

Local Government Law News

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E-MAIL AS A PUBLIC RECORD

In an Open Records Act appeal earlier this year, the Attorney General addressed the right of access to e-mail under the act.¹ A city resident had requested certain e-mail messages currently housed on the computer of a city commissioner covering a period of twelve months. Within three days of receiving the request, the city informed the citizen that the materials would be available in about a week's time. The city's letter provided no detailed explanation for the delay, an oversight for which the Attorney General would criticize the city in the open records decision. Objecting to the delay, the citizen initiated an open records appeal.

On appeal, the city explained that the delay resulted from the city commissioner's inability to retrieve the information requested owing to the demands of his private employment and his campaign for re-election. This did not satisfy the Attorney General who said, "...the duty to provide timely access to nonexempt public records has been deemed to be 'as much a legal obligation of a public agency as the provision of services to the public,' which should not yield to the press of other agency business.... It is the opinion of this office that campaigning for reelection, or discharging duties associated with private employment, do not provide a sufficient legal basis for temporarily suspending the legal obligations imposed on a public agency.... In our view, it is for the records custodian, and not the e-mail account holder, to locate and retrieve these records and to make the determination as to which are exempt and which must be disclosed."²

In reaching that position, the Attorney General wrote, "It is well-recognized, and apparently undisputed, that electronic mail generated by public agency officials or employees is a public record as defined in KRS 61.870(2), and is therefore subject to the Open Records Act."³ As further support for this assertion, the Attorney General cited a policy of the Governor's Office for Technology, *The Status of Electronic Mail as a Public Record*:

The purpose of this document is to underscore the fact that electronic mail, created or maintained by public agencies, meets the statutory definition of a public record in Kentucky. As such, it is subject to management requirements which may be beyond those contemplated by regular mail users: electronic mail may be subject to open records requests; its users may have inappropriate expectations of privacy and informality; mail may be being destroyed inappropriately; or it may be accumulating in systems when it should more properly be destroyed as soon as it no longer has value to the agency. Case law shows that electronic mail certainly is discoverable under actions brought against the government, and its inappropriate retention therefore brings risk.⁴

For these reasons, the Kentucky Information Resources Management Commission (KIRM) advises that public agencies develop policies for managing electronic mail.

More recently, the Kentucky Department of Libraries and Archives published its *Guidelines for Managing E-Mail in Kentucky Government* ("Guidelines").⁵ The *Guidelines* "represent best practices that are designed to assist agencies in effectively and efficiently managing the e-mail records."⁶ Echoing the KIRM policy, it states, "Since e-mail meets the statutory definition of a public record in Kentucky, it is subject to management requirements which may not be obvious."⁷ As a government record, an e-mail message must be retained and managed for as long as it is needed for administrative, fiscal, legal, or historical requirements.

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DIRECTOR'S DESK

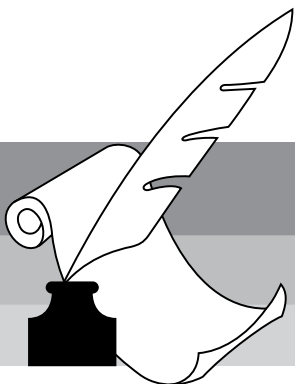
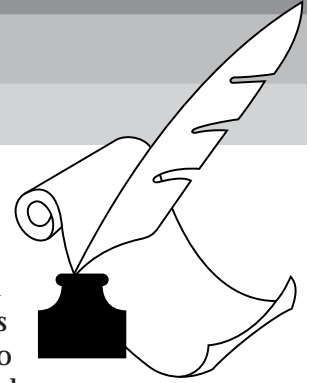
The clinical legal education program at Salmon P. Chase College of Law affords Chase students the chance to engage with the community in the course of their law school education. That is true not just of the community in which the law school is located, but of the community from which a student comes and in which he or she will practice.

The external clinical placement program at Chase, based in the Local Government Law Center and directed by Professor Kathleen Hughes, allows a student to earn academic credit by working under the supervision of a lawyer in a government office or nonprofit organization. The program also allows other students to have an opportunity to work with a member of the judiciary. Complementing the range of courses in the Chase curriculum, the program matches students to a placement that will most closely meet their situations and objectives.

Those students placed in government offices can gain experience in a particular field such as taxation or labor law or in particular processes such as legislation, administrative procedure, or criminal prosecution. Students seeking a broad range of experience typically can find it in a city or county attorney's office. Similarly, those students placed in a nonprofit organization can gain experience in the representation of clients in a specific area of the law such as children's law, disability law, or criminal defense. Students seeking a more global perspective can work with nonprofit organizations focused on researching and formulating public policy.

Over the course of a semester, the program seeks to give students the opportunity to engage in challenging legal work, to learn by doing. It is, as one student put it, a chance to "close the gap between legal studies and the real world." Students perform legal research, learn about issues of professional ethics, write legal memoranda or briefs, draft legal documents, engage in case investigation, meet with clients, and observe and sometimes participate in trials and hearings. They also develop new understandings about the legal system and the different roles played by lawyers within that system. Concurrent with the external placement, students enrolled in the clinical program participate in a classroom component focused on related issues.

The benefits, of course, do not apply exclusively to the student. The experience of a challenging clinical placement can be an effective way to attract talented young lawyers and future leaders to the community. Now that we are in what the former chair of the National Governor's Association called "the worst state fiscal crisis since World War II," a crisis that threatens local governments and nonprofit organizations alike, participation in the externship program offers a chance to augment staff with talented, motivated law students. To learn more about the Chase clinical programs, contact the Local Government Law Center.



According to the *Guidelines*, the first steps after receiving an e-mail message are to determine whether it is an agency record and to determine the kind of record it is. The recipient is usually the person who will make the initial decision based on the scope of that person's responsibility within the agency. However, both senders and receivers of e-mail messages may have a responsibility for retaining them.

If the message has nothing to do with agency business—personal messages and “spam” are examples—it is non-record material. *State ex rel. Wilson-Simmons v. Lake County Sheriff's Department*, 693 N.E.2d 789 (Ohio 1998), demonstrates this concept of non-record material.⁸ Trudy Wilson-Simmons was a corrections officer in the sheriff's department. After a co-worker alerted her, she complained to the administrator of the detention center at which she worked that other, unnamed corrections officers were using the jail's e-mail system to make racial slurs against her. She asked to view the e-mail of every officer at the facility. Later, at the administrator's request, she made a more specific request to view the e-mail of five officers covering the period of a month. In response, the chief deputy advised her that she would have to pay \$2,532.40 plus copying costs to see it because it would take the department's computer specialist 140 hours to reconstruct the e-mail in question. It was on a backup system that was not readily accessible, and the current e-mail system could not read the old data created by a different e-mail system.

Eventually, Wilson-Simmons filed suit under Ohio's Public Records Act to compel the sheriff's department to provide access to the requested e-mail. The sheriff's response was that the e-mail did not constitute a record under the act. The Ohio Supreme Court agreed. Quoting a 1993 decision, it said, “to the extent that any item ... is not a ‘record,’ *i.e.*, does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed.” There was no allegation that the racist e-mail documented sheriff's department policy or procedure.

Times Publishing Company v. City of Clearwater, 830 So. 2d 844 (Fla. App. 2002), reached a similar result under the Florida Public Records Act. A newspaper, looking for evidence that two city employees were running an outside business from work, asked for all the e-mail sent from or received by their government-owned computers. The city permitted the employees to sort the e-mail into personal and public categories and provided only the e-mail identified as public to the paper. The paper asserted a right to all e-mail, in-

cluding that identified as private. The court rejected that position, concluding that e-mail stored in government computers does not automatically become a public record by virtue of that storage. In the court's view there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk. Private or personal e-mail was outside the definition of a public record. On appeal, the Florida Supreme Court agreed, citing its own rule about access to judicial e-mails. *State of Florida v. City of Clearwater*, ___ So.2d ___ (2003). “[P]rivate documents cannot be deemed public records solely by virtue of their placement on an agency-owned computer. The determining factor is the nature of the record, not its physical location.”⁹

Although the e-mails in *Wilson-Simmons* and *Clearwater* did not constitute public records, there was no dispute that they were created by public employees on a public office's e-mail system. Such situations are why the *Guidelines* advise agencies to have in place an appropriate use policy that governs the amount of non-work related e-mail on the system.¹⁰ The city of Clearwater had such a policy in place. The policy, “which states that the City's computer resources are the property of the City and that users have no expectation of privacy, cannot be construed as expanding the constitutional or statutory definition of public records to include ‘personal’ documents.”¹¹

For messages that are business related and meet the definition of public record, the recipient must identify the type of record it is and the appropriate retention period that applies.¹² As public records, e-mail messages are subject to the same retention requirements as records of the same type in another format or medium. In general, relevant messages will fall into one of three broad categories, discussed below. The *Guidelines* point out that all agency employees who use e-mail must be trained to identify the kinds of records they create and receive and must be trained to use the records retention schedules.

The first general category into which e-mail messages may fall is informational and reference material. These are records of transitory value, not meaningful in documenting agency business. E-mail messages in this category can be destroyed as soon as they are no longer needed.¹³ The *Guidelines* recommend removal of non-business-related and transitory e-mail messages as soon as possible. The second category into which e-mail messages may fall is temporary records. These are records with some documentary value to

the agency but that do not need to be retained permanently. Agencies may need to keep e-mail messages in this category for periods of a few months to several years. The third category is permanent records. These are records of the agency that have lasting value because they document the functions and duties of the agency over time. The *Guidelines* recommend training employees in the use of the agency's e-mail application to create folders for organizing their e-mail messages into a structure that mirrors the agency's record-keeping system.

As the Attorney General noted in 03-ORD-005, it is for the records custodian, and not the e-mail account holder, to locate and retrieve e-mail messages and to make the determination whether they are subject to disclosure. It follows that the folders into which senders and receivers place messages ought not to be on individual computer hard drives but instead should be on an agency network drive or in an electronic record-keeping system. This allows agencies promptly to respond to open records requests. It also allows the custodian of the record to segregate, manage, and secure messages that are the subject of open records requests or discovery demands. Consult the *Guidelines* for advice about the preservation of e-mail records.

Endnotes

1. Op. Att'y Gen. 03-ORD-005 (January 8, 2003).
2. *Id.* at 4-5.
3. *Id.* at 4.
4. Governor's Office for Technology, Office of Policy and Customer Relations, *The Status of Electronic Mail as a Public*

- Record, adopted March 4, 1996, available at <http://www.state.ky.us/kirm/emailpol.htm>.
5. Kentucky Department for Libraries and Archives, *Guidelines for Managing E-Mail in Kentucky*, ("Guidelines"), available at <http://www.kdla.ky.gov/recmanagement/EmailGuidelines.pdf>. See also *Understanding Records Management: E-Mail Records*, <http://www.kdla.ky.gov/recmanagement/tutorial/email.htm>. Examples of guidelines from other states include North Carolina Department of Cultural Resources, *E-Mail as a Public Record in North Carolina* (2002), available at http://www.ah.dcr.state.nc.us/sections/archives/rec/Email_8_02.pdf; Montana State Records Committee, *E-mail Guidelines* (1998), available at http://www.sos.state.mt.us/Assets/email_98.pdf; The Library of Virginia, *Electronic Mail (E-Mail) Retention Guidelines and Requirements* (1997), available at <http://www.lva.lib.va.us/whatwedo/records/electron/em-pol.htm>; Connecticut State Library, *Electronic and Voice Mail: A Management and Retention Guide for State and Municipal Government Agencies*, available at <http://www.cslib.org/email.htm>; and Massachusetts Archives SPR Bulletin No. 1-99, available at <http://www.state.ma.us/sec/arc/arcrmu/rmubul/bul199.htm>.
6. *Guidelines*.
7. *Id.*
8. Kentucky courts do not always distinguish between a personal document that is not a public record under KRS 61.870(2) and a personal document that is a public record but is exempt from disclosure under KRS 61.878. *Hardin County v. Valentine*, 894 S.W.3d 151 (Ky. Ct. App. 1995) is a case that turns on the distinction.
9. Slip opinion at 5.
10. See Stuart J. Kaplan, *E-Mail Policies in the Public Sector Workplace: Balancing Management Responsibilities With Employee Privacy Interests*, LERC Monograph Series 1998.
11. Slip opinion at 5.
12. See the various local records schedules available at <http://www.kdla.ky.gov/recmanagement/localschedule.htm>.
13. See, e.g., General Schedule for Local Agencies: Common Records, Administrative: Series L4956 Informational and Reference Material (Disposition: Destroy when no longer useful).



DECISIONS OF NOTE



UNITED STATE SUPREME COURT, 2002-2003 TERM

Coal Act – Orphan Retirees

An important object of the Coal Industry Retiree Health Benefit Act of 1992 was providing stable funding for the health benefits of so-called orphan retirees. The act requires the Commissioner of Social Security to assign eligible retirees to an extant operating company. This binds the company to pay premiums to the UMW Combined Benefit Fund, which administers the benefits. The companies challenged the assignments as not timely made. The court held the assignments are valid. The Coal Act meant to allocate the greatest number of beneficiaries to a prior responsible operator. Therefore, the statutory date is not a bar to tardy completion of the business of ensuring the funding of benefits by those principally responsible. *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 123 S.Ct. 743, 154 L.Ed.2d 653 (2003).

Fair Housing Act – Vicarious Liability

An interracial couple tried to buy a house listed for sale by a real estate corporation. A salesperson for the corporation allegedly prevented them from buying the house for racially discriminatory reasons, contrary to the Fair Housing Act. The couple filed suit in federal court against the salesperson and the corporation and filed a separate suit against the corporation's president, sole shareholder, and licensed broker claiming he was vicariously liable for the salesperson's unlawful conduct. The court assumed that when Congress creates a tort action it intends to incorporate ordinary tort-related vicarious liability rules. Absent special circumstances, it is the corporation, not the owners or officers, who are vicariously liable. The Fair Housing Act imposes liability without fault on the employer in accordance with traditional agency law principles. *Meyer v. Holley*, 537 U.S. 280, 123 S.Ct. 824, 154 L.Ed.2d 753 (2003).

Sex Offender Registration – Procedural Due Process

Connecticut's version of Megan's Law did not provide offenders with a hearing to prove that they were no longer dangerous. Registrants challenged the absence of a hearing requirement under the Due Process Clause as depriving them of a "liberty interest." The court held that mere injury to reputation, even if defamatory, did not constitute the deprivation of a lib-

erty interest. Even assuming a deprivation of a liberty interest, due process did not entitle a registrant to a hearing in order to establish a fact that was not material under the statute. The requirement turned on conviction alone, not on dangerousness. *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003).

Three Strikes Law – Cruel and Unusual Punishment

Under California's three strikes law, a thief was sentenced to 25 years to life in prison. The last conviction was for stealing golf clubs worth about \$1,200. The defendant challenged the sentence as grossly disproportionate under the Eighth Amendment. In the court's judgment, the sentence did not violate the amendment. Three justices concluded that the amendment has a narrow proportionality principle that applies to noncapital sentences, but the amendment does not require strict proportionality between crime and sentences. In this case the sentence was justified by the state's interest in deterring recidivist felons and by the defendant's long criminal record. *Ewing v. California*, 538 U.S. 11, 123 S.Ct. 1179, 155 L.Ed.2d 108 (2003).

Three Strikes Law – Federal Habeas Corpus

A person convicted of the theft of \$153 worth of video tapes was sentenced to consecutive 25-years-to-life terms under California's three strikes law. The defendant sought a writ of habeas corpus in federal court contending that the sentence was "contrary to, or involved an unreasonable application of, clearly established Federal law" under the Antiterrorism and Effective Death Penalty Act of 1996. Finding that the federal law on disproportionality was not clearly established at the time of sentencing, the court held that it was not unreasonable for the California courts to conclude that the sentence complied with prevailing standards even though it was harsher than any other state or the Federal government would have imposed. *Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 155 L.Ed.2d 144 (2003).

Sex Offender Registration – Ex Post Facto Clause

"Megan's Laws" required convicted sex offenders to register with designated governmental agencies. The provisions of Alaska's law were retroactive. Persons subject to the registration requirement challenged it as a violation of the Ex Post Facto Clause, claiming that its effects were punitive. After examining the statute's text and structure, the court concluded that the intent was to create a civil, non-punitive regime to

protect the public from persons with a high risk of recidivism. The court then had to determine whether the statutory scheme was so punitive in effect as to outweigh its intended purpose. Using *Kennedy v. Mendoza-Martinez* as its framework, the court found that the regulatory scheme had not been regarded as punitive; it did not subject registrants to an affirmative disability or restraint; it did not promote the traditional aims of punishment; it had a rational connection to a legitimated non-punitive purpose; and the regulatory scheme is not excessive with respect to the act's purpose. *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003).

False Claims Act – Qui Tam Actions

The False Claims Act provides that “any person” who makes a false or fraudulent claim for payment or approval to an officer or employee of the United States is liable to the government for a civil penalty, treble damages, and costs. The act is enforceable by the Attorney General and by private persons, called relators, through qui tam actions in the name of the government. Successful relators can share up to 30% of the proceeds of the action. In an earlier case, *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, the Supreme Court held that states are not persons subject to qui tam actions. In this case the court held that local governments are persons amenable to qui tam actions. *Cook County v. United States*, 538 U.S. 119, 123 S.Ct. 1239, 155 L.Ed.2d 247 (2003).

Low-income Development – Referendum

After a city passed an ordinance authorizing construction of low-income housing, a group of citizens petitioned the city for a referendum on the ordinance as provided in the city charter. The referendum passed, repealing the ordinance. The developer then sued alleging violations of equal protection and substantive due process rights. A unanimous court held that the developer failed to make out either claim. Proof of racially discriminatory intent is necessary to show an equal protection violation. However, the charter provision authorizing the referendum was generally applicable, and any discriminatory motives on the part of the voters could not be ascribed to the city for following the charter. Adhering to the charter advanced significant First Amendment interests. The due process claims failed because the referendum process did not constitute arbitrary government action. The developer did not challenge the results, only the process. Retaining the power to govern land use decisions through referendum is not per se arbitrary conduct. *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188, 123 S.Ct. 1389, 155 L.Ed.2d 349 (2003).

IOLTA – “Just Compensation”

Every state uses interest on lawyers' trust accounts (IOLTA) to fund legal services for the poor. Under these programs, money belonging to clients is deposited in a pooled interest-bearing account when the money would not generate a positive return for the client if deposited in an account of its own. In a 1998 case the Supreme Court held that interest on client funds deposited by lawyers remains the property of the client. The question here was whether the use of interest on client funds that would not otherwise generate interest was an unconstitutional taking. The court recognized that the application of the interest to support legal services for the needy was a legitimate public use even where, as in this case, the monies were paid over to a foundation. Assuming then that just compensation had to be paid, the court said that the measure of just compensation is the owner's pecuniary loss. Here that loss was zero, and so the compensation due is also zero. *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 123 S.Ct. 1406, 155 L.Ed.2d 376 (2003).

Cross Burnings – Freedom of Speech

A Virginia statute made it a crime to burn a cross with intent to intimidate and provided that the burning of a cross was *prima facie* evidence of intent to intimidate. In complicated series of opinions, six members of the court held that a state could criminalize cross burning with intent to intimidate. Four justices held that the presumption of intimidation was unconstitutional while three other justices did not reach the question. *Virginia v. Black*, ___ U.S. ___, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

Statutes of Limitations – Federal Tolling

If a federal court declines to exercise supplemental jurisdiction over state-law-based claims related to the action in the federal court, federal law (28 U.S.C. 1367) affords a tolling period to permit the claims to be refiled in state court. A county challenged the law as being in excess of Congressional power and a violation of principles of state sovereignty. The court found congressional authority in the Necessary and Proper Clause as related to the power of Congress to establish the lower federal courts. The law is conducive to the administration of justice because it eliminates otherwise serious impediments to access to federal courts. Unlike states, political subdivisions do not enjoy a constitutionally protected immunity from suit. Therefore, Congress has the ability to affect the state's ability to shape state sovereign immunity. *Jinks v. Richland County*, ___ U.S. ___, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003).

Governmental Immunity – Full Faith and Credit

A former Californian now resident in Nevada sued the California Franchise Tax Board in Nevada state court, alleging that the board had committed negligence and intentional torts in the course of an audit. California law grants the board complete immunity, and California argued that Nevada courts must give full faith and credit to the California statutes granting immunity. Nevada refused on the ground that it was inconsistent with Nevada law on governmental immunity. The Supreme Court held that the Full Faith and Credit Clause did not compel the forum state (Nevada) to substitute the statutes of another state for its own statutes dealing with a subject matter concerning which it is competent to legislate. Where, as here, the forum has significant contact, it may choose to apply its own law provided the choice of law is neither arbitrary nor fundamentally unfair. *Franchise Tax Board v. Hyatt*, ___ U.S. ___, 123 S.Ct. 1683, 155 L.Ed.2d 702 (2003).

Erroneous Deprivation – Prompt Hearing

The owner of a car paid \$134.50 to recover his car towed from a no-parking zone, wrongly in the owner's opinion. He requested a hearing to recover the money. Twenty-seven days after the tow, the city held a hearing and denied the claim. The owner then sued in federal court, claiming that the city failed to provide a sufficiently prompt hearing in violation of the owner's right to procedural due process. Applying the balancing test of *Matthews v. Eldridge*, the court concluded that the hearing was sufficiently prompt. The nature of the delay was one of administrative necessity given the need to arrange for courtrooms, presiding officials, and appearances of police officers. *City of Los Angeles v. David*, ___ U.S. ___, 123 S.Ct. 1895, 155 L.Ed.2d 946 (2003).

Family and Medical Leave Act – State Immunity

A state employee sued under a provision of the Family and Medical Leave Act that creates a private right of action, and the state raised the defense of immunity under the Eleventh Amendment. The court ruled that the Eleventh Amendment is not a barrier to private suits by state employees denied their right to 12 weeks of unpaid leave to care for a family member. Congress can abrogate Eleventh Amendment immunity if it does so pursuant to a valid exercise of power under §5 of the Fourteenth Amendment. The court held that section 5 authorizes Congress to remedy and to deter violations of rights guaranteed by that amendment. Legislation meant to deter unconstitutional conduct must show "congruence and proportionality between the injury to be prevented or remedied and the means adopted to the end." Noting that leave pro-

grams reflected an outmoded stereotype that women are more responsible than are men for family care, the court found the act to be a justified response to sex discrimination with respect to leave benefits by the states. *Nevada Department of Human Resources v. Hibbs*, ___ U.S. ___, 123 S.Ct. 1972, 155 L.Ed.2d 953 (2003).

Police Interrogation – Self-incrimination and Due Process

A patrol supervisor interrogated an individual being treated for wounds received in a scuffle with the police. Without being given Miranda warnings, the suspect admitted to heroin use and to taking an officer's gun during the incident. Although he was never charged with a crime and his answers were never used against him, he sued claiming a violation of his Fifth Amendment right against self-incrimination and his Fourteenth Amendment right to substantive due process. A fractured court concluded that there was no violation of the right against self-incrimination because the individual was never prosecuted. A separate majority ordered a remand on the substantive due process claim to allow the plaintiff the opportunity to show whether the interrogation was "the functional equivalent of an attempt to obtain an involuntary confession from a prisoner by torturous methods." *Chavez v. Martinez*, ___ U.S. ___, 123 S.Ct. 1994, 155 L.Ed.2d 984 (2003).

Employment Discrimination – Evidence of Discrimination

It is an unlawful employment practice to discriminate against an individual based on sex. Interpreting the 1991 amendments to Title VII of the Civil Rights Act, the court concluded that direct evidence of discrimination is not required for a plaintiff to obtain a mixed-motive jury instruction under that law. The employee need show only that an employer used a forbidden consideration with respect to any employment practice and can do so using circumstantial evidence. *Desert Palace, Inc. v. Costa*, ___ U.S. ___, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003).

Public Housing – Trespass Policy

In an effort to combat crime and drug dealing by nonresidents, a public housing authority adopted a policy barring persons who did not have "a legitimate business or social purpose." Such persons were liable to arrest and prosecution for trespass. A person convicted for trespass claimed at trial that the policy was unconstitutionally overbroad in violation of the First Amendment. Under the overbreadth doctrine, a showing that a law punishes a substantial amount of protected free speech in relation to the statute's plainly legitimate sweep suffices to invalidate all enforcement

of that law absent a limiting construction or partial invalidation. The defendant could not make that showing since the trespass policy was not aimed at speech and the defendant was not engaging in speech when arrested. The court noted that an overbreadth challenge rarely succeeds against a law or regulation that is not specifically addressed to speech or conduct necessarily associated with speech. *Virginia v. Hicks*, ___ U.S. ___, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003).

Taxation – Equal Protection

An Iowa law allowed certain racetracks to operate slot machines and imposed a graduated tax on adjusted revenues that started at 20 percent and rose over time to 36 percent, leaving in place a 20 percent tax on riverboat slot machine adjusted revenues. Race-track owners and others challenged the 20%/36% difference as a violation of equal protection. Viewing the law as a whole, the court found that it did what it set out to do – advance the racetracks’ economic interests. That subsidiary provisions might achieve other desirable, or even contrary, ends does not deprive the law of the necessary rational support for the difference in the tax rates. Not every provision in a single law must share a single objective. The Constitution grants legislators, not courts, broad authority to decide whom to help with their tax laws and how much help to provide. *Fitzgerald v. Racing Association of Central Iowa*, ___ U.S. ___, 123 S.Ct. 2156, 156 L.Ed.2d 97 (2003).

Prisoners’ Rights – Visitation Restrictions

Concerned about prison security problems caused by an increasing number of visitors and about substance abuse among inmates, the Michigan Department of Corrections promulgated new regulations limiting prison visitation. Prisoners, their friends, and their family members alleged that the regulations violated the First, Eighth, and Fourteenth Amendments. The Supreme Court held that the prison regulations limiting prison visitation bore a rational relation to legitimate penological interests and were valid regardless of whether a constitutional right of association survived incarceration. The court found that the regulations satisfied each of four factors used to decide whether a prison regulation affecting a constitutional right that survives incarceration withstands constitutional challenge. In addition, the visitation restriction for inmates with two substance-abuse violations was not a cruel and unusual confinement condition violating the Eighth Amendment. Withdrawing visitation privileges for a limited period in order to effect prison discipline is not a dramatic departure from accepted standards for confinement conditions and does not create inhumane prison conditions, deprive inmates

of basic necessities or fail to protect their health or safety, or involve the infliction of pain or injury or deliberate indifference to their risk. *Overton v. Barzetta*, ___ U.S. ___, 123 S.Ct. 2162, 156 L.Ed.2d 162 (2003).

Public Libraries – Internet Filtering

The Children’s Internet Protection Act forbids public libraries to receive federal assistance for Internet access unless they install software to block obscene or pornographic images and to prevent minors from accessing material harmful to them. Patrons challenged the law as a violation of their First Amendment rights, but the Supreme Court held that the act was a valid exercise of Congress’s spending power. Congress has wide latitude to attach conditions to the receipt of federal assistance, although the conditions may not induce the recipient to engage in activities that would themselves be unconstitutional. In the view of a plurality of the court, filtering is simply another means by which a library can determine the scope of its collection. Because the filters are not themselves unconstitutional, it is not a constitutional problem to require their use as a condition of funding. *United States v. American Library Association*, ___ U.S. ___, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003).

Law School Admissions – Equal Protection

The University of Michigan Law School followed an official admissions policy that sought to achieve student body diversity. The policy required admissions officials to evaluate each applicant based on all information available in the file, including a personal statement, letters of recommendation, an essay describing how the applicant would contribute to law school life, and the applicant’s undergraduate grade point average and LSAT score. In addition, in seeking to enroll a “critical mass” of underrepresented minority students, the policy required officials to look at so-called “soft variables.” Upholding the principle of affirmative action in higher education, a 5-4 majority of the court found student body diversity to be a compelling state interest that can justify the use of race in admissions decisions. Upholding the specific admissions program at Michigan, the court found that the use of race was narrowly tailored to serve that interest because it was only one among several factors that the university considered in building a diverse class. *Grutter v. Bollinger*, ___ U.S. ___, 123 S.Ct. 2325, 156 L.Ed.2d 304 (2003).

Sex-related Child Abuse – Statute of Limitations

In 1993 California enacted a new criminal statute of limitations allowing, in certain instances, prosecution for sex-related child abuse where the prior limi-

tations period expired. A five-member majority struck down the statute as a violation of the ex post facto clause. For three reasons, the court said, the law produces the kind of retroactivity that the Constitution forbids. First, the law threatens the kinds of harm that the clause seeks to avoid; the clause protects liberty by preventing governments from enacting statutes with “manifestly unjust and oppressive” retroactive effects. Second, the law falls literally within the categorical descriptions of *ex post facto* laws, which include a new law that inflicts punishments where the party was not liable to any punishment. Third, numerous legislators, courts, and commentators have long believed it well settled that the clause forbids resurrection of a time-barred prosecution. *Stogner v. California*, ___ U.S. ___, 123 S.Ct. 2446, 156 L.Ed.2d 544 (2003).

Right to Privacy – Sodomy

Texas had a law making it a crime for two persons of the same sex to engage in certain intimate sexual conduct. An earlier case, *Bowers v. Hardwick*, upheld a similar Georgia statute. By a vote of 6-3, the court overruled *Bowers* and held that the Texas statute violated the Due Process Clause. The court phrased the question not as whether homosexuals had a right to engage in sodomy, but as whether the liberty protected by the Constitution allows homosexuals the right to choose to enter upon relationships in the confines of their homes and their private lives and still retain their dignity as free persons. For the majority of the court, the nation’s laws and traditions in the past half century showed an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex. *Lawrence v. Texas*, ___ U.S. ___, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

Voting Rights Act – Redistricting Plans

After the 2000 census, the Georgia General Assembly began to redistrict the state senate. Part of the redistricting strategy was not only to maintain the number of majority-minority districts, but also to include the number of so-called “influence” districts. These are districts where black voters would be able to exert a significant, if not decisive, force in the election process. To accomplish this, the redistricting plan “unpacked” the most heavily concentrated majority-minority districts and created a number of new influence districts. The federal district court rejected the plan under the Voting Rights Act, concluding that it resulted in a diminution of black voters’ effective exercise of the electoral franchise. The Supreme Court, however, viewed diminution as a violation of the Voting Rights Act only if the state cannot show that the gains in the plan as a whole offset the loss in a particu-

lar district. A state can risk having fewer minority representatives in order to achieve greater overall representation of a minority group by increasing the number of representatives sympathetic to the interests of minority voters. The court returned the case to the district court to consider whether the plan as a whole results in a retrogression in the position of racial minorities with respect to the electoral franchise. *Georgia v. Ashcroft*, ___ U.S. ___, 123 S.Ct. 2498, 156 L.Ed.2d 428, (2003).



KENTUCKY SUPREME COURT

Water Company – Agency Status

The City of Louisville owns all of the stock of Louisville Water Company and holds title to the physical property of the corporation, although the city Board of Waterworks controls the management and properties and the company itself remains a distinct corporate entity. Earlier cases regarded the company as an agency of the city. Reviewing the history, the Supreme Court concluded that the legislature did not intend to change the status of the corporation to that of an agency of the city. The city lacks the right of control, “the most critical element in determining whether an agency relationship exists.” Therefore, the company does not fall within the definition of local government in KRS 65.200(3), and an award of punitive damages against the company stands. *Phelps v. Louisville Water Company*, 103 S.W.3d 46 (Ky. 2003).

Primary Slate – Vacancy

After a candidate for lieutenant governor was disqualified for failure to meet the residency requirement of the state constitution, a voter sued to prevent his running mate from naming a substitute and to remove his running mate from the primary ballot. The Supreme Court, construing KRS 118.125, finds that the slate acquired a legal existence upon certification by the Secretary of State. Thus the gubernatorial candidate was entitled under KRS 121A.080(11) to fill the vacancy when his running mate was disqualified. The court concluded that when statutory construction is uncertain, doubt should be resolved in favor of allowing the candidacy to continue so as not to restrict the right of citizens to vote. *Heleringer v. Brown*, 104 S.W.3d 397 (Ky. 2003).

Annexation – Maintenance of Roads

A city annexed territory that included several county roads. After annexation the county continued to maintain the roads as part of the county system until 1998. The county then advised the city that it was without authority to maintain the roads in the absence of an

interlocal agreement and would cease to service the roads. The city took the position that maintenance was the responsibility of the county. Eventually the dispute reached the courts, which found in favor of the county. The annexation changed the legal character of the roads from county roads to city roads under the exclusive control of the city. Accordingly it was not necessary for the county to discontinue the roads pursuant to KRS Chapter 178. Once a city annexes a road, it is the responsibility of the city to maintain it. *City of Pioneer Village v. Bullitt County*, 104 S.W.3d 757 (Ky. 2003).

Juror Qualification – Restoration of Rights

A defendant was convicted by a jury that included a prior felon. At issue was whether the governor's restoration of rights of the juror in question included the right to sit as a juror. The court concluded it did not. The governor's order invoked only sections 145 and 150 of the Constitution pertaining to the right to vote and the right to hold public office, respectively. The governor could have granted a full pardon, but here the governor granted less than a full pardon, which the law allows. Since the governor did not restore the right to sit on a jury, the defendant is entitled to a new trial. *Anderson v. Commonwealth*, 107 S.W.3d 193 (Ky. 2003).

Pretrial Diversion Program – Participation Over Objection

In a matter of first impression, the court was asked whether a circuit court may permit a defendant to participate in a pretrial diversion program over the Commonwealth's objection. The court concluded that the Commonwealth must give its consent before a circuit court has the authority to approve a defendant's application to participate in a pretrial diversion program. To interpret KRS 533.250(2) otherwise would assign purely executive functions to the judiciary and upset the separation of powers mandated by Kentucky's constitution. *Flynt v. Commonwealth*, 105 S.W.3d 415 (Ky. 2003).

KENTUCKY COURT OF APPEALS



School Shooting – Official Immunity

Parents of three girls shot and killed by a student at their high school sought to impose civil liability on various school officials and others. Because the conduct engaged in by teachers, administrators, and board of education members was properly discretionary, each was entitled to official immunity. The actions were not the result of bad faith or the failure to enforce a known

rule. Neither can the plaintiffs impute to the school as an entity knowledge of the sequence of events that led to the shooting. *James v. Wilson*, 95 S.W.3d 911 (Ky. App. 2002).

Gun Shops – Zoning Restrictions

Under their zoning ordinances, two cities restricted the locations in which a gun shop could operate. A gun shop owner challenged the ordinances as preempted by KRS 65.870. It provides that "no city... may occupy any part of the field of regulation of the transfer, ownership, possession, carrying or transportation of firearms...." The circuit held that the law did not restrict a city's ability to zone the location of a business engaged in those activities, and the Court of Appeals affirmed. The ordinances are regulations in the field of land use, a field of regulation that cities have the authority to control. *Peter Garrett Gunsmith, Inc. v. City of Dayton*, 98 S.W. 3d 517 (Ky. App. 2002)

Special Assessments – Notice

A city passed an ordinance that assessed a portion of the cost of certain sidewalk improvements against adjacent property owners. Statute requires the city to mail notice to the affected owners and gives the owners 30 days from the mailing to contest the ordinance. Property owners sued within 30 days of receipt of the notice, but the action is untimely. The city was not required to publish the ordinance before mailing the notice to property owners. *Chambers v. City of Newport*, 101 S.W.3d 904 (Ky. App. 2002).

Assessment Tests – Misconduct

Allegations of cheating in the administration of an assessment test led to the suspension of a high school principal and a secondary supervisor by the Education Professional Standards Board. On appeal, the Circuit Court upheld the board in part and reversed in part. On further appeal, the Court of Appeals reinstated the board's order in full. The court rejected the employees' argument that a specific intent to violate assessment practices is needed if their conduct is to rise to the level of misconduct. Neglect of duty, lack of judgment, and want of sound discretion in this instance justified findings both of misconduct and incompetence. *Kentucky Education Professional Standards Board v. Gambrel*, 104 S.W.3d 767 (2002).

Highway Design and Maintenance – Governmental Immunity

A driver lost control of her car on a curved section of road and died in the accident. Her estate sued the county, the members of the fiscal court, the county

road department sign director, and the county engineer. The complaint alleged failure to maintain proper warning of the curve and failure to provide an appropriate guardrail. The individual defendants were all sued in their personal and official capacities and raised the defense of immunity. The trial court granted summary judgment for the county on the ground of governmental immunity, and the Court of Appeals affirmed. The trial court also granted summary judgment to the individual defendants with respect to the guardrail, and again the Court of Appeals affirmed because it involved the exercise of a discretionary function for which the official was absolutely immune. However, on authority of *Yanero v. Davis*, the Court of Appeals held that the replacement of a missing sign was a ministerial function for which road department employees were not immune, reversing the trial court. *Estate of Clark ex rel. Mitchell v. Daviess County*, 105 S.W.3d 841 (Ky. App. 2003).

Police Officer Certification – Due Process

The Kentucky Law Enforcement Council revoked the certification of a police officer for allegedly making false statements to his employer regarding the status of his discharge from and reserve obligations to the Marine Corps. The officer appealed, contending that he was not afforded an opportunity to rebut the allegations as due process requires. KLEC asserted that the officer waived his rights when he resigned his employment, but the court disagreed. Voluntary resignation waives the officer's right to question termination but not to challenge the loss of certification absent proof of a knowing and voluntary surrender of that right. *Pangallo v. Kentucky Law Enforcement Council*, 106 S.W.3d 474 (Ky. App. 2003).



UNITED STATES COURT OF APPEALS

Civil Rights – Probable Cause to Arrest

Two college students arrested for complicity in a rape, and who as a result were suspended from college, received failing grades in their courses, and lost their scholarships, sued the arresting officer and his employer under 42 U.S.C. § 1983 as well as on other grounds. The students claimed that the officer lacked probable cause for the arrest. The officer claimed qualified immunity, but the federal district court rejected the claim. The circuit court of appeals reversed. The officer's reliance on statements of the victim and an eyewitness was sufficient to establish probable cause. Once established, the officer was under no duty to investigate further or to look for evidence that could exculpate the accused. Only where the warrant application is so lacking in indicia of probable cause to ren-

der official belief in its existence will the shield of qualified immunity be lost. *Crockett v. Cumberland College*, 316 F.3d 571 (6th Cir. 2003).

Commercial Speech – Access to Accident Reports

In 1994 a group of chiropractors and attorneys challenged KRS 189.635, which governs access to accident reports filed with the state police, and KRS 61.874(3), which provides for reasonable fees for copies of public records for use for noncommercial purposes. (The challenge to KRS 61.874(3) was resolved at an earlier stage of the case, which has a long history including a trip to the U.S. Supreme Court.) At issue was whether KRS 189.635 as applied violated the First Amendment rights of the chiropractors and lawyers as a restriction on commercial speech. The court held that the law is a permissible restriction on access to confidential information possessed by the government, not an unconstitutional condition on plaintiffs' speech. That meant that the statute was constitutional provided that it satisfied the requirements of the Equal Protection Clause because it afforded access to some (e.g., newspapers), but not others (e.g., plaintiffs). The court concluded that permitting news-gathering organizations access to the reports does not negate the legitimate state interest in protecting the privacy of accident victims. *Amelkin v. McClure*, 330 F.3d 832 (6th Cir. 2003).

Public Employee – First Amendment Rights

A classified instructional aide not hired for a certified teaching position complained to the Office of Education Accountability (OEA) about irregularities in hiring for several positions. Following an OEA investigation, the school transferred the aide to a different position and took other actions the aide alleged were in retaliation for her filing the complaints. She filed suit under 43 U.S.C. § 1983, claiming that her right of free speech was infringed. The federal district court granted summary judgment in favor of the school board, concluding that her speech did not address a matter of public concern. Although the majority of the speech in question was motivated by personal concerns, it mixed both personal and public concerns. The court remanded the case to the district court to balance the employee's interest in making the statements against the employer's interest in the efficiency of public services performed. *Banks v. Wolfe County Board of Education*, 330 F.3d 888 (6th Cir. 2003).

Family and Medical Leave Act – Retaliation

After termination, a city employee sued the city arguing that he was fired in retaliation for requesting leave under the Family and Medical Leave Act. The city asserted that it fired him for insubordination and

being absent without authority. After a jury trial, the jury rendered a verdict in favor of the city. The employee appealed, claiming that the instructions the jury received contained an inaccurate statement of the law. Because the instructions reflected that the jury's task was to decide whether or not unlawful discrimination was the real reason for the adverse employment action, the court of appeals affirmed the judgment in the city's favor. *Gibson v. City of Louisville*, 336 F.3d 511 (6th Cir. 2003).

Police Officers – Unlawful Eviction

[This is a revision of the summary that appeared in the Winter 2003 issue of *Local Government Law News*. – Ed.] Residents of a transitional shelter for women were evicted with the aid of police and without following statutory eviction procedures. The tenants sued the police officers for violating their Fourth Amendment right against unreasonable seizures and for violating their Fourteenth Amendment right against deprivation of property without due process of law. The police officers claimed to be protected by the doctrine of qualified immunity. In three opinions a 2-1 majority decided that the officers were qualifiedly immune on the unreasonable seizure claim, and a different 2-1 majority decided that the officers were not qualifiedly immune on the procedural due process claim. The failure to afford these tenants notice and a hearing before eviction denied them due process. The eviction, however, probably did not rise to a seizure and, in any event, a reasonable officer would not have known that an eviction would be a seizure of the plaintiff's real estate interest. *Thomas v. Cohen*, 304 F.3d 563 (6th Cir. 2002).

UNITED STATES DISTRICT COURT



Civil Rights – Failure to Rescue

A person, intoxicated, under arrest, and in handcuffs, ran from the arresting officers, dove into the Ohio River, and drowned. The police called for emergency help, but made no attempt at rescue and prevented bystanders from doing so. The man's estate sued the police department and the officers for violations of his civil rights and for negligence. The court decided that the individual officers were entitled to qualified immunity. A police officer has no affirmative duty to rescue one in danger, particularly where the rescue might be dangerous. [See "No Constitutional Right to Competent Rescue Services," *Local Government Law News*, Winter 2003 – Ed.] Neither does an officer have a duty to permit others to attempt a

potentially dangerous rescue. The negligence claim fails for the same reasons. *Herman v. Cook*, 240 F.Supp.2d 626 (W.D. Ky. 2003).

Adult Entertainment Ordinance – Adequate Safeguards

Jefferson County enacted an ordinance imposing licensing, zoning, and manner of operation restrictions on adult entertainment establishments. Owners of such establishments challenged the constitutionality of the ordinance under federal and state constitutions. The court upheld the zoning restrictions, including a requirement of a five-hundred-foot buffer zone between an adult entertainment establishment and residential areas, schools, churches, government buildings, and other adult entertainment establishments. However, the court found that the ordinance does not provide reasonably brief time limits for license-related decisions, creating the risk of a prior restraint on speech. Also, Kentucky law does not guarantee prompt judicial review of licensing decisions, see *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000), making the ordinance facially unconstitutional. *CAM I, Inc. v. Louisville/Jefferson County Metro Government*, 252 F.Supp.2d 406 (W.D. Ky. 2003).



BE IT ORDAINED . . .

In June 2002 the United States Supreme Court announced its decision in *Watchtower Bible and Tract Society v. Village of Stratton*, 536 U.S. 150. There the court struck down an ordinance that prohibited canvassers from going on private residential property to promote any cause without first obtaining a permit from the mayor's office. The ordinance violated the First Amendment, the court said, because many persons support causes anonymously and the permit requirement tends to chill such advocacy. In addition, some persons' scruples prevent them from applying for a license, so requiring a permit in advance imposes a special burden on the speech of some citizens. The ordinance also banned a significant amount of spontaneous speech because of the permit requirement. Finally, the ordinance was not tailored to the village's stated interest in the prevention of fraud, the prevention of crime, and the protection of privacy.

The decision had the effect of invalidating many municipal ordinances regarding door-to-door solicitation, such as that in Littleton, Colorado. Littleton undertook to revise its ordinance to conform to the *Watchtower* decision. Recently Brad Bailey, Assistant City Attorney for Littleton, offered the revised ordinance reproduced below as a model for others to use. Mr. Bailey's analysis of the case and advice on drafting solicitation ordinances appears in *Solicitations After Watchtower: Brother, Do You Want a Tract?*, COLORADO LAWYER, December 2002, at 65.¹

CITY OF LITTLETON, COLORADO
ORDINANCE NO. ____
Series of 2003

AN ORDINANCE OF THE CITY OF LITTLETON, COLORADO REPEALING CHAPTERS 4 AND 5 OF TITLE 3, LITTLETON CITY CODE, AND REENACTING CHAPTER 4, LITTLETON CITY CODE, REGULATING PEDDLERS, HAWKERS, SOLICITORS AND CANVASSERS; ESTABLISHING PROTECTIONS FOR HOMEOWNERS DESIRING TO AVOID PEDDLERS, HAWKERS, SOLICITORS AND CANVASSERS; REGULATING HANDBILLS AND PROVIDING PENALTIES FOR VIOLATIONS

WHEREAS, many citizens of this community expect their local government to assist them in preserving their privacy and avoiding petty annoyances that disrupt their quiet enjoyment of their homes, and

WHEREAS, other persons often desire to interrupt the quiet enjoyment of one's home to solicit dona-

tions for causes believed to be worthy of support, or to canvas for support for particular religious, ideological, or political causes or for reasons of prompting commerce, and

WHEREAS, an important part of the freedom enjoyed by all citizens and residents of the United States is the right to speak freely, to express ideas that may be unpopular, and to engage others in debate without government interference, and

WHEREAS, the Supreme Court of the United States has consistently recognized the right and obligation of local governments to protect their citizens from fraud and harassment, particularly when solicitation of money is involved, and

WHEREAS, it is the responsibility of all units of government to balance these competing interests in a manner consistent with the Constitution of the United States and of Colorado, while attempting to minimize fraud, prevent crime, and protect the privacy of our citizens.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF LITTLETON, COLORADO, THAT:

Section 1: Chapters 4 and 5 of Title 3 of the Littleton City Code are hereby repealed.

Section 2: Chapter 4 of Title 3 of the Littleton City Code is reenacted to read as follows:

3-4-1 Definitions. As used in this chapter the following words have the meaning indicated:

"Canvasser" is a person who attempts to make personal contact with a resident at his/her residence without prior specific invitation or appointment from the resident, for the primary purpose of (1) attempting to enlist support for or against a particular religion, philosophy, ideology, political party, issue or candidate, even if incidental to such purpose the canvasser accepts the donation of money for or against such cause, or (2) distributing a handbill or flyer advertising a non-commercial event or service.

"Hawker or Peddler" is a person who attempts to make personal contact with a resident at his/her residence without prior specific invitation or appointment from the resident, for the primary purpose of attempting to sell a good or service. A "peddler" does NOT

include a person who distributes handbills or flyers for a commercial purpose, advertising an event, activity, good or service that is offered to the resident for purchase at a location away from the residence or at a time different from the time of visit. Such a person is a "solicitor."

"Solicitor" is a person who attempts to make personal contact with a resident at his/her residence without prior specific invitation or appointment from the resident, for the primary purpose of (1) attempting to obtain a donation to a particular patriotic, philanthropic, social service, welfare, benevolent, educational, civic, fraternal, charitable, political or religious purpose, even if incidental to such purpose there is the sale of some good or service, or (2) distributing a handbill or flyer advertising a commercial event or service.

3-4-2. Registration Required for Hawkers, Peddlers and Solicitors, available for Canvassers. No person shall act as a hawker, peddler or as a solicitor within the city without first registering with the City Manager in accordance with this chapter. A canvasser is not required to register but any canvasser may do so for the purpose of reassuring city residents of the canvasser's good faith.

3-4-3. Fees.

- A. For a peddler acting on behalf of a merchant otherwise licensed to do business within the city.....no fee.
- B. For a peddler acting on behalf of a merchant not otherwise licensed to do business within the city.....a fee of: For one day \$2.00; For one month \$12.50; For one year \$35.00.
- C. For a solicitor (including a commercial solicitor advertising an event, activity, good or service for purchase at a location away from the residence).....no fee.
- D. For a canvasser.....no fee.

3-4-4. Contents of Registration. Any person or organization required to register under this chapter shall provide the following information:

- A. The name, physical description and photograph of each person required to register. In lieu of this information, a driver's license, state identification card, passport, or other government-issued identification card (issued by a govern-

ment within the United States) containing this information may be provided, and a photocopy taken. If a photograph is not supplied, the city will take an instant photograph of each person for which a card is requested at the application site.

- B. The permanent and (if any) local address of the organization or business to be represented by a hawker, peddler, solicitor or canvasser.
- C. The permanent and (if any) local address of each person acting as a hawker, peddler, solicitor or canvasser.
- D. A brief description of the proposed activity related to this registration. (Copies of literature to be distributed may be substituted for this description at the option of the applicant.)
- E. The motor vehicle make, model, year, color, vehicle identification number and state license plate number of any vehicle which will be used by each person.
- F. If registering as a hawker or peddler:
 - 1. The name and permanent address of the business offering the event, activity, good or service (i.e., the peddler's principal).
 - 2. A copy of the principal's sales tax license as issued by the state of Colorado and/or the City of Littleton.
- G. The web address for this organization, person, or group (or other address) where residents having subsequent questions can go for more information.

3-4-5. "No Visit" List. The City Manager shall maintain a list of persons within the city who restrict visits to their residential property (including their leasehold, in the case of a tenant) by hawkers, peddlers, solicitors, and canvassers. The City Manager may provide a form to assist residents, and this form may allow the resident to select certain types of visits that the resident finds acceptable while refusing permission to others. This "no visit" list shall be a public document, reproduced on the city's web site, and available for public inspection and copying. A copy of the "no visit" list shall be provided to each hawker, peddler, solicitor, or canvasser. It shall be the responsibility of all canvassers to obtain a copy of the current "no visit" list.

3-4-6. Distribution of Handbills and Commercial Flyers. In addition to the other regulations contained herein, a solicitor or canvasser leaving handbills or commercial flyers about the community shall observe the following regulations:

- A. No handbill or flyer shall be left at or attached to any sign, utility pole, transit shelter or other structure within the public right-of-way. The police are authorized to remove any handbill or flyer found within the right-of-way.
- B. No handbill or flyer shall be left at or attached to any privately owned property in a manner that causes damage to such privately owned property.
- C. No handbill or flyer shall be left at or attached to any of the property (a) listed on the city “no visit” list, or (b) having a “no solicitor” sign of the type described in paragraph 17A or B.
- D. Any person observed distributing handbills or flyers shall be required to identify himself/herself to the police. This is for the purpose of knowing the likely identity of the perpetrator if the city receives a complaint of damage caused to private property during the distribution of handbills or flyers.

3-4-7. General Prohibitions. No peddler, solicitor or canvasser shall:

- A. Enter upon any private property where the property is clearly posted in the front yard a sign visible from the right-of-way (public or private) indicating a prohibition against peddling, soliciting and/or canvassing. Such sign need not exceed one square foot in size and may contain words such as “no soliciting” or “no solicitors” in letters of at least two inches in height. (The phrase “no soliciting” or “no solicitors” shall also prohibit peddlers and canvassers).
- B. Remain upon any private property where a notice in the form of a sign or sticker is placed upon any door or entrance way leading into the residence or dwelling at which guests would normally enter, which sign contains the words “no soliciting” or “no solicitors” and which is clearly visible to the peddler, solicitor or canvasser.
- C. Enter upon any private property where the current occupant has posted the property on the

city’s “no visit” list (except where the posting form indicates the occupant has given permission for this type of visit), regardless of whether a front yard sign is posted.

- D. Use or attempt to use any entrance other than the front or main entrance to the dwelling, or step from the sidewalk or indicated walkway (where one exists) leading from the right-of-way to the front or main entrance, except by express invitation of the resident or occupant of the property.
- E. Remove any yard sign, door or entrance sign that gives notice to such person that the resident or occupant does not invite visitors.

It shall be an affirmative defense to any violation of this section that the peddler, solicitor, or canvasser has an express invitation from the resident or occupant of a dwelling allowing him/her to enter upon any posted property.

3-4-8. Exceptions. This chapter shall not apply to a federal, state or local government employee or a public utility employee in the performance of his/her duty for his/her employer.

3-4-9. Violation. It shall be unlawful for any person to violate any provision of this chapter. Penalties shall be imposed as provided in Section 1-4-1 of this code.

Section 3: Effective Date. This ordinance shall be in full force and effect from and after _____.

Section 4: Severability. If any part, section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid, such invalidity shall not affect the validity of the remaining sections of this ordinance. The City Council hereby declares that it would have passed this ordinance, including each part, section, subsection, sentence, clause or phrase hereof, irrespective of the fact that one or more parts, sections, subsections, sentences, clauses or phrases may be declared invalid.

Section 5: Repealer. All ordinances or resolutions, or parts thereof, in conflict with this ordinance are hereby repealed, provided that this repealer shall not repeal the repealer clauses of such ordinance nor revive any ordinance thereby.

Endnotes

1. Another model offered by the Missouri League of Cities is at http://www.mocities.com/UploadedMedia/10103_PeddlersSolicitorsCanvassersModelOrdinance.pdf.

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