyers with disabilities from throughout the United States, law firm managing partners, corporate counsel, and others.

Former U.S. Attorney General Dick Thornburgh, my esteemed law partner and a major driving force in the enactment of the Americans with Disabilities Act, noted in delivering the Conference's keynote address:

We can talk a good game about diversity and about how we're open to hiring lawyers with disabilities. But if we don't really do it, don't do the recruiting we need to do, or don't change our profession's attitudes and practices, then the aims of this conference will not have been achieved.

President John F. Kennedy once said that "a journey of a thousand miles starts with a single step." The first step to making law offices across America noticeably diverse with regard to disability has been taken. The May 2006 Conference was an unqualified success, and the *Conference Report* is available to all on the ABA website at www.abanet.org/disability. The next step is up to law firm leaders, corporate counsel, and legal employers.



Michael S. Greco is Immediate Past President of the American Bar Association. He is a partner in the Boston office of K&L Gates.

Disability diversity includes lawyers already employed when they become impaired and those who have had a disability during all or most of their lives. The major concern of the first group is an accommodation that will allow them to continue as they have in the past, and because they already are part of the firm, there is less resistance to providing reasonable accommodations.

The primary concern of the second group is obtaining employment in the first instance and the availability and effectiveness of reasonable accommodations once employed. What can and should legal employers do to improve the hiring and retention of lawyers with disabilities?

Steps such as the following will help improve hiring practices: (1) appointing a diversity representative experienced in disability issues to the firm's management committee; (2) understanding the requirements of the Americans with Disabilities Act and state disability discrimination laws; (3) including references to persons with disabilities in equal opportunity language in job announcements; (4) writing job descriptions that include only specific tasks essential to the position to be filled, and evaluating candidates based on ability to perform them; and (5) asking interview questions that highlight a candidate's strengths, and then inquiring about any limitations.

Once a lawyer with a disability is hired, both that individual and the law office will benefit by making the workplace "disability friendly." For example: (1) establishing flexible work arrangements for all employees; (2) prorating billable hours, or billing hours directly to the firm; (3) appointing a committee chaired by a well-respected senior partner with representatives from all employment levels to address diversity issues, including disability; (4) specifying in firm documents that diversity, including persons with disabilities, is an important value, and monitoring diversity progress; (5) creating an active mentor program, individualized to meet different needs, including those of lawyers with disabilities; and (6) creating a centralized fund to pay for reasonable accommodations.

These concrete actions by corporations and law offices will help make the hiring and retention of lawyers with disabilities more successful. Other practical suggestions and perspectives worthy of consideration are contained in the ABA Commission's *Conference Report*.

No qualified lawyer—or member of any profession—should be denied the opportunity to work and to contribute solely because of a disability. "Equal opportunity for all" is a cherished principle in America. But effort is needed to make that eloquent promise a reality.

If the legal profession is to reflect the true diversity of our nation—and benefit from the *entire* pool of available talent—we must include lawyers with disabilities in the same way that the profession has included women and persons of color.

Our profession truly will be diverse, and lawyers with and without disabilities will be considered equal before the bar, only when you and I and our hiring colleagues across the land make the commitment to hire and retain lawyers with disabilities.

It is past time for us to make that commitment.

Land Use Committee

Before I catch everyone up on what the Land Use Committee has been doing, I want to take a moment to remember our good friend Dan Curtin. The State and Local Government Law Section, and, indeed, the entire land use bar, lost a good friend and great man when Dan passed away. Many others have spoken eloquently of Dan—of his influence on land use law, his leadership, his personal warmth, and his friendship. Dan was a true giant of the bar. Among his many achievements, Dan was responsible for making our Committee the success it is today. I got to know Dan through my involvement with the Section and the Land Use Committee. Both before and during my tenure as Land Use Committee chair, Dan was a wise advisor and enthusiastic supporter of our work. He was always available for advice and counsel and always presented some of the most informative and interesting Hot Topics reports every year. But

Join a Committee!

One way to ensure that you are maximizing your Section membership is to sign up for a Section committee. Even if you do not want to be an active member, please sign up for the committees that deal with the areas of law in which you are interested.

- Condemnation Law
- Environmental Law
- Ethics
- Government Operations and Liability
- Homeland Security/Emergency Management
- Land Use, Planning & Zoning
- Public Education
- Public Finance

Committee membership is free. Committees offer access to special information, networking, and leadership opportunities. Working through substantive subcommittees, committee members help ensure that the Section provides services—and addresses issues—important to your practice. For more information about a specific committee, visit www.abanet.org/statelocal/home.html or contact Edwin P. Voss, Jr., committee coordinator, at evoss@bhlaw.net.

Send your committee enrollment information to Leigh Stewart, Administrative Assistant, by fax at 312/988-5121, or by mail to 321 N. Clark St., Chicago, IL 60610-4714.

Committee(s): _____

Your Name: _____

Address _____

E-Mail: _____

Telephone: _____

Fax: _____

perhaps what was most impressive about Dan was how much he gave of himself. He was a great mentor—at every meeting it seems he brought along another young land use attorney and helped him or her get involved in the committee and the land use bar. He will be sorely missed.

The Section's Fall Meeting in Madison, Wisconsin, was a great success. The Committee sponsored a two-part program on "Land Use Law: Wisconsin Innovations." Part one was a classroom presentation and part two was a bus tour of downtown Madison and the University of Wisconsin campus. Our thanks to Richard Lehmann, of counsel with Boardman, Suhr, Curry & Field in Madison, for this great program.

Our Spring Meeting is fast approaching! Set for May 17–20, 2007 in San Juan, the Spring Meeting will boast two terrific programs from the Land Use Committee. The first, of course, will be the Committee's annual Hot Topics brown bag luncheon. Once again, we will hear reports from our many subcommittees on the latest developments in land use. Topics include comprehensive plans, exactions, civil rights, ethics, and telecommunications. Bryan Wenter and Paul Wilson, vice-chairs for reports and the organizing force behind the luncheon, promise another great round of reports. In fact, Paul insists, as always, that the title to his report will top the list as the worst pun. You're on, Paul!

Our other program promises to be special. The Religious Land Use and Institutionalized Persons Act, or "RLUIPA," signed into law in 2000, is having an impact in communities around the country. So we think it's a good time to present a panel entitled "Church, State and Dirt—RLUIPA and Land Use in 2007." We have an exciting panel: Professor Marci Hamilton of the Cardozo Law School in New York, Kevin J. Hasson of the Becket Fund, and our own Dan Dalton, of Tomkiw Dalton in Royal Oak, Michigan. Marci and Kevin will discuss the current state of RLUIPA jurisprudence and present their different views on the law. Dan will give us the practical view of a lawyer who is actually taking a RLUIPA case to trial. I'm very excited to be moderating this panel and look forward to a lively and informative discussion.

It's not too early to be thinking about the Annual Meeting in San Francisco! Once again, the Committee will co-sponsor a program with our sister committee in the Real Property, Probate and Trust Section. This year, we will present a panel entitled "America's Ongoing Property Rights Debate Reinvigorated: Legislative and Judicial Reactions to *Kelo*," to be hosted by our very own Dwight Merriam. I hope to see you there.

It's a great pleasure to be able to serve you as Land Use Committee chair, especially with the help of our great vice-chairs: Andy Gowder and Lora Lucero for programs, Bryan Wenter and Paul Wilson for reports, and Mitch Carrell for membership outreach. Thank you, Andy, Lora, Bryan, Paul, and Mitch, for your great work! We hope that all of you get involved in the Committee. It's not hard—in fact, it's as easy as volunteering to do a Hot Topics report! The meetings have fascinating programs, and fun evenings. See you there.

—Robert (Bob) Foster, Chair
Rackemann, Sawyer & Brewster, P.C.
Boston, Massachusetts

2007 ABA Annual Meeting

August 9–12, 2007 • Hilton San Francisco • 333 O'Farrell Street • San Francisco, California 94102

Thursday, August 9, 2007

2:00–4:00 p.m.

Executive Committee Meeting

Friday, August 10, 2007

7:30–8:15 a.m.

Committee Meetings

8:00 a.m.–5:00 p.m.

Section Office and Hospitality Room

8:30–10:00 a.m.

**America's Ongoing Property Rights Debate Reinvigorated:
Legislative and Judicial Reactions to *Kelo***

Cosponsor: Section of Real Property, Probate and Trust Law

This program will address the current legislative and judicial reactions to the Supreme Court's decision in the *Kelo* case. While such reactions do target some of the eminent domain-specific issues raised by *Kelo*, many groups have also used the public's newly re-heightened awareness of private property concerns to address issues of governmental regulation of private property per se, thus reigniting a debate that is older than the Constitution itself. Speakers will present various perspectives on this age-old debate and discuss current implications and where we go from here.

Moderator:

Dwight H. Merriam, Hartford, Connecticut

Speakers:

Michael M. Berger, Los Angeles, California
Andrew W. Schwartz, San Francisco, California
James S. Burling, Sacramento, California
Prof. Rick Frank, Berkeley, California

10:15–11:45 a.m.

Council Meeting & Nominating Committee Report

Noon–2:00 p.m.

Jefferson Fordham Awards Luncheon

Keynote Speaker:

Richard Frank, University of California Boalt Hall

Ticketed \$35

2:15–3:30 p.m.

Land Use Program

3:45–4:45 p.m.

Urban Lawyer Advisory Committee Meeting

6:00–8:00 p.m.

Chair-Elect Reception

Lefty O'Doul's

333 Geary Street

Saturday, August 11, 2007

8:00–5:00 p.m.

Section Office and Hospitality Room

7:30–9:30 a.m.

Publications Oversight Board

9:30–10:15 a.m.

Land Use Committee Meeting

10:30 a.m.–6:30 p.m.

**Land Use Law in California and Beyond
(Tribute to Dan Curtin)**

*Program and Walking Tour in Sonoma Followed by
Wine Tasting & Dinner*

Sunday, August 12, 2007

8:30–10:30 a.m.

Council Meeting & Section Election

Spring Meeting

Caribe Hilton • San Juan, Puerto Rico
May 18–20, 2007

Friday, May 18, 2007

Optional

7:30–11:30 a.m.

Caribbean National Rain Forest

Located on the Caribbean island of Puerto Rico in the Greater Antilles group, the Caribbean National Forest is the sole tropical rain forest in the U.S. National Forest System. The Caribbean National Forest has no large wildlife species, but hundreds of smaller animals abound in this gentle forest, many of which exist nowhere else on the planet!

Admission tickets cost \$3 per person and can be purchased at the main entrance. Bus transportation is provided. We will depart from the main entrance of the Caribe Hilton at 7:45 a.m. and will depart from the Rain Forest at 10:45 a.m. If you plan to attend this event, please e-mail Leigh Stewart at stewartl@staff.abanet.org, indicating the number of people in your group.

8:00 a.m.–5:00 p.m.

Registration and Hospitality Room

1:00–2:00 p.m.

Metadata and Its Implications to the Government Lawyer

Ethical problems and issues caused by disclosing to the public, opposing counsel, or clients e-mail pleadings or other electronic documents and the metadata embedded therein. Together we will try to navigate this growing ethical issue.

2:15–3:30 p.m.

Environmental Protection and the Role of Supplemental Environmental Projects (SEPs) in Civil Enforcement

Moderator:

Prof. John (Jack) H. Minan, University of San Diego School of Law, San Diego, California

Speakers:

Luis E. Rodriguez, Professor, University of Puerto Rico School of Law, San Juan, Puerto Rico

Patricia McKenna, U.S. Department of Justice, Washington, D.C.

Steven Bonorris, Associate Director, Center for State and Local Government Law, University of California, Hastings College of Law, San Francisco, California

This distinguished panel of legal experts will present their views during the environmental law program. Professor

Rodriguez, who is on the faculty at the University of Puerto Rico School of Law, will begin the program by sharing his views on environmental protection and economic development in Puerto Rico. He teaches environmental law and international environmental law and has been involved in a wide-range of government service activities. Patricia McKenna, a trial attorney with the Environmental Enforcement Section of the U.S. Department of Justice, will then explore the federal policy on Supplemental Environmental Projects (SEPs), which are environmental projects undertaken by environmental defendants in mitigation of civil penalties. Her litigation experience includes the 2006 civil settlement between the Puerto Rico Aqueduct and Sewer Authority and the United States of America that resolved environmental violations at sixty-one wastewater treatment plants throughout the Commonwealth and that required the Authority to spend \$1.6 billion to improve wastewater treatment facilities. Steven Bonorris, who is the editor of the definitive fifty-state study on SEPs, as well as other significant published research, will conclude the session by providing a useful survey of SEPs under state law. Jack Minan, who is the Chair of the Environmental Law Committee and responsible for organizing the environmental law program, will moderate the panel. Professor Minan is on the law faculty at the University of San Diego School of Law.

3:45–5:00 p.m.

Church, State and Dirt: RLUIPA and Land Use in 2007

Moderator:

Robert B. Foster, Rackemann, Sawyer & Brewster, Boston, Massachusetts

Speakers:

Marci Hamilton, Professor, Cardozo Law School, New York (author of *God vs. The Gavel: Religion and the Rule of Law* (2005))

Kevin J. (Seamus) Hasson, Founder & President, Becket Fund for Religious Liberty, Washington, D.C.

Daniel P. Dalton, Tomkiw Dalton, Detroit, Michigan

6:00–7:30 p.m.

Welcome Reception

Banco Popular, 206 Recinto Sur Street, 11th Floor, Old San Juan

Speaker: Hon. Kenneth McClintock-Hernandez
President of the Senate of Puerto Rico

Sponsored by Banco Popular and Foley & Lardner

Dinner on your own

Saturday, May 19, 2007

8:00 a.m.–5:00 p.m.

Registration and Hospitality Room

8:00–10:00 a.m.

Executive Committee Breakfast Meeting

8:00–9:00 a.m.

Newsletter & CLE Advisory Board Meeting

2007 Hot Topics What's New in Your Legal World?

9:15–10:15 a.m.

HOT TOPICS—Condemnation Law

10:30–11:30 a.m.

HOT TOPICS—Public Finance

11:45 a.m.–2:15 p.m.

Land Use Box Luncheon Meeting

2:30–4:00 p.m.

Publications Oversight Board

Saturday, May 19, 2007

4:00–5:00 p.m.

All Committee Business Meetings

6:00–8:30 p.m.

Calypso Theme Reception

Atlantic Garden, Caribe Hilton

Buffet Caribbean Food Fair & Open Bar—
\$75 adults/\$30 children

Sunday, May 20, 2007

8:00–8:45 a.m.

Urban Lawyer Advisory Board Meeting

8:00–8:45 a.m.

Membership & Special Committee on Diversity and
Minority Outreach

9:00 a.m.–Noon

Council Breakfast Meeting

REGISTER NOW!

HOTEL INFORMATION

The Caribe Hilton: Just 15 minutes from Luis Munoz International Airport. A block of rooms has been reserved on a **priority basis for program registrants**. Room rates at the Caribe Hilton are \$200, single/double, plus a \$20 resort fee and tax per night.

You may reserve your accommodations by calling the hotel directly at 1-787-721-0303, via e-mail at reservations.caribe@hilton.com, or by calling toll free 1-800-468-8585. Be sure to refer to the **ABA Section of State & Local Government Law's 2007 Spring Meeting**. **Individuals with guaranteed reservations must cancel their reservations by May 14, 2007, to avoid a one-night cancellation charge.**

**Please, make your reservations NOW.
The hotel will release our room block on
Thursday, April 26, 2007, at 5:00 p.m. (CST).**

CANCELLATION POLICY

Refund requests must be made in writing (via e-mail or U.S. mail) and received in the Section of State & Local Government Law's office **on or before April 25, 2007**. All refunds will be reduced by a \$25 administrative fee. Substitutions may be made at any time.

NO refunds will be made after April 25, 2007.

REGISTRATION APPLICATION

The registration fee includes all CLE and Hot Topics sessions, a reception, and CLE materials. Payment must accompany registration. Confirmations will be sent to all registrants.

Register online through the Section website at www.abanet.org/statelocal/home.html (credit card only)

or

Send via fax to: 312/988-5121 (credit card only)

or

Mail directly to: Leigh Stewart, ABA, Section of State & Local Government Law, 321 North Clark Street, Chicago, IL 60610-4714

Please register the following individual for the ABA Section of State & Local Government Law's Spring Meeting, May 18-20, 2007, Caribe Hilton, San Juan, Puerto Rico.

Registration Fees

- \$ 10 Law Student
- \$ 85 ABA & Section of State & Local Government Law member
- \$125 ABA & Non-Section Member—\$40 will be applied for LG Section membership
- \$155 Non-ABA Member
- \$ 50 Guest/Spouse
- \$ 50 CLE and Hot Topics Course Materials only
- \$ 75 Calypso Theme Reception per person
 - \$30 for Children

Please indicate which events below you will attend:

Friday, May 18, 2007

6:00–7:30 p.m.

Welcome Reception—Banco Popular

Total number of adults attending _____

Total number of children attending _____

Saturday, May 19, 2007

6:00–8:30 p.m.

Calypso Theme Reception, Caribe Hilton (Buffet Caribbean Food Fair & Open Bar)

Total number of adults attending _____

Total number of children attending _____

REGISTRANT NAME: _____

2ND REGISTRANT NAME: _____

GUEST/SPOUSE: _____

CHILD(ren): _____

FIRM: _____

ADDRESS: _____

CITY, STATE, ZIP: _____

TELEPHONE NUMBER: _____

E-MAIL ADDRESS: _____

Payment Information

- Enclosed is my check, made payable to the **American Bar Association**, for \$ _____.
- Government purchase order enclosed.
- Charge \$ _____ to my Credit Card:
- Visa Mastercard AmEx

Card Number _____

Exp. Date _____

Signature _____



***Kentucky v. Davis:* A Question of Tax Parity in a Flat World**

By Caryl Stephens Johnson

Before this article is published, the U.S. Supreme Court (the “Court”) should have determined whether to hear *Kentucky v. Davis*,¹ on a petition by writ of certiorari by the Commonwealth of Kentucky (the “Commonwealth” or “Kentucky”). This case is of significance to the states and their political subdivisions engaged in borrowing funds through the authorization and issuance of tax-exempt municipal securities² because, if affirmed by the Court, it will nationalize the market for municipal bonds of any state. Further, this case is important to the municipal securities industry where underwriting tax-exempt bond mutual funds is currently limited to state-specific offerings. It is hoped that the Court will hear this case and provide bright line guideposts in the nascent concept of tax parity of municipal securities to assist municipal securities practitioners.

Kentucky v. Davis arose from an appeal by taxpayers to a grant by the trial court of summary judgment in favor of the Department of Revenue of the Finance and Administration Cabinet for the Commonwealth of Kentucky over the issue of Kentucky’s state policy of taxing the interest on tax-exempt municipal bonds issued by “sister states.” The central issue in the case is the constitutionality under the dormant Commerce Clause of the U.S. Constitution³ of a state exempting from taxation the interest on bonds issued by the state or its political subdivisions while taxing the income on out-of-state bonds, which are tax-exempt under the Internal Revenue Code and under the tax laws of such “sister” state. The Kentucky Court of Appeals⁴ ruled in favor of the taxpayers to the effect that taxing out-of-state bonds while exempting in-state bonds from taxation was found to be discriminatory in violation of the Commerce Clause without the benefit of any judicially recognized exception. The Kentucky Supreme Court refused to hear the case on further ap-

peal, and the Commonwealth sought certiorari on the ground of unconstitutionality and a contrary holding on similar facts in an Ohio decision, *Shaper v. Tracy*,⁵ causing a split among state courts.⁶

In the *Shaper* case, an Ohio appeals court found that under identical facts, Ohio taxpayers were not entitled to relief from paying tax on out-of-state tax-exempt bonds they owned on the theory that Ohio’s tax regime violates the Commerce Clause. The court in *Shaper* applied recognized exceptions to finding unconstitutionality under the dormant Commerce Clause (discussed *supra*) and upheld the state tax prohibiting the exemption from taxation of interest on non-Ohio municipal securities.

The dormant Commerce Clause forbids states from interfering with interstate commerce by protecting in-state economic interests at the expense of out-of-state economic interests. In analyzing the constitutionality of a statute under the Commerce Clause, one that is found to be per se discriminatory will be upheld under a strict scrutiny standard if there exists a reason unrelated to economic protectionism to justify the discriminatory action.⁷ Alternatively, if a court finds that the statute is not facially invalid, but its impact is discriminatory, a court may apply a balancing test to determine if there is any legitimate reason for the discriminatory action.⁸

This analysis has led the Court to create several exceptions to the application of the dormant Commerce Clause, namely, the “market participant” exception, the “sovereign entity” exception, and the “subsidy” exception. The “market participant” exception sanctions a state’s discriminatory actions when the state is a market participant, for example, when the state is a buyer or a seller (say, as an issuer of municipal securities).⁹ In *Kentucky v. Davis*, the Commonwealth argued the “market participant” exception, not as a business enterprise, but as a sovereign acting on behalf of itself, in a manner to favor itself over other sovereign states.¹⁰ Further, the Commonwealth argued that the Court has not found a constitutional basis that would prohibit a state from favoring its own citizens over out-of-state citizens,¹¹ and that the in-state tax exemption is an inducement to Commonwealth residents to purchase the Commonwealth’s bonds instead of corporate securities or bonds of other states.¹² The Commonwealth pointed out to the Court that the issuance and sale of tax-exempt bonds by any state that exempts from taxation the income earned by its citizens from its bonds while taxing the income earned by its citizens on “sister state” tax-exempt obligations is a question that needs to be formally addressed by the Court to prevent further division.¹³

In the appeal to the Court, the respondent-taxpayers, the Davises, argued that Kentucky’s tax statute is facially invalid and violates the dormant Commerce Clause per se, and that the court of appeals decision (finding the statute unconstitutional) is consistent with the Court’s jurisprudence in this area.¹⁴ The



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respondents argued that reduced borrowing costs for the Commonwealth's tax-exempt bonds is a form of economic protectionism and, therefore, not constitutionally permissible.¹⁵

Some commentators have equated the concept of the tax exemption on in-state municipal securities to that of a subsidy, which the Court has found to be permissible¹⁶ (i.e., when an increase in yield on a municipal security inures to the benefit of in-state bondholders). This argument most recently was advanced in *West Lynn Creamery v. Healy*.¹⁷ The Court, in *West Lynn Creamery*, determined that, when a pure subsidy is funded out of the general revenue and paid for by all taxpayers, there is no burden on interstate commerce.¹⁸ Applying this analysis to *Kentucky v. Davis*, all taxpayers pay for a state tax exemption equally from the general fund of the state, therefore, providing the exemption does not burden interstate commerce. However, the court of appeals did not adopt this view.

Because of the novelty and importance of *Kentucky v. Davis* to the municipal securities industry, some observers believe the Court will hear the case. An affirming decision from the Court may provide definitive rules by which to apply dormant Commerce Clause analysis. Indeed the dissents in *Camps Newfound/Owatanna v. Town of Harrison, Maine* evidence pause for concern among the Justices that the Court's jurisprudence in the area of the dormant Commerce Clause may have gone astray. Interestingly in Justice Thomas's dissent, he finds another basis a taxpayer could use to challenge state taxation of municipal securities: the Import-Export Clause.¹⁹ Justice Thomas's dissent includes a discussion of the historical significance and meaning of the Import-Export Clause and its application to the imposition of taxes on written property that crosses state borders.²⁰ It is Justice Thomas's contention that the Import-Export Clause prohibits not only taxation of foreign imports, but also the taxation of commerce between the states.²¹

Should the Court hear the case, there are at least two important outcomes. First, the Court could decide to uphold the Kentucky Court of Appeals decision and clarify the dormant Commerce Clause in that context. States would have to decide whether to tax all municipal securities or exempt all municipal securities from state taxation. State concern as to how much revenue would be gained or lost from taxation would take center stage. Further, state concern would focus on potentially significant borrowing rate increases, if all state and local government bonds are taxed at the state level. With affirmation by the Court, there may suffer the demise of single-state mutual funds.²² Some estimate that the interest rate on single-state mutual funds may be between 10 to 25 basis points lower than the mutual funds of those states that do not provide the state tax exemption. Those states that do not offer tax exemptions may realize reduced borrowing costs because they would no longer have to offer taxable high-yield bonds to attract investment dollars.²³

What are the implications for states like Louisiana that have seen their credit ratings slide in the wake of natural disasters? A thought worth considering is whether a national or multi-state bond fund would be considered less risky than a

state-specific fund because the investment pool would be more diverse. The fund theoretically would be more sensitive to national economic cycles and less sensitive to geographic economic cycles—and tax-exempt or not at the state level depending on the Court's decision in *Kentucky v. Davis*.

Second, the Court could overturn the court of appeals and adopt an exception to the dormant Commerce Clause doctrine for municipal securities while ignoring Justice Thomas's argument that the Import-Export Clause should apply to domestic commerce. In that case, the ruling of *Kentucky v. Davis* will extend no further than Kentucky, and as to state taxation of municipal securities, it will not be a flat world²⁴ after all.

Certainly, creating a national or multi-state market for municipal bonds would seem to be the direction Congress and the U.S. Securities and Exchange Commission would like the Court to move. Likewise, market makers in municipal securities could greatly expand their product mix and investment offerings in a national market, replete with all the trappings of full disclosure and transparency that accompany flat world thinking. With regulators and the regulated community both cheering on the Court to accept certiorari and affirm, the outcome of this case will not go unnoticed.

Endnotes

1. *Kentucky v. Davis*, No. 2004-CA-001940-MR, 2006 Ky. Ct. App. (6th Cir. Jan. 6, 2006) (to be published).
2. I.R.C. §§ 103(a) *et seq.* & 144 *et seq.* (1986).
3. U.S. CONST., art. I, § 8, cl. 3.
4. *Kentucky v. Davis*, No. 2004-CA-001940-MR, 2006 Ky. Ct. App. (6th Cir. Jan. 6, 2006), *petition for cert. filed* (No. 06-666).
5. *Shaper v. Tracy*, 647 N.E.2d 550 (Ohio Ct. App. 1994).
6. *Kentucky v. Davis*, No. 2004-CA-001940-MR, 2006 Ky. Ct. App. (6th Cir. Jan. 6, 2006), *petition for cert. filed* (No. 06-666).
7. *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).
8. *Camps Newfound/Owatanna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 598 (1997) (quoting *Piker v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).
9. *Shaper*, 647 N.E.2d at 763.
10. *Kentucky v. Davis*, No. 2004-CA-001940-MR, 2006 Ky. Ct. App. (6th Cir. Jan. 6, 2006), *petition for cert. filed* (No. 06-666), at 14.
11. *Id.* at 15.
12. *Id.* at 16 (citing *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 810 (1976)).
13. *Kentucky v. Davis*, No. 2004-CA-001940-MR, 2006 Ky. Ct. App. (6th Cir. Jan. 6, 2006), *petition for cert. filed* (No. 06-666), at 13.
14. Brief for Respondent at 4, *Kentucky v. Davis*, No. 2004-CA-001940-MR, 2006 Ky. Ct. App. (6th Cir. Jan. 6, 2006) (No. 06-666).
15. *Id.* at 7.
16. Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 474 (1989).
17. 512 U.S. 186 (1994).
18. *Camps Newfound/Owatanna, Inc.*, 520 U.S. at 564.
19. No state shall, without the consent of the Congress, lay any imposts or duties on imports produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the Congress.
20. U.S. CONST., art. I, § 10 cl. 2.
21. *Camps Newfound/Owatanna, Inc.*, 520 U.S. at 621.
22. *Id.*
23. At current estimates, there are over 1300 single-state mutual funds.
24. John Birger, *A Bomb in the Muni Market?*, FORTUNE, Feb. 5, 2007, at 112, available at http://money.cnn.com/magazines/fortune/fortune_archive/2007/02/05/8399181/index.htm.
25. THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Farrar, Straus & Giroux 2005).



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Regulating Cemeteries: Understanding and Sensitivity Can Go a Long Way

By Ronald D. Richards, Jr.

From a distance, cemeteries appear as a sanctuary of peace and quiet where one can pay respect to loved ones. In the best of cases, cemeteries are just that for everyone. Yet many municipalities that own and operate a cemetery can face great challenges. For example, they must navigate the several evolving and perhaps lesser known cemetery laws in place and recognize potential premises liability issues.

Equally important, municipalities with local cemetery ordinances face the daunting task of enforcing cemetery regulations without attracting negative publicity that can so easily arise in these contexts. This is no easy task, particularly given the heavy emotions and unique dynamics cemetery issues can invoke. Consider the following hypothetical:

Wanting to pay respects to her deceased husband of 50-plus years, Mrs. Smith places 5 flower pots, 2 family markers, a 4 foot tall cement angel statute, and a cement bench next to her deceased husband's burial plot in a township-owned cemetery. She also has dirt brought in to create a raised landscape bed. The township discovers this, and realizes its cemetery ordinance bars all items except 2 pots and 1 marker. The township wants to enforce its ordinance, but is worried about looking like an 800 pound gorilla being insensitive to an elderly lady's devotion to her husband and attracting negative publicity. What can the Township do?

This article addresses an area that in the best of times goes unnoticed, but which, when issues arise, can present very challenging issues for a municipality. The article first reviews some of the many cemetery laws in place, including one enacted in January 2007, and then summarizes a recent court decision addressing premises liability issues in the municipal-owned cemetery context. The article then notes how municipalities may meet statutory or other legal duties through cemetery ordinances, and concludes with suggestions on addressing cemetery issues in an efficient, cost-effective way while limiting the dreaded public relations headache.

I. Summary of Cemetery Laws

The State of Michigan has a long-adopted policy of promoting the establishment of cemeteries, as well as their preser-



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vation, care, and maintenance.¹ Indeed, the legislature has been enacting laws relating to cemeteries since at least 1855² through the present.³ Cemetery laws cover a wide range of topics: from requiring some operators to register with the state to setting rules regarding caring for, transferring, and vacating cemeteries, and how cemetery care funds may be used. Some laws are very new. Some are quite old. All must be heeded.⁴ Although the limited scope of this article could not summarize all laws, many are highlighted below.

A. 2006 Public Act 627: Free Flag Holders and Flags for Veterans

Act 627, the legislature's most recent cemetery law, changes the rules regarding providing flag holders and U.S. flags for veterans:

- A municipality (except a county) no longer has the choice, upon a proper petition, to buy a flag holder and U.S. flag for a veteran buried in a cemetery in its boundaries, but not owned by it. Now, a municipality (except a county) *must* buy a holder and flag for a veteran buried within a public or private cemetery.
- The petition asking a municipality to buy a holder and flag may now come from either five eligible voters or a recognized veterans' organization.
- A county now has the choice whether to buy at its expense a suitable flag and flag holder for a veteran buried in a public or private cemetery.

B. Cemetery Regulation Act⁵: Registration, Audits, and Ordinances

This Act creates a "cemetery commissioner" as the director of the Department of Labor and Economic Growth or the director's designee and requires those seeking to establish a cemetery to secure a valid permit or registration from the commissioner. It allows audits of cemetery trust funds required under law. It further lets municipalities pass cemetery ordinances and exempts a cemetery owned and operated by a municipality, church, or religious institution from the Act.

C. Cemetery or Burial Grounds Act⁶: Perpetual Care

This Act authorizes a municipality owning or controlling a cemetery to, by ordinance, provide for the perpetual care and maintenance of a cemetery upon payment by the lot owner of an agreed sum. It also allows multiple municipalities to form a nonprofit corporation to acquire, own, operate, maintain, and sell property used for a cemetery or burial ground.

D. Care of Cemeteries Act⁷: Duty to Care for Cemeteries

This Act imposes on townships the duty to ensure all cemeteries in its boundaries are properly taken care of. A person interested in the maintenance of a lot in any cemetery may deposit up to \$500 in trust with the treasurer, with the interest or principal used to maintain the lot as designated in the letter of deposit or by agreement with the township. The township supervisor supervises all expenditures. To help townships meet their required duty to care for cemeteries,

this Act even creates a “Cemetery Day”—the third Wednesday in August of each year—on which township residents may spend time to improve local cemeteries.

E. Trust Fund for Care of Cemeteries Act⁸: Cemetery Care Trust Funds

Townships may hold property granted it in trust to care for lots or a cemetery. Likewise, townships may receive monies for cemetery purposes; these monies are under the township board’s control and unless otherwise expressed by the grantor, must be invested in safe interest bearing securities with the interest used as designated in the trust. The principal or income derived from trust funds may not be transferred to the general cemetery or other fund, used for general cemetery purposes, or diverted contrary to the trust’s provisions. The township clerk is the custodian of these funds.

F. Public Cemeteries Act⁹: Terminating an Owner’s Rights to a Burial Site

This Act creates a process to terminate an owner’s right to a burial site in a public cemetery if the owner fails for seven years to maintain the space in accordance with cemetery care laws and regulations. The process starts with a cemetery board resolution finding the failure and then serving the owner with it. If the owner does not cure the failure within thirty days, the board may petition the circuit court for a termination order.

G. The Transfer of Rights to Municipal Corporations Act¹⁰: Transfer to Municipalities

A cemetery corporation may sell, assign, transfer, or convey to any municipality in which the cemetery is located (or to any municipality within ten miles of the municipality where that cemetery is located) all or part of its assets, rights, and liabilities. The transfer process requires the cemetery corporation to hold a special meeting and adopt an appropriate resolution, among other steps.

H. Vacating Cemetery in Township Act¹¹: Vacating a Cemetery

A township may take actions to vacate a private cemetery within its boundaries. The process starts with a complaint by ten or more residents alleging that the private cemetery has become neglected, abandoned, or a public nuisance, impedes the growth of a city or village in the township, or endangers the health of the people living in the immediate vicinity. Upon receiving the complaint, the township board must start proceedings to vacate the cemetery. If the township board refuses, a township resident may file the petition and proceed with the matter. If the court orders the cemetery vacated, all bodies and remains must be reinterred in a township cemetery or a suitable nearby cemetery.¹²

I. The Enlargement of Township Burial Ground Act¹³: Enlarging Cemeteries

Townships may acquire or buy new burying grounds or enlarge an existing burial ground. If the township and

landowner cannot agree on the amount of compensation, the township may apply to the circuit court to resolve the issue. A jury determines the just compensation to be paid.

II. Caring for Cemeteries and Premises Liability

Regulating cemeteries does not merely entail complying with cemetery statutes. Rather, a municipality that owns and operates a cemetery must also recognize potential premises liability concerns, particularly given the many visitors cemeteries see every day.

Recently, the court of appeals addressed whether a person visiting a municipally owned cemetery is a licensee or invitee for purposes of premises liability duties.¹⁴ In *Hiar v. Strong*, a cemetery visitor fell into a 6-foot deep trench at a cemetery owned by the defendant township. The trench was dug by the cemetery sexton at the township’s direction to move a burial vault from one location to another. The court of appeals held that the visitor was a licensee because her visit had no commercial purpose. The court summarized the duty municipalities owning cemeteries owe licensees visiting cemeteries:

- warn of any hidden dangers known (or having reason to have known) if the licensee does not know or have reason to know the dangers involved,
- no duty to inspect or affirmatively make the premises safe, and
- no duty to safeguard licensees from open and obvious conditions.

Thus, at least when governmental immunity does not shield the municipality from liability, recognizing these premises liabilities is imperative.¹⁵

III. Common Ordinance Terms

Bearing in mind their duty to care for and maintain cemeteries and given their authority to enact cemetery ordinances,¹⁶ many municipalities adopt such ordinances. This is wise as ordinances can be a very effective regulation tool if comprehensive and clear. Although each municipality may have individualized concerns requiring additional terms, the following is a summary of terms that should be addressed in such ordinances:

- *Sale or Transfer of Burial Lots*: Address who a municipality may sell a cemetery lot to and at what price, and whether lots may be transferred and on what terms.
- *Markers, Memorials, and Monuments*: In addition to defining those terms,¹⁷ specify the number of monuments, markers, or memorials allowed per cemetery lot, and the type permitted (e.g., size, composition, footing).
- *Interment Regulations*: Specify those that may be buried in a burial lot (persons, pets), and the number per lot.
- *Ground Maintenance*: Address whether the following are allowed (and if so, the terms): tree planting, items (e.g., emblems, displays, pots, flowers, urns) that may interfere with the use of lawn mowers and lawn maintenance equipment, and dirt fill.
- *Forfeiture of Vacant Cemetery Lots or Burial Spaces*: Iden-

tify when, if at all, a burial lot that is vacant for a period of years may revert to the municipality.

- *Hours of Operation*: Address when the cemetery is open to the general public.

IV. Enforcing Cemetery Regulations Without Negative Publicity

Even with an understanding of cemetery laws and a comprehensive ordinance, a municipality's regulation of cemeteries can still be a challenging endeavor given the unique dynamics at play and their propensity to create potential public relations headaches. For example, returning to the hypothetical at the beginning of this article, the municipality has a policy decision whether to pursue enforcement. If it seeks to do so, the municipality would do well to consider the following in trying to solve the conflict and gain compliance with its ordinance:

- Appreciate the sensitive feelings involved. The alleged offender's actions may be inspired only by a desire to pay tribute to a loved one. Appreciating this "motive" will go a long way toward resolving the matter.
- Consider using a different strategy for cemetery ordinance violations. While a one-time violation notice threatening litigation absent immediate compliance may be effective and appropriate as to other ordinance violations, it is a questionable approach in the cemetery ordinance context given the dynamics. It may also only offend the alleged violator and lead to negative publicity or costly ordinance enforcement litigation.
- Consider scheduling a personal meeting with the alleged offender. This allows the offender to explain his or her actions, and the municipality to explain its goals underlying the ordinance (efficient maintenance, orderly grounds, etc.) and how the offender's actions are inconsistent with those goals. By educating the offender, this approach may very well resolve the situation with limited cost and on amicable terms. Even if it does not and the municipality pursues enforcement in court, at least the municipality will be able to show it attempted to resolve the matter appreciative of the sensitive nature of the situation.
- Consider whether the situation at hand arose due to an

ambiguity in the local ordinance. When that may be the case, consider rewriting ambiguous language to eliminate ambiguity and help avoid similar situations in the future.

Although conflicts in cemeteries are perhaps inevitable, the approach suggested above should help gain compliance outside of court action—i.e., efficiently and cost-effectively—and avoid aggravating a sensitive system to the point of attracting potentially negative newspaper involvement.

V. Conclusion

Cemeteries present unique dynamics that make their regulation challenging. Yet understanding the many cemetery laws on the books, having a clear local cemetery ordinance, and showing sensitivity when conflicts arise, a municipality should be on its way to regulating cemeteries in peace.

Endnotes

1. *Avery v. Forest Lawn Cemetery Co.*, 86 N.W. 538 (Mich. 1901).
2. 1855 Mich. Pub. Acts 87, as amended (now MICH. COMP. LAWS § 456.1 *et seq.*).
3. 2006 Mich. Pub. Acts 627.
4. For example, the attorney general has recently begun cracking down on cemetery trust fund law violators. Derek Wallbank, *State Seizes Cemeteries, Says Funds Mishandled*, LANSING ST. J., Dec. 20, 2006 (on file with author); Midday Update, *State Freezes Attorney's Assets in Cemetery Investigation*, LANSING ST. J., Jan. 26, 2007 (on file with author).
5. MICH. COMP. LAWS § 456.521 *et seq.*
6. MICH. COMP. LAWS § 128.1 *et seq.*
7. MICH. COMP. LAWS 128.61 *et seq.*
8. *See* MICH. COMP. LAWS § 128.71 *et seq.*
9. MICH. COMP. LAWS § 128.11 *et seq.*
10. MICH. COMP. LAWS § 456.181 *et seq.*
11. MICH. COMP. LAWS § 128.31 *et seq.*
12. A separate statute, the Vacating Cemetery in City or Village Act, MICH. COMP. LAWS § 128.51 *et seq.*, addresses cities' vacating cemeteries.
13. MICH. COMP. LAWS § 128.151 *et seq.*
14. *Hiar v. Strong*, No. 257918, 2006 WL 664242 (Mich. Ct. App. Mar. 16, 2006) (per curiam).
15. In *Hiar*, the Court noted that although not addressed below, the township's alternative basis for affirming summary disposition—governmental immunity—supported affirmance. *See id.* at n.2.
16. *Wetherby v. City of Jackson*, 249 N.W. 484 (Mich. 1933); *see also* MICH. COMP. LAWS § 456.530.
17. Ordinances commonly define terms used therein, including these: burial space (a space within a cemetery lot appropriate for burial), cemetery lot (a burial space sufficient to accommodate one burial), marker (a stone or plaque, either flush or above the ground, indicating the given or family name of the deceased), monument (a stone extending above the ground inscribed with the family name only), and memorial (any other structure defined to pay tribute to one buried in a cemetery lot).

Chair's Message

(continued from page 2)

St. Louis and Michael Asimow of the University of California at Los Angeles, a Joint Task Force of the two Sections has worked on enabling legislation regarding procedures, using the Growing Smart™ final report as a template. The Joint Task Force made a presentation to the leadership of both Sections at the ABA Midyear Meeting in February and is accepting comments on the draft until mid-April, when it will be finalized and presented to the Councils of both Sections at

the ABA Annual Meeting in San Francisco in August. If adopted by both Councils, a Model Act will be presented to the ABA House of Delegates for action. You can get a copy by sending me an e-mail at esullivan@gsblaw.com.

The Joint Task Force combines the expertise of both Sections to provide for fair procedures for the enactment and administration of land use regulations. These are excellent examples of our efforts to serve our colleagues and our country.

Government Employees

(continued from page 1)

mance to the current sheriff's political party. *Id.* at 355. Second, the practice of such patronage hindered the "free functioning of the electoral process" by restricting the employees' ability to support opposing candidates. *Id.* at 356. Therefore, the Supreme Court determined that the sheriff of Cook County was liable for civil penalties for violating the employees' First Amendment rights in the absence of a vital governmental interest. *Id.* at 362.

In *O'Hare Truck Service v. City of Northlake*, 518 U.S. 712 (1996), the Supreme Court decided that the anti-patronage protections of *Elrod* applied not just to direct employees of counties and municipalities, but they were equally applicable to a city's independent contractors. In *O'Hare Truck Service*, an independent contractor's contract was terminated and its name removed from an official list of contractors authorized to perform public services because the contractor refused to contribute to the incumbent mayor's campaign, and instead contributed to his opponent. *Id.* at 712. Considering the Court's prior decision in *Elrod*, the *O'Hare Truck Service* Court held that "those who perform the government's work outside the formal employment relationship" have the same First Amendment rights as public employees. *Id.* at 720. The *O'Hare Truck Service* Court maintained that the government can terminate or modify at-will contracts and employment positions without any cause at all, but cannot do so based on conflicting political views. *Id.* at 726. Thus, the City of Northlake was found civilly liable for violating the independent contractor's First Amendment rights. *Id.* at 714.

In 1990, the Supreme Court extended the *Elrod* rule, prohibiting patronage dismissals, to hiring and promotion decisions at the state level. *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990). In *Rutan*, the governor of Illinois implemented a civil service employment system in which every employment decision was subject to the governor's approval, which ensured that hiring and promotional decisions were conditioned upon political support for the governor's interests. *Id.* Public employees passed over in the hiring and promotion process brought an action challenging the governor's use of political considerations. *Id.* Using similar reasoning to *Elrod*, the Court held that conditioning hiring and promotion decisions on political belief and association violates the applicant's First Amendment right, unless there is an essential government interest. *Id.* at 78.

By systematically applying *Elrod*, *O'Hare Truck Services*, and *Rutan* to termination and, subsequently, to promotions and hirings, the judiciary has given adequate warning to Public Employers and their officials that if they employ a politically based patronage system, they may be held accountable for violating employees' and prospective employees' constitutional rights. Now, through *Sorich*, Public Employers and their officials must also fear the threat of criminal prosecutions for what was previously considered only civil violations.

In *Sorich*, the scheme alleged in the indictment included the defendants' directions to other City employees to falsify

or inflate the test scores of certain job applicants so those applicants would be found the most qualified for the positions. The scheme also included the pre-screening of names before job interviews so that the persons conducting the interviews would know which applicants were to receive the highest ratings. The government contended that, through this fraudulent scheme, the defendants and other co-schemers were able to maintain the City's political patronage system, which supplied precinct workers and other campaign support to political candidates favored by the City administration. What was unique about the *Sorich* scheme, as compared to previous hiring fraud prosecutions, was the absence of any overt bribery or kickbacks. Other than their continued City employment, the participants in the scheme received no money or any other thing of value.

In light of *Elrod*, *O'Hare Truck Services*, and *Rutan*, it would appear initially that the defendants should have been subjected to civil penalties, or perhaps criminal contempt citations, for violating the constitutional rights of the applicants who were not hired and the employees who were not promoted. At the time of the scheme in *Sorich*, the City and all of its hiring officials had been subject to the provisions of the *Shakman* Decree, a civil consent decree entered by the U.S. District Court for the Northern District of Illinois, Eastern Division. The decree provided that City employees were permanently enjoined from basing any aspect of City employment, including hiring and promotions, "upon or because of any political reason or factor including, without limitation, any prospective employee's political affiliation, political support or activity, political financial contributions, promises of such political support, activity or financial contributions or such prospective employee's political sponsorship or recommendation." Pursuant to the decree, the City was obligated to take steps to ensure that all non-policy-making positions were filled without any political consideration and to file periodic compliance reports.

Under the decree, City workers have filed claims against the City for alleged violations of the *Shakman* Decree as civil actions for damages and, in some instances, injunctive relief. Until *Sorich*, no violations of the *Shakman* Decree had been prosecuted criminally. The *Sorich* indictment alleged that through their scheme, Defendants Sorich and McCarthy arranged for the promotion of a current City employee who had volunteered on a political campaign. Federal mail fraud jurisdiction was based on the fact that job candidates were, in some instances, notified of the hiring decisions through the U.S. mail.

The government alleged that the defendants had used the U.S. mail in violation of 18 U.S.C. §§ 1341 and 1346 and, through these false statements, deprived the City and the people of the City of Chicago of money and property and the defendants' "honest services" as City employees. Whether such a scheme, absent some personal gain to the defendants or the loss of some identifiable money or property, amounts to mail fraud, is now before the U.S. Court of Appeals for the Seventh Circuit.

The Seventh Circuit first articulated the "personal gain" re-

quirement of honest services fraud under the mail fraud statute in *United States v. Bloom*, 149 F.3d 649, 650 (7th Cir. 1998). In *Bloom*, a Chicago lawyer, who was also an alderman, was charged with violation of the mail fraud honest services provisions of 18 U.S.C. § 1346. The indictment alleged that Bloom had provided legal advice to one of his clients that deprived the City of Chicago of tax revenues the City would otherwise have obtained absent Bloom's advice. Bloom's advice would allow his client to circumvent certain state statutes and allow the client to avoid paying the full value of delinquent property taxes. The prosecution claimed that this arrangement conflicted with Bloom's fiduciary duties to the City as alderman. The Seventh Circuit upheld the district court's dismissal and recognized the principle that "[n]ot every breach of every fiduciary duty works a criminal fraud." *Id.* Moreover, "[i]n almost all of the intangible rights cases [the Seventh] [C]ircuit has decided (before *McNally* or since § 1346), the defendant used his office for private gain, as by accepting a bribe in exchange for official action." *Id.* at 655. The *Bloom* court relied heavily on its analysis of other cases in which the indictments charged that the "defendants converted to private use information that they possessed by virtue of their public positions." *Id.* Having found that Bloom's conduct in advising his client resulted in no personal gain to Bloom, the Seventh Circuit affirmed the district court's dismissal of the mail fraud and honest services count. *Id.* at 656–57.

The holding in *Bloom* is consistent with the Seventh Circuit's holding in *United States v. Hausman*, 345 F.3d 952 (7th Cir. 2003), in which the appellate court affirmed the denial of a defendant attorney's motion to dismiss mail and wire fraud charges under 18 U.S.C. §§ 1341, 1343, and 1346. Hausman was a Wisconsin personal injury attorney who referred clients

to a co-defendant chiropractor, Rise, for services paid from insurance settlement proceeds. In exchange for the referral of business from Hausman, the chiropractor would pay 20 percent of the fees collected from the insurance companies to third parties who had provided various personal and business services to either Hausman or Rise. Considering the court's prior holding in *Bloom* that criminal liability for breach of fiduciary duty under the § 1346 "intangible rights of honest services" stems from some personal gain on the defendant's part, the *Hausman* court found that the indictment did sufficiently allege that the attorney breached his fiduciary duty to his clients (i.e., his employer) by failing to disclose the benefit he was receiving from the kickback scheme with the chiropractor. *Hausman*, 345 F.3d at 956–57.

In *Sorich*, the district court relied on certain dicta in *United States v. Spano*, 421 F.3d 599 (7th Cir. 2005), *cert. denied*, 126 S. Ct. 1084 (2006), in which the court observed that a participant in a scheme to defraud is guilty even if all the benefits of the fraud accrued to other participants. The *Sorich* court read that language to extend to the ultimate job recipients who, based on the trial evidence, were not knowing participants in the criminal scheme.

Despite the lack of personal gain by any of these defendants, each was still convicted under the mail fraud statute. What was once considered only a possibility for civil violations has now morphed into an entirely different type of exposure. Moreover, since *Sorich* seems to have equated the dispensing of jobs to supporters of certain political candidates to the necessary "personal gain" to find criminal liability, patronage decisions to hire, fire, or promote may become a stronger focus of federal corruption investigations and prosecutions.

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