CML Annual Seminar on Municipal Law

Sept. 27–28, 2019 • Greeley, CO

CML
COLORADO
MUNICIPAL
LEAGUE

CML Annual Seminar on Municipal Law

Sept. 27–28, 2019 • Greeley

CML Annual Seminar on Municipal Law

Sept. 27–28, 2019 • Greeley

CML Annual Seminar on Municipal Law

Sept. 27–28, 2019 • Greeley

CML Annual Seminar on Municipal Law

Sept. 27–28, 2019 • Greeley

CML Annual Seminar on Municipal Law

Sept. 27–28, 2019 • Greeley

COLORADO MUNICIPAL LEAGUE

CML Annual Seminar on Municipal Law

Presented by the Colorado Municipal League and the CML Municipal Attorneys Section

Sept. 27–28, 2019 • Greeley, CO

Table of contents

Special thanks to our sponsors

Supreme

Butler Snow LLP

Amicus

Hoffmann Parker Wilson & Carberry PC

Kissinger & Fellman PC

Kutak Rock LLP

Michow Cox & McAskin LLP

Murray Dahl Beery Renaud LLP

Thanks to the sponsors of the 2019 CML Annual Seminar on Municipal Law

presented by the Colorado Municipal League and the CML Municipal Attorneys Section

BUTLER SNOW

Butler Snow LLP
1801 California St., Ste. 5100, Denver, CO 80202
www.butlersnow.com

Dee P. Wisor, Attorney • 720-330-2357 • dee.wisor@butlersnow.com

HP WC Hoffmann Parker Wilson & Carberry | P.C.

Hoffmann Parker Wilson & Carberry PC

Corey Hoffmann
Director
511 16th St., Ste. 610
Denver, CO 80202
303-825-6444
cyh@hpwclaw.com
www.hpwclaw.com

Kendra L. Carberry
Director
303-825-6444
klc@hpwclaw.com

K&F Kissinger & Fellman, P.C. Attorneys at Law www.kandf.com

Kissinger & Fellman PC

Ken Fellman
President
3773 Cherry Creek N. Dr., Ste. 900
Denver, CO 80209
303-320-6100
kfellman@kandf.com
www.kandf.com

Beth Ann Jackson
Paralegal
303-320-6100
ejackson@kandf.com

Thanks to the sponsors of the 2019 CML Annual Seminar on Municipal Law

presented by the Colorado Municipal League and the CML Municipal Attorneys Section

Kutak Rock LLP

Mario Trimble
Partner
1801 California St., Ste. 3000
Denver, CO 80202
303-297-2400
mario.trimble@kutakrock.com
www.kutakrock.com

Ken Guckenberger
Partner
303-297-2400
kenneth.guckenberger@kutakrock.com

Michow Cox & McAskin LLP

6530 S. Yosemite St., Ste. 200
Greenwood Village, CO 80111
303-459-2725
info@mcm-legal.com
www.mcm-legal.com

Murray Dahl Beery Renaud LLP

Gerald Dahl
Attorney
710 Kipling St., Ste. 300
Lakewood, CO 80215
303-493-6670
gdahl@mdbrlaw.com
www.mdbrlaw.com

CML thanks the City of Greeley

COLORADO MUNICIPAL LEAGUE

CML Annual Seminar on Municipal Law

Sept. 27–28, 2019 • Greeley, CO

Agenda

Friday, Sept. 27

8:00–9:00	**Registration and Breakfast**
9:00–10:30	**Annual Survey of Municipal Law** *David Broadwell, CML general counsel; and Laurel Witt, CML staff attorney*
10:30–10:45	**Break**
10:45–noon	**Case Study: The New Lakewood Residential Growth Cap** *Tim Cox, Lakewood city attorney; and Steve Glueck, Golden planning and development director*
Noon–1:15	**Luncheon: Opioid Class Action Litigation** *Gretchen Freeman Cappio, Keller Rohrback LLP; and Corey Hoffmann, Hoffmann Parker Wilson & Carberry PC*
1:30–2:45	**Sexual Harassment Investigations** *Kirsten Crawford, Denver legislative counsel; Anna S. Itenberg, Karp Neu Hanlon PC; and Liz Rita, Investigations Law Group*
2:45–3:00	**Break**
3:00–4:15	**Municipal Courts and Criminal Justice Reform** *Michael Curran, Colorado Springs prosecution division chief; Erich Schwiesow, Alamosa city attorney; and Carolyn Wolf, Lakewood lead municipal prosecutor*
5:00–6:00	**Social Hour**

Saturday, Sept. 28

8:00–9:00	**Registration and Breakfast**
8:30–9:30	**Regulatory Takings Refresher** *Barbara Green, Sullivan Green Seavy LLC; and Tom Macdonald, Otten Johnson Robinson Neff & Ragonetti*
9:30–10:30	**Extreme Risk Protection Orders** *Rick D. Brandt, Evans chief of police; and Matt Hader, Commerce City deputy city attorney*
10:30–10:45	**Break**
10:45–noon	**Dealing Ethically with Conflicting Client Demands** *David Broadwell, CML general counsel; Clay Douglas, retired Longmont and Loveland city attorney; and Marty McCullough, retired Westminster city attorney*
Noon	**Adjourn**

Biographies in alphabetical order by last name

Rick Brandt has served as a police officer for 38 years, beginning his career in the Aurora police department in 1981. He retired in 2007 to serve as the chief of police in Evans. Brandt has served as the president of the Colorado Association of Chiefs of Police and he currently serves as the law enforcement chair for CML and is the Governor's appointee on the Substance Abuse Trends and Response Task Force serving as the criminal justice co-chair.

David W. Broadwell has served Colorado municipalities for more than 35 years, starting as a city planner in Glenwood Springs in 1982. He recently retired from his position in the Denver City Attorney's office after 18 years of service. From 1992 to 1999, he was employed as staff attorney for the Colorado Municipal League. Broadwell rejoined the League in 2019 as general counsel.

As a partner in Keller Rohrback's nationally recognized Complex Litigation Group, **Gretchen Freeman Cappio** has a track record of success in class action and multidistrict litigation. Whether the case involves environmental disasters, skyrocketing drug prices, or corporate malfeasance, Cappio approaches each case with passion and determination. It's one of the many reasons physicians, professors, parents, environmentalists, and other attorneys call on Cappio when they require representation in the face of long odds. She is a leading member of the Keller Rohrback team that has been hired by numerous governments to hold drug manufacturers accountable for one of the most urgent human-made epidemics in our country's history.

Tim Cox is a founding partner with the law firm of Michow Cox & McAskin, LLP. His practice includes representation of Colorado municipalities and counties on a broad range of local government matters. Since September 2007, Cox has served as the city attorney for the City of Lakewood, the largest municipality in Colorado to contract for legal services.

Kirsten J. Crawford has been with the City of Denver since May 2013. Crawford provides legal counsel to the Denver City Council. Crawford received her J.D. from the University of Denver in 1999, after which she served as a judicial clerk for the Hon. Raymond D. Jones, Colorado Court of Appeals. Prior to joining the City of Denver, Crawford was the city attorney for the City of Littleton where she was the chief legal officer to the elected officials. As an assistant attorney for both Adams and Arapahoe Counties, she specialized in employment, contracts civil rights, public safety, and administrative law matters. Ms. Crawford has a B.A. in Asian Studies from DePauw University and studied Japanese at Kansai Gaidai in Osaka, Japan. She loves to spend her free time running, cycling, and skiing.

Michael Curran, Colorado Springs prosecution division chief, has been a prosecutor with more than 20 years of experience in prosecution.

Claybourne M. Douglas has served local governments for more than 40 years, starting in Alaska with the Greater Anchorage Area Borough (assistant Borough attorney) and Municipality of Anchorage (assistant municipal attorney). In Colorado, Douglas has served Aurora (assistant city attorney, managing municipal prosecutor, deputy city attorney); Longmont (city attorney); Boulder (senior assistant city attorney) and Loveland (city attorney). Douglas has served the International Municipal Lawyers Association (10th Cir. North Region vice president and Colorado state chair); Colorado Municipal League (board member, Attorneys section president, vice president, CLE presenter and panelist); Metro City Attorneys Association (president, vice president, Outstanding City Attorney Award, Outstanding Deputy City Attorney Award and Special Accomplishment Award) and Colorado Municipal Judges Association (CLE presenter and panelist). He has also served several other Colorado municipalities and law firms as special prosecutor, special counsel, hearing officer, and municipal law consultant.

Steve Glueck has been a proponent of vital, healthy, economically strong urban environments throughout his 40 year career in municipally oriented city planning, economic development, sustainability, and community development. Glueck has degrees from Michigan State University and the University of Colorado Denver, and has focused his professional career in Lakewood and Golden, as well as international work through the international program of the International City and County Managers Association (ICMA). He is currently the director of community and economic development for Golden and serves as director of the city's Urban Renewal Authority and Downtown Development Authority.

Barbara Green earned a J.D. degree from the University of Colorado law school in 1985. Since that time, she has been practicing environmental and land use law. She has represented clients in matters involving land use and development, oil and gas development, mining, water development, water quality, and low-level radioactive waste. Green has substantial experience in rulemaking, administrative proceedings, and litigation in state and federal district and appellate courts.

Matt Hader presently serves the City of Commerce City as its deputy city attorney. For the last several years, he has actively provided legal counsel to multiple departments including police, planning, public works, and community development. Hader also oversees the city's outside litigation and is actively involved in municipal oil and gas issues. Previous to serving Commerce City, he served the cities of Greeley, Denver, and Chicago.

Corey Y. Hoffmann is a director and shareholder with the law firm of Hoffmann, Parker, Wilson & Carberry, P.C., where he practices primarily in the areas of local government law, litigation, and urban renewal. Hoffmann currently serves as the city attorney for the cities of Northglenn, Black Hawk, and Cañon City; town attorney for the Towns of Hudson, Foxfield, Elizabeth, Gilcrest, Kiowa, Deer Trial, Arriba, and Genoa; and general and special counsel to several other local governmental entities. Hoffmann received his B.A. degree, with honors, from the University of California at Santa Barbara in 1989, and his J.D. degree, cum laude, from California Western School of Law in 1993.

Anna S. Itenberg has been an attorney at KNH since 2001. She serves as assistant city attorney for Glenwood Springs and provides legal counsel to several other municipalities on the Western Slope in employment matters. Itenberg's employment practice includes performing workplace investigations, drafting agreements and policies; advising on hiring, firing and disciplinary action; and representing clients in EEOC and CCRD investigations and other administrative proceedings.

Tom Macdonald is a shareholder with the Denver law firm Otten Johnson Robinson Neff & Ragonetti PC. He has substantial experience across a broad spectrum of transactional real estate, and real estate and land use litigation, with three distinct specialties: real estate transactions; workouts, foreclosures and bankruptcy; and land use and constitutional litigation. Macdonald represents commercial lenders with a particular emphasis on loan foreclosures, workouts, bankruptcies and mechanics' lien litigation. In addition, he represents clients in all types of real estate transactions. In the litigation context, he represents clients in complex litigation involving land use and governmental regulation.

Marty McCullough began his career in local government law in 1983 as an associate with Calkins, Kramer, Grimshaw, and Harring. He started with the City of Westminster as an assistant city attorney in 1985 and was appointed city attorney in 1986. McCullough recently retired after 30 years of service with the city and now maintains a limited municipal law practice as McCullough Law LLC.

Liz Rita has been providing impartial investigations to clients in Colorado and around the country since 1995. She specializes in complex and high-risk investigations in the workplace, with a special focus on municipal clients both large and small. Rita writes, speaks, and trains on workplace investigations for a variety of audiences, and she sits on the Board of Directors of the Association of Workplace Investigators.

Erich Schwiesom has been serving as the Alamosa city attorney since 2007. In 2014, at the insistence of the IRS, he became a City of Alamosa employee (long story), and in January of this year added the city prosecutor duties to become Alamosa's full time city attorney/prosecutor. Schwiesom grew up in Boulder (back when it had a rodeo). He obtained his B.A. in Rhetoric from the University of California, Berkeley, and in 1993 his J.D. from the University of Colorado (no rodeo anymore).

Laurel Witt provides support to municipal attorneys around the state as the CML staff attorney. Before her third year of law school, Witt interned with the City Attorney's Office in Fort Collins, which led her to a career in municipal law. After graduating, she worked as a fellow for the Denver City Attorney's Office for legislative counsel. Witt has been the staff attorney for CML since April of 2018.

Carolyn Wolf has been a prosecutor for the City of Lakewood since 2007 and became the lead municipal prosecutor in May of 2018.

COLORADO
MUNICIPAL
LEAGUE

303 831 6411 / 866 578 0936
303 860 8175
www.cml.org
1144 Sherman St., Denver, CO 80203

2018-19 Survey of Local Government Law

David W. Broadwell, General Counsel
Colorado Municipal League
September 27, 2019

This outline contains a review of selected Colorado, Tenth Circuit, and U.S. Supreme Court appellate decisions of interest to municipal attorneys in Colorado, reported during the period of October, 2018 through September, 2019.

CAMPAIGNS AND ELECTIONS

Are ballot issue campaign promises legally binding?

- *Rechberger v. Boulder County*, 2019 WL 1513629 (Colo. App., April 4, 2019)

- When the Boulder County commissioners referred to the voters an LPID property tax increase for parks and open space a "campaign flyer" authored by the BOCC (?) stated that the county would match up to $1.9 million in LPID taxes to assist in the acquisition of open space. Years later, this "promise" has not entirely been fulfilled. When residents of the LPID sued to enforce the original "promise" the trial court and the court of appeals agreed that the suit must be dismissed for lack of standing, simply because individual citizens do not have a legally protected interest in the enforcement of campaign promises. Quoting a federal court in Pennsylvania, the court observed "our political system could not function" if political messaging were deemed to create an enforceable contract.

- This decision may have broader implications for <u>any</u> situation where assurances are made to the voters in advance of an election on a fiscal matter, and if the purpose of a tax, debt or de-Brucing question changes over time.

"Raise-the-bar" upheld by Tenth Circuit

- *Semple v. Griswold*, 2019 WL 3926932 (10th Cir., Aug. 20, 2019).

- For many years in Colorado, the standards and procedures for initiating a state constitutional amendment were no different than for a statutory change. In 2016, Colorado voters adopted Amendment 71 and finally agreed to "raise the bar" for constitutional amendments by requiring petition signatures to be garnered from all 35 state senatorial districts (*i.e.* two percent of the registered electors in each district), and by requiring a 55% majority vote to add language to the constitution. In early 2018, federal Judge William Martinez declared Amendment 71 unconstitutional on "one-person-one-vote" principles, ostensibly because state senatorial districts, although proportional in population, do not contain a proportional number of registered electors.

- A divided panel of the Tenth Circuit overruled the district court and held that Amendment 71 violates neither Equal Protection nor the First Amendment rights of initiative petitioners. The earlier district court ruling was an instant anomaly because other states had long since required initiative petition signatures to be geographically distributed based on population (not registered electors), and as recently as 2016 the U.S. Supreme Court rejected the theory that electoral districts must be apportioned according to voter registration rather than population.

- The advantages of "raise the bar" for municipalities is illustrated by the pending initiated measure to impose a 1% growth cap on front range counties, proposed this year as a statutory change, not a constitutional amendment as it was in 2017.

Private enforcement actions for campaign finance violations again under the microscope

- *Alliance for a Safe and Independent Woodman Hills v. Campaign Integrity Watchdog, LLC*, 2019 WL 4251890 (Colo. September 9, 2019)

- Ever since Amendment 27 was added to the Colorado Constitution in 2002, one of the most controversial elements of this campaign finance reform measure has been the "private enforcement" provisions of the law. (Indeed, last year in the case of *Holland v. Williams* the federal district court for Colorado determined that the enforcement provision chills First Amendment rights and is unconstitutional.) This year a unanimous Colorado Supreme Court reversed the court of appeals on two counts. First, the court held that private enforcement action absolutely must be brought within one year of an alleged, discrete violation of the law (i.e. there is no plausible theory of a so-called "continuing violation.") Second, under the self-executing provisions of Amendment 27, the prevailing party in a private enforcement action is absolutely entitled to an award of attorney fees, and the General Assembly has no ability to narrow this entitlement via statute, as they attempted to do in one provision of the FCPA.

- This case involved a campaign reporting violation by a citizens group that organized in part to oppose a candidate for a metro district board seat. An ALJ fined the group $9,650 for failure to timely register and report as a political committee. Over a year later when the group had still failed to pay the fine, CIW filed a separate complaint on a "continuing violation" theory, which the supreme court categorically rejected, while awarding attorney fees to the citizen group.

- The FCPA was amended in 2019 to henceforth require that, "Any complaint arising out of a municipal campaign finance matter must be exclusively filed with the clerk of the municipality." § 1-45-111.7 (9)(b), C.R.S. Most municipalities have not adopted procedures for processing FCPA complaints.

EMPLOYMENT

EEOC precondition for Title VII claims is not "jurisdictional"

- *Fort Bend Cty., Texas v. Davis*,139 S.Ct. 1843 (2019).

- A longstanding provision of Title VII of the federal Civil Rights Act has required plaintiffs to file employment discrimination charges first with the Equal Employment Opportunity Commission (EEOC) or a counterpart state agency for investigation and potential administrative resolution before the plaintiff can go to court. This term, a unanimous U.S. Supreme Court clarified for the first time that this procedural prerequisite is not a "jurisdictional" prerequisite to filing a Title VII claim. Thus, if an employer seeks dismissal of a claim for failure to comply with the EEOC prerequisite, the employer must do so immediately when a lawsuit is filed, because the employer cannot make a "jurisdictional" argument much later in the litigation, for example when the case is on appeal.
- In related news, municipal attorneys should be aware that Colorado anti-discrimination statutes were just amended to allow claims of wage discrimination on the basis of sex to go directly to court without any need to exhaust administrative remedies per the new Equal Pay for Equal Work Act, SB 19-085.

Important new guidance on essential elements of a prima facie ADA employment claim

- *Exby-Stolley v. Board of County Commissioners, Weld County, Colorado*, 906 F.3d 900 (10th Cir. 2018)

- A divided panel of the court clearly held for the first time in this circuit that an ADA employment discrimination claims cannot rest solely on a claim of "failure to accommodate" an employee's disability. Instead, the claim must also be linked to an "adverse employment action" as defined by the statute. The plaintiff, a county health inspector, was unable to perform her job due to the after-effects of a broken arm. At trial, the evidence showed that the employer never reached an accommodation, because the employer thought the parties were still in the "iterative process" when the employee resigned. The employer never did any actionable harm to the employee under these facts.

Denver manager of safety may delegate disciplinary functions to a subordinate

- *Roybal v. City and County of Denver,* 436 P.3d 604 (Colo. App. 2019)
- In yet another decision interpreting the detailed provisions of Denver's charter governing the discipline of safety department employees, the court of appeals confirmed that the manager of the department is not required personally to mete out discipline, but instead can delegate this function to a designated subordinate of his choosing. The court easily reached this conclusion by applying the plain language of the charter and associated career service rules.
- Of broader relevance to other home rule municipalities, this decision contains a brief reaffirmation of the principle that any conflict between a home rule charter and state statutes on employment disciplinary matters will be resolved in favor of the municipality

No way to reopen a police disciplinary case in Denver after time for appeal has passed

- *Murr v. City and County of Denver,* 2019 WL 1474323 (Colo. App. April 4, 2019)
- Denver's home rule charter contains unusually detailed procedures for adjudicating appeals in police disciplinary cases, including tight deadlines for a determination of disciplinary sanctions by the city's Manager of Safety and appeal of those decisions to the Civil Service Commission. Of particular note, the charter contains no express provision for reconsidering a disciplinary decision after the time for appeal of the original decision has run, even if new evidence comes to light later. In a case originating from a 2009 police beating of a bystander (caught on security cameras and eyewitness accounts that contradicted the officers' version of events), the city was unable to convince the Colorado Court of Appeals that the Manager should be deemed to have an "implied" right to reopen disciplinary cases in appropriate circumstances. The court held that the plain language of Denver's charter controlled the process and rendered the first disciplinary decision final.

Another chapter in firefighter's presumptive eligibility for worker's compensation saga

- Packard v. Industrial Claims Appeal Office and City and County of Denver, ___ WL___ (Colo. App. Sept. 12, 2019).

- In 2007 Colorado firefighters' obtained an amendment to the worker's comp laws, saying that certain cancers, including skin cancer, "shall be presumed to result from the firefighter's employment." §8-41-209, C.R.S. This presumption led to long-running litigation of WC claims by Littleton, Castle Rock and Boulder, until the Colorado Supreme Court finally ruled in 2016 in the Littleton case that the presumption was rebuttable if the municpal employer could prove that the cancer was more likely attributable to factors outside the workplace.

- In July of 2013 a Denver firefighter reported to the city that the he had been diagnosed with skin cancer which he believed was attributable to his job, but he did not formally file a worker's comp claim for compensation until four year later, long after the expiration of the statute of limitations. In fact it was not until May of 2017 that the firefighter's doctor opined that the "melonoma meets the requirements of the Colorado Firefighter Presumption Statute." By the claimant's own admission, he filed his formal claim for compensation late because he was awaiting the Supreme Court's ruling on the burden of proof issue in the Littleton case.

- The firefighter argued in vain that Denver's filing of the first report of injury with the Division of Worker's Compensation and the Division's docketing of the claim in 2013 should have satisfied the statute of limitations. These filings did not relieve the firefighter himself from the responsibility for formally "claiming compensation" within two years of the discovery of his alleged occupational injury.

FIRST AMENDMENT

New guidance for religious monuments on public property

- *American Legion v. American Humanist Assoc.*, 139 S.Ct. 2067 (2019).

- The ever-popular question of whether a government expenditure or practice violates the Establishment Clause returned to the U.S. Supreme Court this session. The case addressed a 32-foot tall Latin cross installed alongside a highway in Virginia in 1925 as a memorial to the fallen dead in World War I. As is typical in Establishment Clause cases, seven different opinions were rendered by the various members of the court. The new wrinkle added by Justice Alito's majority opinion was this: The sheer longevity with which a religious monument has existed without objection on public property is one factor to be considered in the Establishment Clause analysis, in addition to the usual parsing of the record to determine whether the monument serves a primarily secular or religious purpose. The opinion also placed renewed emphasis on the notion that the forced removal of older religious monuments on public property could actually manifest an outright "hostility" to religion in violation of the Free Exercise Clause.

Gender-specific public nudity ordinance violates Equal Protection

- *Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 762 (10th Cir. 2019)
- In 2015 Ft. Collins adopted a public nudity ordinance which included a prohibition on the public display of female breasts (with certain exceptions). When the city was immediately sued, the federal court agreed with the city that "topless protests" are not protected speech under the First Amendment, but enjoined enforcement of the ordinance anyway on Equal Protection grounds. A divided panel of the Tenth Circuit upheld the injunction, becoming the first circuit count in America to strike down such a law. The court analyzed the ordinance as being no different than other laws that have been struck down because they discriminate against women based upon "generalizations about the way women are." Moreover, the majority reasoned that women wishing to display their breasts should not be punished because society as a whole has chosen to "sexualize" the female breast but not the male breast.
- In May, the Ft. Collins City Council voted 4-3 not to appeal to the U.S. Supreme Court, and in September the council formally repealed the ordinance.

City can exclude panhandlers from some medians

- *Evans v. Sandy City*, No. 928 F.3d 1171 (10th Cir. 2019).

- Sandy City, Utah adopted an ordinance simply making it illegal for any person "to sit or stand, in or on any unpaved median, or any median of less than 36 inches for any period of time." A panhandler who insisted on utilizing medians to interact with drivers

at intersections facially challenged the ordinance as violating his First Amendment rights. A divided panel of the Tenth Circuit upheld the ordinance, but made two notable analytical choices in so doing.

  - First, the court treated the ordinance as a regulation of speech, even though it clearly is not on its face.

  - Second, the court "assumed without deciding" that structural medians in streets and highways are "traditional public forum" spaces, even though this assumption is at least debatable.

- Proceeding on these two assumption, the court analyzed the ordinance according to the familiar standards applicable to "time, place and manner" restrictions on speech in traditional public fora, especially dwelling on the requirement for narrow tailoring. Thus, the court implied that the ordinance was valid only because it was supported by evidence in the record showing that it was tailored to address a demonstrable safety hazard specifically associated with narrow medians, and because the ordinance did not totally ban speech on all medians in the city.

- Ever since the 2014 federal district court ruling in *Browne v. City of Grand Junction*, 27 F. Supp. 3d 1161 (D. Colo. 2014), the authority of Colorado muncipalities to regulate panhandling from medians and traffic islands has been uncertain.

Per 10th Circuit: county employee's sworn testimony not protected speech

- *Butler v. Board of County Commissioners of San Miguel County,* 920 F.3d 651 (10th Cir. 2019).

- A county road supervisor in San Miguel County testified as a character witness in his sister-in-law's child custody suit. The problem was, the sister-in-law's ex-husband was one of the supervisor's co-workers in the county road department. This led the County Road and Bridge Director to demote the supervisor shortly after his testimony, and the demoted supervisor then sued the county alleging a violation of his First Amendment rights. There is a circuit split on this question. Some have adopted a *per se* rule saying any truthful sworn testimony in a judicial proceeding is automatically considered to be protected speech. But the Tenth Circuit has now joined other circuits in holding that the contents of the testimony ultimately determine whether the speech is protected. In this case, the testimony was determined to be on a matter of purely private, not public, concern.

GOVERNMENTAL IMMUNITY

"Willful and wanton" claims against public employees

- *Hernandez v. City and County of Denver*, 439 P.3d 57 (Colo. App. 2018); *cert. denied* (2019).

- Ever since the landmark CIGIA case of *Trinity Broadcasting of Denver v. City of Westminster* (1993), public entities have been able to knock out many tort claims in a motions hearing under Rule 12(b)(1). If the public entity enjoys immunity under the CGIA, then the complaint must be dismissed for lack of subject matter jurisdiction by the trial court. But if immunity has been waived under the statute, the case must typically proceed to summary judgment or trial on the facts.

- This year the court of appeals clarified, however, that a *Trinity* hearing is the wrong forum in which to dismiss "willful and wanton" claims against individual public employees. (The CGIA imposes potentially severe penalties on public employees who engage in "willful and wanton behavior" in the scope of their employment, including personal liability for punitive damages.) If the court determines in the *Trinity* hearing that the disputed tort claims fall into a category for which immunity has been waived under the CGIA (in this case, a claim by a pre-trial detainee for negligent operation of a county jail), then any included claim of "willful and wanton" behavior by individual employees must be determined via a separate motion or at trial.

Liability for slip-and-fall accidents on 16th Street Mall

- *Trujillo v. RTD,* 434 P.3d 782 (Colo. App. 2018).

- Under CGIA a public entity can be liable for dangerous conditions of a "sidewalk" adjacent to a public road. In this case, the court interpreted the shuttle-bus turnaround area at the RTD-owned Market Street Station I downtown Denver to be a public roadway, even though traffic in the turnaround was limited only to the shuttles themselves. Thus, when plaintiff tripped on a faulty tree grate in the adjacent pedestrian areas, RTD was potentially liable.

- This ruling may have applicablity to other types of plazas, malls, and limited acess circulation areas owned and maintained my muncpalities.

Damage claims for employment discrimination barred by CGIA

- *Houchin v. Denver Health*, 2019 WL 1474320 (Colo. App., April 4, 2019)

- In 2013 the General Assembly amended the Colorado Anti-Discrimination Act (CADA) to allow plaintiffs to seek compensatory and punitive damages against employers. The amendments expressly allowed claimants to seek compensatory damages against the state as an employer, notwithstanding the grant of immunity in the CGIA, but expressly did *not* extend this waiver of immunity to local governments. Thus, when a plaintiff sues a political subdivision of the state for employment discrimination and includes a compensatory damages claim, the local government can move for dismissal of the damages claim based on governmental immunity. The 2-1 majority in this case observed that this distinction between the state and local government employers in the 2013 amendments to CADA "does not seem logical or equitable" but upheld it anyway.
- Note: SB 19-085 adopted this year created a direct path to court for wage discrimination claims based on sex, along with granting plaintiffs the right to claim liquidated and economic damages. However, the bill was completely silent on whether the CGIA renders state and local government employers immune from such damages.

Analyzing the applicability of the CGIA to public-private partnerships

- *Martinez v. CSG Redevelopment. Partners, LLP*, 2019 WL 2528770 (Colo. App. June 20, 2019).
- The Colorado Governmental Immunity Act (CGIA) covers local governments as well as any "instrumentality" of a local government. What happens when a political subdivision of the state, in this case the Denver Housing Authority, forms a public-private partnership to build and operate a public project, and a plaintiff sues due to an injury sustained at the project site? The court of appeals illustrated in this case that, under the right facts and circumstances, even when the private party has a 99.989 percent ownership interest in the project, the partnership can still be considered an "instrumentality" of the public entity, and thus the partnership can enjoy immunity from tort liability under the CGIA.

MARIJUANA

Heightened "right to privacy" recognized for marijuana searches in Colorado

- *People v. McKnight,* 446 P.3d 397 (Colo. 2019); *People v. Gadberry,* 440 P.3d 449 (Colo. 2019).
- Since the original blossoming of medical marijuana dispensaries in Colorado in 2009, through the adoption of Amendment 64 in 2012 and beyond, "legalized" marijuana has fared poorly in state and federal courts in Colorado. Many cases have turned on the simple fact that marijuana remains illegal under federal law, and federal law remains fully operative in Colorado.
- However, in what may be a landmark, a 4-3 majority of the Colorado Supreme Court has now rendered two marijuana decisions that effectively exalt the Colorado Constitution over the Supremacy Clause of the U.S. Constitution. Indeed, the majority interpreted the state constitution to create a new "right to privacy" in the possession of marijuana, a right that provides enhanced protection from unreasonable search and seizure of the drug in Colorado. The basic holding in the cases: the sniff of a police dog trained to detect marijuana, standing alone, can no longer provide probable cause for a warrantless search of a motor vehicle. The broader and longer-term consequences of these decisions on "marijuana rights" in Colorado: time will tell.

Marijuana, hemp, and probable cause

- *People v. Cox,* 429 P.3d 75 (Colo. 2018)

- Another cannabis dilemma for law enforcement: marijuana plants and hemp plants look and smell virtually the same. Thus, when an officer seeks a search warrant for what he believes to be an illegal marijuana grow, to what extent is the officer obligated to determine that the plants are *not* hemp before filing an affidavit seeking a search warrant? In this case, the Supreme Court reversed a suppression order for evidence seized pursuant to a warrant seeking "marijuana" that turned out to be hemp. The case turned on the technicality that the trial court simply did not give the officer's affidavit the presumption of validity it deserved, improperly considered facts outside the affidavit, and did not give due deference to magistrate's decision to issue the warrant.

- With the adoption of amendments to the federal Controlled Substances Act, as well as new legislation in Colorado in the form of SB 19-240 and HB 19-1191, the legalized hemp industry is expected to expand rapidly in Colorado.

OPEN RECORDS/OPEN MEETINGS

FOIA Decision on "confidential commercial" records may help in interpreting CORA

- *Food Marketing Instit. v. Argus Leader Media,* 139 S.Ct. 2356 (2019).
- Records custodians sometimes ask municipal attorneys to interpret the exception in the Colorado Open Records Act (CORA) for, "Trade secrets, privileged information, and confidential commercial, financial ... data ... furnished by or obtained from any person." The U.S. Supreme Court reviewed a very similar provision of the federal Freedom of Information Act. The Court rejected a theory afoot in some of the federal circuits that agencies may withhold such information only upon a showing that revealing the information would cause businesses substantial competitive harm. Instead, the Court applied a dictionary definition of "confidential" and determined that such information can and should be withheld if it is not the sort of thing the business itself would voluntarily reveal.
- In reaching its conclusion in this case, the Supreme Court overruled a longstanding circuit court decision, *National Parks and Conservation Association v. Morton,* 498 F.2d 765 (D.C. Cir. 1974). This is significant because Colorado courts have previously relied on *Morton* in construing the exception in CORA for confidential commercial information. See, e.g.: *IBEW v. Denver Metropolitan Major League Baseball Stadium District*, 880 P.2d 160 (Colo. 1994).

Hazards of "meeting via email" highlighted in Boulder County case

- *Bjornsen v. Board of County Commissioners,* 2019 WL 1830203 (Colo. App. April 25, 2019)
- A Boulder County resident upset over a county decision to site an affordable housing project turned her grievances into a suit over alleged violations of the Colorado Open Records Act (CORA) and the Colorado Open Meetings Law (OML). Acting *pro se* in both the trial court and the court of appeals, she sued both the board of county commissioners and the county housing authority. Her efforts resulted in a ruling in the Colorado Court of Appeals that email conversations between two county commissioners regarding the project potentially violated the OML. Furthermore, on a question of first impression, the court held that the OML never condones the use of an "emergency" executive session outside the context of a regularly scheduled meeting. Finally, the appellate court ruled that draft emails prepared for and at the behest of the executive director of the housing authority were not protected from disclosure by the "work product" exception in CORA, for the simple reason that the director is not an "elected official."

POLICE CIVIL LIABILITY

A big win for police on "retaliatory arrest" claims (with a caveat)

- *Nieves v. Bartlett,*139 S.Ct. 1715 (2019)
- In recent years the U.S. Supreme Court has repeatedly wrestled with the question of whether the existence of probable cause for an arrest or prosecution effectively shields a defendant from a claim of First Amendment retaliation. One of the earlier cases actually arose out of an arrest at the Beaver Creek resort in Colorado. *Reichle v. Howards*, 566 U.S. 658 (2012). After this term's decision, here is the current lay of the land:

    - *For prosecutors*. If a criminal case is supported by probable cause, prosecutors (including municipal prosecutors) enjoy absolute immunity from a retaliatory prosecution claim. *Hartman v. Moore*, 547 U.S. 250 (2006).
    - *For other municipal officials*. If another municipal official, such as an elected official, causes a retaliatory arrest to occur and there is evidence of some sort of animus by the official toward the speaker, the official is susceptible to a First Amendment retaliation claim, regardless of whether the arrest was supported by probable cause. *Lozman v. Riviera Beach*, 138 S. Ct. 1945 (2018).
    - *For police officers*. As a general rule, if an arrest is supported by probable cause, a police officer is not exposed to a claim for First Amendment retaliation. In *Nieves* the Supreme Court rejected a ruling by the Ninth Circuit that relied entirely on a subjective evaluation of the officer's motives. However, the high court also articulated an important exception to the rule: If evidence in the record shows that the officer singled out someone for arrest and treated the arrestee differently from other similarly situated persons, the officer may still be susceptible to a retaliation claim.

De-escalation tactics matter in Fourth Amendment claims

- *Estate of Ceballos v. Husk, 919 F.3d 1204 (10th Cir. 2019).*

- Thornton police were dispatched to a home where a woman reported that her husband was in the driveway of the home, "acting crazy," and brandishing a couple of baseball bats. The officers advanced on the subject and, after the man refused to obey the officers' repeated commands to drop the bats, Officer Husk shot and killed the man. The shooting occurred within a minute of the officers arrival on the scene. The officers believed they were under an immediate threat at the precise moment the shooting occurred and thus the shooting was objectively reasonable under the Fourth Amendment.

- However, Officer Husk was denied qualified immunity based upon clearly established law in the Tenth Circuit holding that Fourth Amendment claims also require an evaluation of whether "the officers' own conduct during the seizure unreasonably created the need to use such force." *Allen v. Muskogee* (10th Cir. 1997). The absence

of any effort by the officers to "de-escalate" the situation under the facts of this case before using lethal force could support a Fourth Amendment claim, according to divided panel of the court.

Liability for violating confidentiality provisions of juvenile justice laws

- *A.N. v. Syling*, 928 F.3d 1191 (10th Cir. 2019).

- Even if an alleged constitutional violation does not have an exact "factual antecedent" in a prior Tenth Circuit or U.S. Supreme Court case, local officials will be denied qualified immunity if their behavior violates "general principles" previously articulated by the courts. In one case, a police department blatantly violated a state statute requiring that the identity of juveniles arrested for juvenile acts must remain confidential. Without any authority under the statute, the department decided that the identity of juveniles aged 16 and older could be reveled, but not those under 16. This irrational distinction supported an Equal Protection claim, even in the absence of any prior case law precisely on point.

Offenses to "personal dignity" of prisoner can violate Due Process

- *Colbruno v. Kessler*, 928 F.3d 1155 (10th Cir. 2019).

- A pretrial detainee at the Denver County Jail suffered a psychotic episode and was being transported to the hospital. On the way, the prisoner urinated and defecated on himself, and deputies removed the soiled clothing before escorting him naked through the intake area of the hospital where others could see the prisoner. Because the Fourth Amendment protects, among other things, a person's "sense of security and personal dignity" as a general proposition, a divided panel held that these facts could support a Due Process claim, even in the absence of any prior case law with similar facts.

"Brazen" outburst by deputy sheriff cannot be imputed to Denver

- *Waller v. City & Cty. of Denver*, 2019 WL 3543115 (10th Cir., Aug. 5, 2019).

- In a Denver courtroom in 2012, a pre-trail detainee was "politely addressing the court in a normal and subdued voice" when a deputy sheriff "without warning, justification or provocation" grabbed the detainee and smashed his face against a glass wall and metal post causing severe injuries. A jury held the deputy sheriff individually liable for a Fourth Amendment violation on these facts. However, the Tenth Circuit affirmed the dismissal of municipal liability claims against Denver itself. The plaintiff simply failed to sufficiently allege in his complaint anything that Denver did or did not do that would lead to this bizarre outburst, with the appellate court concluding: "nothing . . . would explain why Deputy Lovingier would brazenly launch a wholly unprovoked attack on a

detainee in front of a judge—an multiple cameras—in a courtroom." Of particular note in the case: the appellate court ruled that reports and audits of systemic problems in the Denver Sheriff Department that came out *after* the 2012 incident (and which ultimately led to management reforms within the department) could not be used to establish an official policy or practice that was in existence prior to the incident.

No Fourth Amendment or Due Process liability for police chase of "UTV"

- *Lindsey v. Hyler,* 918 F.3d 1109 (10th Cir. 2019)

- After "spending the afternoon drinking beer" a couple of young men took off down the road on a CanAm "small utility task vehicle (UTV), a four-wheeled vehicle used for light construction and recreation." In so doing, the men violated several traffic laws, including the fact that the UTV was not "street legal." When a police officer pursued the UTV and activated his siren, the men sped away, crashed on a curve, and suffered serious injuries. In the absence of any evidence that the officer's vehicle had physically contacted the UTV, the Tenth Circuit held that there could not be a Fourth Amendment "seizure" under these facts. Moreover, the court ruled there could not be a Substantive Due Process violation because it hardly "shocks the conscience" for an officer simply to pursue a fleeing vehicle.

Turn signals and the Fourth Amendment

- *People v. Burnett,* 432 P.3d 617 (Colo. 2019); *U.S. v. Rubio-Sepulveda,* 237 F. Supp. 3d 1116 (D. Colo. 2017), *appeal docketed,* No. 18-1055 (10th Cir. Feb. 13, 2018).

- Obstructed windshield. Broken tail light. Failure to use turn signals. Many a Fourth Amendment claim has arisen out of a traffic stop that was triggered by these types of infractions and then resulted in a search that turned up drugs, guns or some other cause for arrest. This year a 5-2 majority of the Colorado Supreme Court ruled for the first time that a state trooper erred when the trooper stopped a car for failure of the driver to activate a turn signal for a sufficient distance before changing lanes. The majority deemed the state traffic code to be clear and unambiguous on this point—there is no time or distance requirement for signaling a lane change, and it was not "objectively reasonable" for the trooper to interpret the statute otherwise. Methamphetamines and an illegal firearm seized in this traffic stop were thus subject to the exclusionary rule in this case.

- Coincidentally, a similar case was pending in the Tenth Circuit, in which a Westminster police officer initiated a traffic stop for failure to signal a lane change for a sufficient distance. Federal Judge Christine Arguello reached exactly the opposite conclusion from the Colorado Supreme Court and noted it was objectively reasonable for the officer to interpret the statute this way.

PUBLIC WORKS AND UTILTIES

ADA complaints about Trinidad sidewalks survive on a day-to-day basis

- *Hamer v. City of Trinidad*, 2019 WL 2120132 (10th Cir. May 15, 2019)

- The City of Trinidad is in a dispute with one local resident over the question of whether deficiencies in the city's sidewalk system violate Title II of the Americans with Disabilities Act (ADA). The citizen identified 79 city sidewalks and curb cuts that allegedly violated the ADA and brought his complaints directly to the city council; but then the citizen waited for over two years before suing in federal court. The city moved to dismiss the claims as untimely and the district court agreed. However, the Tenth Circuit reversed, holding that each day a "program, service or activity" remains out of compliance with Title II of the ADA constitutes a "repeated violation," essentially preventing the statute of limitation from running as long as the violation continues to exist. Apparently, this ruling is the first of its kind in the United States, at least insofar as ADA sidewalk claims are involved. However, the ruling reserved judgment on a much more fundamental question, a question that may be addressed on remand: Is a municipal sidewalk system a type of "program, service or activity" that is even covered by Title II?
- A petition for writ of certiorari to the U.S. Supreme Court, supported by CML and IMLA, is pending in this case.

TAXATION AND FINANCE

TABOR can now be entirely repealed in a single ballot question (but will it?)

- *In the Matter of the Title, Ballot Title and Submission Clause for 2019-2020 #3*, 442 P.3d 867 (Colo. 2019).
- A 5-2 majority of the Colorado Supreme Court held that the constitutional single-subject rule does not prevent the voters from repealing TABOR in its entirety with a single ballot question. The court had indicated for years that, since TABOR itself covers so many different subjects, it would be impossible to repeal it with a single question. However, the majority of the current members of the court have now concluded that a simple repeal measure should be analyzed differently under the single subject rule than would a question proposing to adopt new language in the constitution in the first place.
- Query: Would it be possible under the single-subject rule and the reasoning of the court in this case to repeal everything in TABOR *except* the basic requirement to vote on new taxes and tax rate increases?

Effort to totally invalidate TABOR continues its slow progress through the federal courts

- *Kerr v. Polis*, No. 930 F.3d 1190 (10th Cir. 2019).

- In 2011, a group of state legislator and local government officials (including a few city council members, long since departed) sued in federal court claiming TABOR violates the guarantee of a "government republican in form" as secured by Art. IV, sec. 4 of the U.S. Constitution. Eight years later, the courts still have not reached the merits of this novel claim, as all rulings to date have focused on standing and jurisdictional issues. In the latest chapter, a divided panel of the Tenth Circuit issued a very narrow ruling: political subdivision plaintiffs (ten school districts, one county, and one special district) could not be knocked out on a Rule 12(b)(1) motion to dismiss for lack of standing. The question of whether the Guarantee Clause provides a legally protected interest to political subdivisions of a state is too "intertwined" with the ultimate merits of the case, i.e., what does the Guarantee Clause even mean in the first place?

- There was nothing in this year's decision that provided any comfort to the plaintiffs that they will ultimtely prevail on the merits. Indeed, the court treated the Guarantee Clause as essentially being a riddle that no court has ever truly deciphered.

Deadlock in Colorado Supreme Court results in loss for Breckenridge in lodger's tax case

- *Town of Breckenridge v. Egencia,* 441 P.3d 1020 (Colo. 2019)

- The Colorado Supreme Court announced a 3-3 tie in a Breckenridge case involving the applicability of a municipal lodger's tax ordinance to on-line travel companies, thus affirming by operation of law the earlier decision by the court of appeals adverse to the town. In 2017, the City and County of Denver won a 4-3 victory in the Colorado Supreme Court allowing the city to collect lodger's taxes on the markup imposed by on-line hotel booking companies such as Travelocity and Orbitz. Denver prevailed on the theory that the online companies are engaged in the business of *"furnishing"* hotel rooms within the meaning of its ordinance. Last year the Colorado Court of Appeals reached the opposite conclusion in relation to a lodger's tax ordinance such as the one in Breckenridge that refers to the *"leasing"* of hotel rooms. Simply put, because the on-line travel companies do not have a possessory interest in the hotel rooms in Breckenridge, they cannot be deemed to "lease" the rooms, and thus cannot be required to pay the tax.
- Earlier in this case the court of appeals also rebuffed an attempt to certify fifty-five other home rule municipalities as a class to make their own claims that on-line travel companies should be collecting and remitting lodger's taxes. Bottom line: Each municipality will need to determine whether it can apply its lodger's tax ordinance to the on-line travel companies based upon the particular wording of their own ordinance

No use tax on furniture displays

- *Big Sur Waterbeds v. City of Lakewood,* 440 P.3d 1214 (Colo. App. 2018); *cert. denied* (2019).

- When retailers purchase inventory at wholesale with the intention to re-sell the goods to consumers, they are typically not required to pay sales or use tax on the wholesale purchase price. This holds true even if some of the goods, like furniture and home accessories, are temporarily displayed in a showroom before the goods are eventually sold to consumers. Lakewood attempted, unsuccessfully, to argue that furniture displayed in showrooms was being used for marketing purposes and should thus have triggered a use tax liability.

Golden loses sales tax battle with food concessionaire at Colorado School of Mines

- *City of Golden v. Sodexo America, LLC,* 431 P.3d 444 (Colo. App. 2019)

- A unanimous Colorado Supreme Court ruled that the City of Golden may not apply its sales tax to the concessionaire that supplies food plan meals to School of Mines students. The court determined that the concessionaire was essentially a wholesale supplier, selling food to the university who in turn sold it to the students. Like other municipalities, the Golden sales tax ordinance contains an exception for wholesale sales. Although the outcome in this case was relatively fact-bound, the decision may provide guidance for other situations in which there is a dispute about the distinction between wholesale and retail sales.

Privately-owned hangar at Centennial Airport subject to property taxation

- *Rare Air Ltd. v. Property Tax Administer,* 2019 WL 4064961 (Colo. App. Aug. 29, 2019)

- For the past twenty years private businesses located on tax-exempt public property (e.g. via a lease or concession) have been subject to *ad valorem* property taxation under a "possessory interest" theory. In the latest example, an entity that constructed and operated a hangar at Centennial Airport in Arapahoe and Douglas County and held title to the improvements under a sub-lease was required to pay taxes on the value of the improvements. The hangar in this case was valued at over $2.8 million. The owner of the hangar tried in vain to argue that the tax liability should be borne by the master lessee and not by them as sublessee.

- One interesting sidelight to this case: The Douglas County BOCC was prepared to abate the property taxes in this case; but the BOCC was countermanded by the State Property Tax Administrator who appropriately determined that taxation of the hangar was mandated by the Colorado Constitution.

ZONING, LAND USE AND EMINENT DOMAIN

A Sea Change for Regulatory Takings Litigation

- *Knick v. Township of Scott,* 139 S.Ct. 2162 (2019).
- Until now, it was not possible for a plaintiff to directly file a §1983 action in federal courts seeking "just compensation" for a regulatory taking without first having exhausted "inverse condemnation" remedies in a state court. Now, the U.S. Supreme Court has reversed its longstanding ruling in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and held that a takings claim is no different from any other civil rights claim for which a plaintiff has direct access to federal courts. The practical effect of this landmark ruling will likely be to increase the complexity and costs associated with takings litigation in the future (including new exposure for payment of plaintiffs' attorney fees). Notably, however, the new ruling did not address or change our basic understanding of when regulations go "too far" and thus violate the Fifth Amendment.
- As municipalities tackle new regulatory initiatives, whether it be in traditional land use and regulatory matters or new endeavors such as oil and gas regulation, it is important to recognize now that disputes and challenges are likely to land now in federal court.

Another Analysis of Public/Private Nature of Metro Districts

- *Carousel Farms Metropolitan Dist. v. Woodcrest Homes, Inc.*, 2019 WL 2414999 (Colo. June 10, 2019)
- A number of appellate decisions in Colorado in recent years have explored the dual nature of metro districts, entities that serve the interests of private developers yet are undeniably governmental in nature. The latest example focused on eminent domain. The Town of Parker agreed to annex a large adjacent tract of land for development if the petitioner/developer managed to consolidate all of the property in one ownership. The developer then formed a metro district, and the first task of the district was to condemn a narrow sliver of land to consolidate the ownership and allow for the annexation. The metro district intended to use the sliver for roads and utilities in the new development. Reversing a 2017 decision by the court of appeals, a unanimous Colorado Supreme Court ruled that this exercise of eminent domain served a legitimate public purpose, notwithstanding the private benefits which obviously flowed to the developer who formed the district.

Eminent domain and private restrictive covenants

- *Town of Monument v. State by and through State Board of Land Commissioners*, 2018 WL 4781388 (Colo. App., October 4, 2018); *cert. granted* sub nom *Decker v. Town of Monument* (2019)

- This case involves ongoing efforts by the Town of Monument to install a water storage tank in a residential neighborhood. If a municipality acquires a lot in a subdivision that is subject to restrictive covenants, is the municipality obliged to abide by the covenants? If the municipality wants to use the lot for a public purpose that is prohibited by the covenants, must the municipality pay just compensation to all the other lot owners? Apparently not, because a restrictive covenant does not create a compensable property interest according to the court's interpretation of a 1956 Colorado Supreme Court decision in this case.
- The majority rule in other states treats private restrictive covenants as a type of property interest that cannot be taken without just compensation.

Zoning protest procedures may apply to other municipal regulatory actions

- *O'Connell v. City and County of Denver,* 2019 WL 2108760 (Colo. App. May 2, 2019)
- Zoning codes commonly contain a procedure allowing a certain percentage of dissenting property owners to file a petition objecting to a rezoning, thus triggering the need for a supermajority vote by the governing body to approve the rezoning. Indeed, this sort of protest procedure is a central feature of zoning enabling statues throughout the country. See, e.g., §31-23-305, C.R.S.
- Now, in a remarkable and unprecedented decision, the Colorado Court of Appeals has ruled that opponents can potentially invoke this sort of zoning protest procedure even in the case of regulatory enactments that have nothing to do with zoning, *per se*. Denver's landmark preservation code allows for the creation of landmark districts to serve historic preservation objectives. In Denver, the landmark code is separate and distinct from the zoning code. Nevertheless, the court held that dissenting property owners could invoke the rezoning protest procedures, and thus trigger the need for a supermajority vote for city council to approve a new landmark district.

Oil and gas decision traces direct line to adoption of SB 19-181

- *Colorado Oil and Gas Conservation Commission v. Martinez,* 433 P.3d 22 (Colo. 2019).
- Just as the Colorado General Assembly was convening this year, the Colorado Supreme Court issued their unanimous opinion in this case. The court overruled a 2017 decision of the court of appeals and agreed that, under its former statutory

mandate, the COGCC did not have the authority to adopt a rule that would flatly preclude the commission from approving new oil and gas development absent a showing that the development "does not cumulatively with other actions . . .contribute to climate change."

- SB 19-181 repealed or substantially altered much of the language in the statute that led the court to this conclusion: references to "fostering" the industry were stricken, statutory language on preventing "waste" of oil and gas (the original purpose of the statue) was substantially weakened; language requiring the CGOCC to take into account the "cost-effectiveness and technical feasibility" of their regulations was stricken.
- Query: Will anti-fracking activists now renew their call for exactly the same sort of rulemaking that was denied in this case?

Third-party Challenges for "Wrongful Approval" of Oil and Gas Drilling Permits

- *Weld Air & Water v. Colorado Oil and Gas Conservation Commission,* 2019 WL 2375889 (Colo. App. June 6, 2019).
- Aside from the much-ballyhooed "local control" provisions of SB 19-181, the new state legislation promises to change dramatically the way the COGCC itself handles future applications for oil and gas permits. One issue to watch: How robustly will future regulations increase the power of neighbors and environmental groups to oppose new drilling permits at the COGCC on a case-by-case basis? Echoing themes familiar to municipal attorneys who handle land use decisions and appeals under Rule 106(a)(4), the court of appeals showed how difficult it is for opponents to win a case for "wrongful approval" of a drilling permit under the former law..
- The case involved the approval of two wells near a school in the City of Greeley. On the one hand, it was relatively easy for the opponents to establish standing to challenge the approval of a drilling permit in order to vindicate their "aesthetic, recreational, health and environmental interests." On the other hand, it was impossible for the opponents to prevail in the end as long as the COGCC made a proper record and followed their own rules in granting the permit.

Littleton land use appeals go to district court, <u>not</u> municipal court

- *Burger Inv. Fam. Limited Partnership v. City of Littleton,* 2019 WL 3949250 (Colo. App., Aug. 25, 2019).
- In 2004 we learned for the first time that a municipal court might exercise jurisdiction over the appeal of a land use decision, depending on how the charter for the municipality is worded. *Town of Frisco v. Baum,* 90 P.3d 845 (Colo. 2004) (where the charter gave the municipal court exclusive original jurisdiction over "all matters arising" under the ordinances of the Town).

- In the wake of *Baum*, some home rule cities amended their charters to clarify that the function of the municipal court is solely to hear charges related to "violations" of local laws, not garden-variety civil cases. For example, Littleton voters amended their charter to clarify that the jurisdiction of their municipal court extended only to causes arising under the city's ordinances "for a violation thereof." Ironically, however, in a case involving an appeal from an approval of a PUD amendment, the City of Littleton joined the applicant for the amendment in arguing that *Baum* should still control notwithstanding the charter amendment, and the appeal should be heard in municipal court. The court of appeals disagreed, and interpreted the city charter as excluding appeals arising under C.R.C.P. 106(a)(4), which should properly be filed in state court.

MISCELLANY

In civil forfeiture case, U.S. Supreme Court holds Eighth Amendment ban on excessive fines applies to the states

- *Timbs v. Indiana,* 139 S.Ct. 682 (2019)

- The U.S. Supreme Court held for the first time in a unanimous opinion that the Eighth Amendment's Excessive Fines Clause is incorporated in the Fourteenth Amendment's Due Process Clause and is therefore applicable to the states. Equally as important, the court refused to revisit its precedent holding that civil forfeiture laws are subject to Eight Amendment claims when such laws are designed, in whole or in part, to be punitive in nature. In this case, a defendant who pled guilty to a drug charge that carried a maximum $10,000 fine was required to forfeit his $42,000 Land Rover SUV.
- "Civil forfeiture reform" has been a popular topic among some Colorado state legislators for many years, and alleged "abuses" by municipalities (especially in regard to seized vehicles) sometimes draws their attention.

Ban on large-capacity ammunition clips upheld

- *Rocky Mountain Gun Owners v. Hickenlooper*, 2018 WL 5074555 (Colo. App., October 18, 2018); *cert. granted* (2019).

- Noting the quadrupling of mass shootings in the U.S. since Columbine, the court of appeals upheld a ban on large-capacity magazines (LCMs) adopted by the Colorado General Assembly in 2013. The plaintiffs had mounted a challenged under Art. II, Sec. 13 of the Colorado Constitution only, not the Second Amendment, because the state constitution arguably confers a broader right to keep and bear arms for self-defense than does the federal constitution. Applying Colorado precedent, the court held that the LCM ban represented a reasonable exercise of the police power, was not overbroad, and did not impair the right to possess firearms for self-defense.

- At least three Colorado municpalities regulate high-capacity magazines: Denver (1989), Vail (1994) and Boulder (2018). The Boulder ordinance adopted just last year is currently the subject of a court challenge.

Rights of criminal defendants to advisement on "immigration consequences" of guilty pleas

- *People v. Alvarado Hinojos*, No. 444 P.3d 755 (Colo. 2019); *People v. Chavez-Torres*, 442 P.3d 843 (Colo. 2019).
- The Colorado Supreme Court ruled in two separate cases on the circumstances in which non-citizen defendants can re-open a criminal case years after the fact, on the theory that they were not adequately advised that a guilty plea may subject them to deportation. In one case, a 4-3 majority of the court held that a very general advisement of potential immigration consequences in a plea agreement was adequate and the defendant could not reopen the case. In the other, the court unanimously held that no mention of immigration consequences at the time the defendant pled guilty could create grounds for the defendant to petition to vacate his plea many years later.
- Although these were state court cases, these holdings may have relevance to municipal courts. Via the adoption of HB 19-1148 this year, the General Assembly also attempted to mitigate immigration consequences by limiting the maximum jail sentence for municipal ordinance violations to 364 days (rather than one year).

Sex offender registration as a potential Eighth Amendment violation?

- *People in the Interest of T.B.*, 2019 WL 2528764 (Colo. App. June 20, 2019)
- In a remarkable turn of events, a division of the Colorado Court of Appeals ruled for the first time that the obligation to register under longstanding state sex offender registration statutes may be considered a form of "punishment" and thus could be the basis of an Eighth Amendment claim of cruel and unusual punishment depending on the circumstances of the case. (This case involved a provision of the statute that requires lifetime registration for anyone convicted twice for sexual offenses, even those offenses committed as a juvenile.) Over the last twenty years, other divisions of the court of appeals had reached exactly the opposite conclusion on ten prior occasions. Not surprisingly, the panel in the new case split 2-1, and this ruling is almost certain to trigger Colorado Supreme Court review.
- Municipalities care about Colorado's sex offender registration system for two distinct reasons: (1) all municipal police departments play a hands-on role in administering the registration system at the local level; and (2) a handful of municipalities have chosen to adopt restrictions on where sex offenders may reside and register within their communities.

City attorneys enjoy absolute immunity from §1983 claims when defending their clients in court

- *Benavidez v. Howard*, 931 F.3d 1225 (10th Cir. 2019).

- The Tenth Circuit confirmed the following, "a government defense attorney who, in the course of a civil adjudication, prepares a motion and arranges for the presentation of evidence on the court record by way of affidavit in support of the motion, is absolutely immune from a collateral § 1983 suit for damages based on the filing of such motion and affidavit." In this case, a city clerk was being sued in state court by a candidate for mayor after the clerk determined the candidate's nominating petitions were insufficient. The candidate's daughter then proceeded to repeatedly harass the clerk (including forcing her way into a secure area of the office to confront the clerk). City attorneys filed a motion for a protective order in the state court matter to limit further contact with the clerk by the daughter or anybody else on the candidate's campaign staff. The candidate and her daughter then filed a collateral First Amendment retaliation claim in federal court against the clerk and three city attorneys who participated in filing the motion.

- The Tenth Circuit easily determined that the attorneys enjoyed absolute immunity as participants in a judicial a process. The First Amendment retaliation claim against the clerk was dismissed as well based upon the facts of this case and circuit precedent.

Distinguishing "pawnbrokers" and "secondhand dealers" in state and municipal laws

- *Pro's Closet v. City of Boulder,* 2019 WL 3949252 (Colo. App., Aug. 22, 2019).

- Pro's Closet is a Boulder-based business that buys and sells used bicycles and bike components, and is licensed by the city as a "secondhand dealer." The business does not behave like a traditional "pawnbroker" in the sense of offering a thirty-day right of redemption to the seller (with a concomitant obligation to hold the goods for thirty days before selling the goods to someone else). Instead they simply buy and sell used goods. Nevertheless, the Boulder District Attorney and the City took the position that the business should be required to hold goods for thirty days anyway, in accordance with state pawnbroker statutes. Interpreting the plain language of the statute (language that has been in place since 1984), the trial court and the court of appeals agreed. The court noted that the Colorado pawnbroker statute is "unique" in the U.S. in that it encompasses not only traditional notions of what it means to "pawn" property, but also any straight buy-and-sell transaction involving used property. The court noted, "To be sure, the potential scope of the statute's application gives us some pause" but suggested it would be up to the state legislature to fix any unintended consequences caused by the statute's broad language.

- Police departments, concerned that either pawnbrokers or second hand dealers may deal in stolen goods, strongly support record keeping and mandatory hold periods for any bsuiness that buys and sells used goods. Query: If the state pawnbroker statute covers, not just traditional pawn shops, but also any other business that is engaged in

the buying and selling of any used personal property, is there any need for state and local laws separately regulating "secondhand dealers" as a distinct class of business?

APPENDIX: CML AMICUS PARTICIPATION IN 2018-19 DECIDED CASES

Barner v. Town of Silt

- Issue: Whether a *Trinity* evidentiary hearing is required before concluding that the Colorado Governmental Immunity waiver for "operation and maintenance" applies
- Status: Petition for Cert. before the Colorado Supreme Court denied on April 19, 2019.
- CML *Amicus* Author: Sophia Tsai, Morgan Rider Riter Tsai, P.C.

Boulder v. Taylor

- Issue: Whether a water meter put on private property is a "public water facility" for purposes of a waiver under the Colorado Governmental Immunity Act
- Status: Petition for Cert. denied by the Colorado Supreme Court on March 18, 2018.
- CML *Amicus* Author: Dianne Criswell, CML (currently works at Kelly P.C.)

City of Golden v. Sodexo

- Issue: Whether a food concessionaire is a wholesale provider that is exempt from city sales tax or a retail provider that must pay city sales tax
- Status: Sodexo prevails before the Colorado Supreme Court on May 20, 2019.
- CML *Amicus* Author: Dianne Criswell, CML (currently works at Kelly P.C.)

Lopez v. City of Grand Junction

- Issue: Whether immunity can be waived under the Colorado Governmental Immunity Act for incidences caused by an independent contractor that is performing its work without specific direction by a public entity
- Status: Petition for Cert. before the Colorado Supreme Court denied on April 29, 2019
- CML *Amicus* Author: Marni Kloster and Nicholas Poppe, Nathan, Dumm & Mayer P.C.

M.A.K. Investment Group LLC v. Glendale

- Issue: Whether a municipality must notify property owners of blight designation under the Urban Renewal Statute and the Due Process Clause of the Fourteenth Amendment
- Status: Appeal for En Banc Review by the 10th Circuit denied on July 31, 2018; Court amended original decision
- CML *Amicus* Author: Carolynne White, Brownstein Hyatt Farber Schreck; filed jointly with the Special District Association and Downtwon Colorado Inc.

PENDING CASES

AMC Theaters v. Aurora

- Issue: Applicability of municipal use tax to digital movies displayed in theaters as a type of tangible personal property
- Status: Fully briefed and pending before the Colorado Court of Appeals
- CML *Amicus* Author: Michael Axelrad, City of Greeley; filed jointly with five municipalities

Aptive Environ., LLC v. Town of Castle Rock

- Issue: First Amendment challenge to door-to-door solicitation curfew
- Status: Pending before the 10th Circuit Court of Appeals; fully briefed and oral argument occurred in May, 2019.
- CML *Amicus* Author: Todd Messenger, Fairfield and Woods, P.C.

Decker v. Town of Monument

- Issue: Whether municipalities and other condemning authorities must pay just compendation to eliminate private restrictive covenants on property aquired by the municipality
- Status: Monument prevailed in the Colorado Court of Appeals on October 4, 2018; Petition for Cert. granted June 3, 2019
- CML *Amicus* Author: Laurel Witt, CML

Dunafon v. Independent Ethics Commission

- Issue: Jurisdiction of the IEC over home rule municipalities who have their own ethics codes
- Status: Pending and fully briefed before the Colorado Court of Appeals; on August 14, 2019 the court of appeals asked for supplemental briefing on the question of whether or not the court has jurisdiction to hear the case
- CML *Amicus* Author: Tracy Lessig, City of Colorado Springs

Hamer v. City of Trinidad

- Issue: Whether "continuing violation doctrine" applies to ADA Title II claims (sidewalks)?
- Status: On May 15, 2019 the Tenth Circuit ruled against Trinidad; Pending Petition for Cert. before the U.S. Supreme Court
- CML *Amicus* Author: Lindsay Rose, City of Colorado Springs

John Does 1-9 v. Colo. Dept. of Public Health and Environ.

- Issue: Definition of "public body" under the Colorado Open Meetings Law; whether an entire agency of government can be considered a "public body"
- Status: Pending before the Colorado Supreme Court; oral argument scheduled for September 17, 2019
- *Amicus* Author: Emmy Langley, Assistant Solicitor General. Attorney General's Office; filed jointly with seventeen state departments

Lech v. Jackson

- Issue: Viability of takings claim for property destroyed in police raid
- Status: Fully briefed and pending before the 10th Circuit Court of Appeals
- CML *Amicus* Author: Dianne Criswell, CML (currently works at Kelly P.C.); jointly filed with IMLA

National Association for Gun Rights, Inc. v. Polis

- Issue: CML focused on the singular issue of the standard of review that applies to any legal challenge to any state or local firearms regulation; the Supreme Court will ultimately determine whether the high-capacirt magazine restriction in HB 1223 violates the right to keep and bear arms secured by the Colorado Constitution.
- Status: Pending before the Colorado Supreme Court, oral argument scheduled for November 13th
- CML *Amicus* Author: David Broadwell, CML

Williams v. National Federation of Independent Business (NFIB)

- Issue: Whether SOS business licensing "fees" are actually "taxes" under TABOR
- Status: Pending before the Colorado Supreme Court; oral argument occurred on June 25, 2019
- CML *Amicus* Author: David Broadwell, City and County of Denver (currently works at CML); jointly filed with Denver

Lakewood Tries a Growth Cap on for Size

TIM COX
LAKEWOOD CITY ATTORNEY
MICHOW COX & MCASKIN LLP

July 2, 2019: Lakewood voters approve a citizen-initiated ordinance that would cap the number of permits that can be issued for residential units in a given year

May 23, 2017: Original form of petition submitted to City Clerk.

Yes, you read that right: the initiative was the subject of a special election nearly **14 months** after it was introduced

April 2013: Major rezoning of City converts most commercial zones to mixed-use.

Some think the zoning change led to numerous large-scale, high-rise rental projects

Ordinance was "modeled" after Golden's 1996 Ordinance

By "modeled" we mean the drafters changed "Golden" to "Lakewood"

Key Events in Timeline Leading to Adoption:

May 2017	Petition representatives submit form of petition to Clerk
June 2017	Clerk sets Title, Summary and Submission Clause, and approved form of petition
July 2017	Petition reps submit signed petitions to Clerk
	Attorney representing resident asks Clerk to hold inquiry and hearing on protest

Key Events in Timeline Leading to Adoption:

August 2017 Clerk rejects protest as inadequate, makes initial determination of petition sufficiency, and hires outside counsel to defend protest

Valid protest filed; hearing before Clerk set for Aug 30 and 31

Protester's attorney requests, receives one-day delay; later gets continuance to September 7

Key Events in Timeline Leading to Adoption:

September 2017 Hearing concludes; clerk determines that petitions were sufficient, enters order affirming validity of petition

Protester files complaint in district court against Lakewood and two petition representatives

Key Events in Timeline Leading to Adoption:

October 2017 Defendants answer complaint

November 2017 One of two petition representatives withdraws

Protester files motion to remand to hearing officer to declare petition invalid

Key Events in Timeline Leading to Adoption:

December 2017 Defendants respond to motion to remand

March 2018 Protester files opening brief on 106 claim

April 2018 City and remaining Petition Representative file 106 answer briefs

Defendants file Motion to Dismiss

Key Events in Timeline Leading to Adoption:

May 2018 Defendants file motion for oral argument on 106 appeal

July 2018 Oral argument on 106 appeal, motion to remand, motion to dismiss

August 2018 District Court issues order ruling in City's favor on 106 appeal, motion to remand, and other claims

Key Events in Timeline Leading to Adoption:

December 2018 Court dismisses constitutional claims

January 2019 Protester files notice of appeal

February 2019 Lakewood City Council adopts ordinance removing "stay" provisions from Initiative/Referendum

April 2019 Protester files motion for injunctive relief – in District Court – to stop special election

Key Events in Timeline Leading to Adoption

July 2019	With no protest or appeal pending, question 200 appears on Lakewood voters' ballots at a special election
September 2019	City requests oral argument on appeal

So what took so long?

5 Factors that You May Never Encounter with a Citizen-Initiated Ordinance

The Stay – Lakewood Code Provisions Prevented Vote
The Runaway - Petition Rep's Withdrawal affected validity?
The Replay – Protester pressed the validity argument in Dist. Ct.
The Delay – City did not explicitly ask City Council to act quickly
The Cache – Get yourself a high-priced, well-known elections lawyer

5 Factors that You May Never Encounter with a Citizen-Initiated Ordinance

The Stay – Lakewood's Municipal Code provided:

The City Council, notwithstanding the above provisions, shall not act on any petition presented to it during the pendency of any protest or proceedings … or any review thereof or appeal therefrom.

5 Factors that You May Never Encounter with a Citizen-Initiated Ordinance

The Stay – Lakewood's Municipal Code also provided:

Upon timely appeal to the District Court of Jefferson County of any decision of the City Clerk, all proceedings leading to any election upon any initiative petition shall be suspended until final disposition of such review …

5 Factors that You May Never Encounter with a Citizen-Initiated Ordinance

The Runaway – The LMC states that every petition must have two representatives. One withdrew after the protest was in court, citing threats of bodily harm and financial ruin.

The withdrawal raised questions about what authority the petition representatives have at the various stages of the proceedings.

5 Factors that You May Never Encounter with a Citizen-Initiated Ordinance

The Replay – The Protester's attorney believed the withdrawal of the petition rep rendered the petition invalid because the Code requires two representatives "at all times." But instead of asking the court to address the issue, the Protester filed a motion to remand the case to the hearing officer, believing the Clerk to be the only person authorized to rule on the validity of a petition.

The withdrawal raised questions about what authority the

5 Factors that You May Never Encounter with a Citizen-Initiated Ordinance

The Delay – The petition representatives said they filed the petition at the precise time necessary to get the question on the November 2017 ballot. Then the protest came along, accompanied by the stay. Even after the claims were resolved in favor of the City and the petition, the petition representative and others alleged the City deliberately avoided telling the judge when the case needed to be decided.

5 Factors that You May Never Encounter with a Citizen-Initiated Ordinance

The Delay – The City's motion for oral argument in the district court was filed in large part to get the court to focus on the claims; the motion for oral argument in the appeals court was criticized as being a ploy to run up the petitioner's legal fees.

5 Factors that You May Never Encounter with a Citizen-Initiated Ordinance

The Cache – When all else fails, get yourself a Grueskin.

Loose Ends

Constitutional Claims

At each stage of the appeal, the complaint has included challenges to the constitutionality of the ordinance itself, even though the law is clear that the ordinance must be adopted before it can be challenged.

Loose Ends

Interpretation and Application

Like Golden, Lakewood cannot repeal or amend the ordinance for 6 months. But we have identified undefined or ambiguous terms and adopted rules of procedure. We anticipate some amendments after 1/1/20.

Residential Growth Management

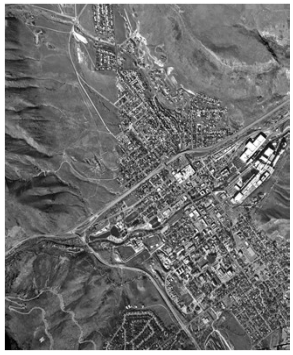
In Golden, Colorado

September 27, 2019

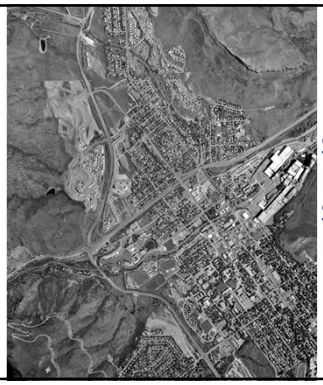
What Prompted It?

How was it enacted?

How has it evolved?



Pre 1990



1995:

SH 93 “Bypass”
Large Subdivision
Soils Mitigation
Beige Glacier

Initiated Question No. One

Shall Proposed People’s Ordinance No. 95-1, restricting the issuance of building permits to limit residential growth in Golden to one percent (1%) per year, effective 1996, be adopted?

Petitioners met with City Attorney and agreed to:

- Simple question as opposed to implementing ordinance
- Initiated Ordinance as opposed to Charter Amendment
- Effective date of January 1, 1996 (approx. 55 days later)

Over 60% passage

Rush on Building Permits through December 1995

Moratorium implemented January 1 through March

Staff driven drafting of implementing ordinance with input from petitioner committee and builders

Enacted March 1996 - 72 allocations in first year

Formula distribution – dealing cards

Planner/lawyer drafted… so lots of administrative sections included to address….

What if this happens, what if that happens?

By City Home Rule Charter, an initiated ordinance can be amended or repealed after six months.

First Amendments adopted in summer of 1997 to maintain intent but add needed flexibility

- Banking of Allocations beyond year end
- "Pipeline Pool" to assure substantial majority of allocations to existing projects (single family)
- Process for Council to authorize exemptions for senior housing and up to 72 maximum downtown units

2013 Amendment discussed and supported by most of the original petitioners:

- Enable "borrow from future allocations" for Transit Oriented Development near RTD W Line.
- Eliminate potential for senior exemption
- Reduce number of allocations for five years from 1% to 0.9%

2018 Amendment proposed by Planning Commission:

- Extend borrow from future allocations to affordable housing.
- Still limited to no more than 1/3 of total annual and no more than 4 years into future….. Effectively allows early start for about 100 unit project every 3 or 4 years.

Thoughts……..

- Original target and 1990's construction primarily single family suburban subdivisions – much easier to phase.
- Managed to not get sued by previously approved developments.
- Biggest builder concern is unpredictability of future competing developments

More Thoughts……

- Lenders do not want to release financing until all allocations in hand – limits phasing.
- Restricting building permits instead of initial entitlements less efficient.
- Due to unique geography, probably little long term effect on level of residential construction EXCEPT prevented annexation requests to north.

Thanks and Questions

Steve Glueck
sglueck@cityofgolden.net

Opioid Litigation and the Negotiation Class

Seminar on Municipal Law
Colorado Municipal League
September 27th, 2019

KELLERROHRBACK

Corey Hoffmann

- Hoffmann, Parker, Wilson, & Carberry, P.C.
- Clients in the Opioid Litigation
  - City of Northglenn
  - City of Black Hawk
  - Town of Hudson

2

GOAL: To inform CO municipalities about the Opioid Litigation

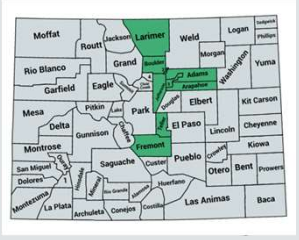
Every non-participating municipality in America, large and small, will soon be receiving a notice about the Opioids Negotiation Class. This presentation will equip you with information before your clients receive that notice and start coming to you with questions about it.

We are NOT here to urge additional municipalities to join the litigation, and recognize that not all municipalities will wish to file suit.

3

Colorado – a Diverse Coalition

- Adams County
- Arapahoe County
- Boulder County
- City and County of Broomfield
- City and County of Denver
- City of Aurora
- City of Black Hawk
- City of Brighton
- City of Commerce City
- City of Federal Heights
- City of Northglenn
- City of Sheridan
- City of Thornton
- City of Westminster
- Fremont County
- Jefferson County
- Larimer County
- Teller County
- Town of Hudson
- Tri-County Health Dept.



Types of Defendants

- Drug Manufacturers
  - *Examples*: Purdue, Johnson & Johnson, Endo, Mallinckrodt
  - Sackler Family also sued, acting as agents of Purdue Pharma
- Distributors
  - *Examples*; McKesson, Cardinal Health, AmerisourceBergen
  - Those big three account for 85-90% of all revenues from drug distribution

5

Causes of Action Brought

- Negligence
- False Advertising
- Nuisance
- Unfair Competition
- Consumer Fraud
- False Claims
- Fraud
- Unjust Enrichment
- Gross Negligence
- Civil Conspiracy
- Unfair and Deceptive Practices
- Insurance Fraud
- RICO
- Negligence Per Se

6

MDL Case Status

- *In Re: National Prescription Opiate Litigation*, MDL No. 2804
- Filed September 25, 2017
- On December 5, 2017, the JPML ordered the cases be consolidated and transferred to the Northern District of Ohio, to be heard by the Honorable Dan A. Polster
- Since the initial filing, cases continue to get filed – there are now over 2,100 cases in the MDL

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	CASE NO. 1:17-MD-2804
	)	JUDGE POLSTER
	)	ORDER

7

Hon. Dan Aaron Polster on the Opioid Crisis

What's happening in our country with the opioid crisis is present and ongoing. I did a little math. Since we're losing more than 50,000 of our citizens every year, about 150 Americans are going to die today, just today, while we're meeting.

And in my humble opinion, everyone shares some of the responsibility, and no one has done enough to abate it. That includes the manufacturers, the distributors, the pharmacies, the doctors, the federal government and state government, local governments, hospitals, third-party payors, and individuals. Just about everyone we've got on both sides of the equation in this case.

The federal court is probably the least likely branch of government to try and tackle this, but candidly, the other branches of government, federal and state, have punted. So it's here.

8

"That's what happened in the tobacco litigation" … Not doing that again

THE COURT: That I was going to raise at the end, but I'll raise it -- I'll point that out now.

The problem is that in a number of states, any money that is, that a State Attorney General obtains, either by victory in court, litigated judgment, or settlement, goes into the general fund. And the men and women who control what happens in the general fund are the elected state representatives and senators. That's what they do.

And that's what happened in the tobacco litigation. Over $200 billion, far more than 90 percent of that was used for public purposes totally unrelated to tobacco smoking, lung cancer, whatever. And I believe that's why we have all these counties and cities that filed separate lawsuits, to make sure that doesn't happen again.

9

What kinds of resources are cities/counties hoping to gain?

Prevention

- Training for health care providers around opioid use disorder (OUD) Treatment and responsible opioid prescribing
  - Medication-Assisted Treatment (MAT)
- Officer prevention strategies
  - Law Enforcement Assisted Diversion (LEAD) model
- Educational programming in schools about opioid risks
- Increased support for Children's Services

Treatment

- Expand telehealth and mobile services to increase access to treatment
- Funding for Screening, Brief Intervention and Referral to Treatment (SBIRT) programs
- Training related to treating OUD for emergency room personnel and other health care providers
- Support for referral strategies
  - Angel Programs or Police Assisted Addiction Recovery Initiative (PAARI)
- Drug treatment programs in jails

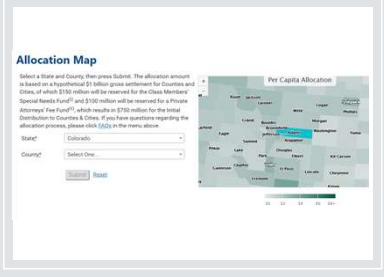
Harm Reduction

- Increasing availability of naloxone and rescue breathing supplies
- Public education materials to reduce stigma around addiction
- Training to ensure government staff know how to appropriately provide social services related to OUD
- Drug disposal programs

10

Motion for Negotiation Class

- Key documents are available on the website www.opioidsnegotiationclass.info



11

Motion for Negotiation Class: APPROVED

- Approved on September 11, 2019
- **Class Definition**: "All counties, parishes, and boroughs (collectively, 'counties'); and all incorporated places, including without limitation cities, towns, townships, villages, and municipalities (collectively 'cities')"
- Denver, CO is one of the 49 appointed Class Representatives

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: NATIONAL PRESCRIPTION OPIATE LITIGATION	)	Case No. 1:17-md-2804 Case No. 18-op-45090
THIS DOCUMENT RELATES TO:	)	Judge Dan Aaron Polster
All Cases	)	ORDER CERTIFYING NEGOTIATION CLASS AND APPROVING NOTICE
and	)	
The County of Summit, Ohio, et al., v. Purdue Pharma L.P. et al., Case No. 18-op-45090	)	

12

Timeline (Per Negotiation Class Order)

- Notice to be sent to all cities and counties via mail and email (where known) and posted on the Negotiation Class website – the Order specifies this should be done "as soon as possible"
- Exclusion Request Forms must be submitted via email or mail by **November 22, 2019** for any cities or counties choosing to opt out
- Class Notice provider (Epiq Global) to provide a report to the Court regarding completion of the notice program by **December 1, 2019**

13

Motion for Negotiation Class: APPROVED

- Supermajority approval needed for any proposed settlement offers:

75% of litigating entities by number 75% of litigating entities by population 75% of litigating entities by settlement fund allocation	and	75% of non-litigating entities by number 75% of non-litigating entities by population 75% of non-litigating entities by settlement fund allocation

- Opt out option available – will not share in any settlement reached by the Class
- Special Needs Fund – 15% of any settlement
  - Class members may apply for distributions for:
    - costs of litigating individual lawsuits
    - additional relief for impacts of opioid crisis not captured by the automatic allocation

14

What does it mean to be in the Negotiation Class?

- Participation in the Negotiation Class is automatic. It is possible to opt OUT.
- Negotiation Class members will be able to vote on any proposed settlement offers.
- Negotiation Class members will be eligible to collect funds from any settlement reached through the Negotiation Class mechanism.

15

Negotiation Class FAQs

- You do NOT need to hire an attorney.
- You do NOT need to do anything to stay in the class.
- You do NOT need to file suit.

16

Questions?

17

Thank You!

Gretchen Freeman Cappio
Keller Rohrback L.L.P.
gcappio@kellerrohrback.com

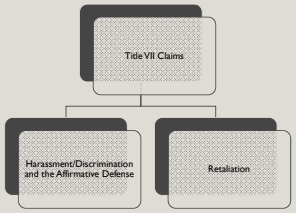
Corey Hoffmann
Hoffmann, Parker, Wilson, & Carberry, P.C.
cyh@hpwclaw.com

18

THE NEXT-GEN MUNICIPAL WORKPLACE

ANNA ITENBERG, KARP, NEU, HANLON
LIZ RITA, INVESTIGATIONS LAW GROUP
KIRSTEN CRAWFORD, LEGISLATIVE COUNSEL, DENVER CITY ATTORNEY'S OFFICE

LEGAL FRAMEWORK



BEYOND THE AFFIRMATIVE DEFENSE

CREATING A RESPECTFUL WORKPLACE FREE FROM HARASSMENT, DISCRIMINATION AND RETALIATION

COLORADO LEGISLATURE PROJECT – A CASE STUDY

- Best Practices
- Top Three Ways to Build a Respectful Workplace
  - Appropriate transparency
  - Methods and strategies to prevent retaliation in a political world
  - Role of outsiders

SCALING THE PROCESS TO FIT THE JURISDICTION

- Right sizing for allegations
- Right sizing for organization
- Combining roles

SPECIAL ISSUES WITH SMALLER JURISDICTIONS

- Identifying neutral complaint contacts
- Employing anti-retaliation strategies
- Advising on nepotism and other special concerns in the small town

SPECIAL ISSUES WITH ELECTED OFFICIALS

Charter Limitations	Open Meetings Laws	Consequences	Politics
Crafting a policy/process in compliance with Charter limitations	Maintaining confidentiality and complying with open meetings laws	Creating meaningful consequences for elected officials and balancing Due Process concerns	Ensuring the process is not being politicized

- **Scenario 1 – Managing the process in a small town**

- **Scenario 2 – Preventing or avoiding the lawsuit**

- **Scenario 3 – Managing the process when the complaint is against an elected official**

Municipal Courts and Criminal Justice Reform

CML 2019 annual seminar on municipal law

Michael Curran, Prosecution Division Chief, Colorado Springs
Erich Schwiesow, City Attorney, Alamosa
Carolyn Wolf, Lead Municipal Prosecutor, Lakewood

Solving problems you didn't know you had in ways you won't understand

Three Main Categories of Legislation since 2016

1. Advisement Issues
2. Sealing and Expunging Cases
3. Issuance of Bonds and Court Appointed Counsel

Legislation related to Advisements

In addition to the advisements that have been historically given to Defendants, Judges are now required to include specific information in the areas of:

- Right to Counsel at First Appearance
- Defendant's Ability to Pay Fines
- Immigration Consequences
- Resources for Prior Military Service
- Right to Have Cases Sealed or Expunged

Advisement of Rights/First Appearance and Guilty Pleas
HB 16-1309 & HB 17-1083

CRS §16-7-207. Court's duty to inform on first appearance in court and on pleas of guilty. Makes clear that this section requiring advisement of rights applies to prosecutions for violations of municipal charters and prosecutions for violations of municipal ordinances, except for traffic infractions for which the penalty is only a fine and arrest is prohibited and for which a court shall not issue a bench warrant, including a warrant for failure to appear.

Advisement Concerning Monetary Payments
HB 16-1311

CRS §18-1.3-702 Monetary payments-due process required

(2) When the court imposes a sentence, enters a judgment, or issues an order that obligates a defendant to pay any monetary amount, the court shall instruct the defendant as follows:
(a) If at any time the defendant is unable to pay the monetary amount due, the defendant must contact the court's designated official or appear before the court to explain why he or she is unable to pay the monetary amount;
(b) If the defendant lacks the present ability to pay the monetary amount due without undue hardship to the defendant or the defendant's dependents, the court shall not jail the defendant for failure to pay; and
(c) If the defendant has the ability to pay the monetary amount as directed by the court or the court's designee but willfully fails to pay, the defendant may be imprisoned for failure to comply with the court's lawful order to pay pursuant to the terms of this section.
(3) Incarceration for failure to pay is prohibited absent provision of the following procedural protections:

WHAT ARE THOSE PROCEDURAL PROTECTIONS, YOU MAY ASK. . .

Stated in abbreviated fashion, they are the following:

(a) Can't imprison for failure to pay if paying would cause undue hardship.
(b) If the failure to pay is willful, the court may consider a motion to impose part or all of a suspended sentence, to revoke probation, or may institute proceedings for contempt of court.
(c) Can't do any of those unless the court has made findings on the record, after providing notice to the defendant and a hearing, that the defendant has the ability to comply with the court's order to pay without undue hardship and that the defendant has not made a good-faith effort to comply with the order.
(d) Can't accept a guilty plea for contempt of court for failure to pay unless the court has made findings on the record that the defendant has the ability to comply with the court's order to pay without undue hardship and that the defendant has not made a good-faith effort to comply with the order; and
(e) Can't issue a warrant for failure to pay, or failure to appear at any post-sentencing court appearance wherein the defendant was required to appear if he or she failed to pay; however, a court may issue an arrest warrant or incarcerate a defendant related to his or her failure to pay a monetary amount only through the procedures described in paragraphs (a) to (d) of this subsection (3).

QUERY: Can the Court issue an arrest warrant based on (c) findings made in default? On what basis could such findings be made? Should we just rely on collections for deadbeat defendants?

Advisement to avoid CRS 18-1-410.5 Relief from improperly entered guilty pleas
SB 19-030

Advise of potential immigration consequences of guilty pleas to avoid this CRS § 18-1-410.5 problem:

A defendant moving to vacate a guilty plea that has already been withdrawn following the successful completion of a deferred judgment or upon the dismissal of charges . . . must, in good faith, allege the following:
(a) As a result of the guilty plea, the defendant has suffered, is currently suffering, or will suffer, an adverse immigration consequence; and
(b) The guilty plea was obtained in violation of the constitution or laws of the United States or of this state under one or more of the following grounds:
(I) The defendant was not informed that the guilty plea would continue to result in adverse immigration consequences despite the subsequent withdrawal of the guilty plea and dismissal of the charges with prejudice;
(II) The defendant was not adequately advised of the immigration consequences of the guilty plea; or
(III) The guilty plea was constitutionally infirm for any other reason set forth in section 18-1-410 (1).

WHAT ARE THE IMMIGRATION CONSEQUENCES OF WHICH DEFENDANTS SHOULD BE ADVISED?

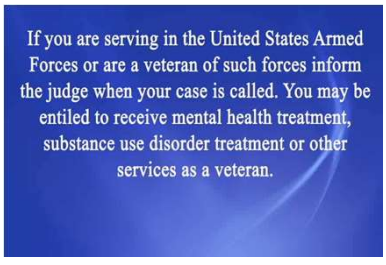
None of us are immigration lawyers, but as a matter of curiosity, see in the Appendix:

Peck, Sarah Herman and Smith, Hillel R., *The Immigration Consequences of Criminal Activity,* Congressional Research Service, April 5, 2018;

Immigration Consequences of Crimes Summary Checklist, Immigrant Defense Project, June, 2017.

And note, in this context, HB 19-1148, amending CRS § 13-10-113 to limit municipal court sentences to 364 days rather than one year. It's probably easiest just to add a written advisement to the effect that a plea of guilty or no contest, even if withdrawn or dismissed following the successful completion of a deferred judgment or upon the dismissal of charges, may have immigration consequences.

QUERY: Is that sufficient, or should something like the checklist be included for any non-citizen defendant?



***Military**
HB 18-1078

CRS §16-7-207.5 Court's Duty to inform defendants with current or prior military service on first appearance in court and on pleas of guilty:
(1) At the first appearance of a defendant in court or upon arraignment. . . the court shall ascertain whether the defendant is serving in the United States armed forces or is a veteran of such forces. The court shall inform any such defendant that he or she may be entitled to receive mental health treatment, substance use disorder treatment, or other services as a veteran.
(2) The court shall not accept a plea of guilty or nolo contendere without first determining whether the defendant is serving in the United States armed forces or is a veteran of such forces and, if so, informing the defendant as described in subsection (1) of this section.
(3) This section applies to. . . prosecutions for violations of municipal charters and. . . ordinances, except for traffic infractions for which the penalty is only a fine and arrest is prohibited.

QUERY: is this best done from the bench on the record, in the written advisement, or both?


Colorado Springs Municipal Court

Veteran Resources Information

Categories Include:

Advocacy & Assistance	Housing & Shelter
Autism & Special Needs	In Home Services
Caregiver & Respite Services	Information & Referral
Case/Care Management	Insurance & Benefits
Children & Families	Legal Services
Crisis & Emergency Services	Mental Health Services & Facilities
Disability Issues/Assistance	Recreation & Leisure
Education	Residential/Inpatient Care
Employment	Self-Help & Support Groups
Faith Based Services	Senior Services
Financial/Expense Assistance	Substance Abuse & Addiction Recovery
Food, Clothing & Household Goods	Transportation
Health Care	Veteran/Military Services

Peak Military Care Network

1257 Lake Plaza Drive, Suite #220,

Colorado Springs, CO 80906

(719)577-7417

Hours: Monday through Friday, 8am—5pm

CREATED BY: Denise Montaño, CPS II

MENTAL HEALTH

Aspen Pointe Crisis Centers	719-635-7000
Barbara C. Murray- Trauma , sex addiction	719-671-2871
Beyond Beautiful Counseling	719-598-7800
Creating Mindfulness Counseling	719-726-0367
David Ferrell, LPC, CAC III	719-564-9039
Denver Counseling Solutions	720-608-0379
Depression Bipolar Support Alliance (DBSA)	719-477-1515
Due North Life Coach- Specialty with (LGBTQ)	719-640-1200
Equinox Counseling & Wellness Center	303-861-1916
Fulfillment Counseling & Life Coaching	719-445-0840
Harmonized Brain Centers	719-661-6422
Healing with heart, LLC Art Therapy	720-532-8194
Health Solutions	719-545-2746
Heart and Soul Counseling Services	719-488-3333
Heart-Hands-Healings Addiction & MH	719-432-5000
Jeri Sutton-Shores, LPC, EMDR	719-475-1434
Jim Cunningham, MA, LPCC	719-238-5187
Medical Center of Aurora	844-556-2012
Mental Health Walk in crisis center Denver	844-493-8255

MENTAL HEALTH

National Alliance on Mental Illness Denver	303-504-6545
National Alliance on Mental Illness CS	719-473-8477
New Heights Behavioral Health (Disabilities)	719-344-6379
Nostrovia! Fitness & Hypnosis	719-622-0920
Perceptions Counseling Services (LGBTQ)	719-201-2879
Peterson Family Counseling	720-541-6289
Pikes Peak Therapeutic Riding Center	719-495-3908
Queer Asterisk	720-507-6161
Regis University Division of Counseling	719-264-7027
Renewed Heart Counseling	719-661-8996
The Counseling Couch	719-238-2829

ADDICTION & RECOVERY

A Turning Point	719-337-4310
Alcoholics Anonymous	719-573-5020
Al-non-& AL-A-Teen	719-632-0063
Aspen Ridge Recovery	877-736-9727
Ayuda- MH, SBTX Spanish Speaking	719-459-6710
Crossroads Turning points Pueblo	719-546-6666
El Paso County Detox Center	719-390-2046
Lifted From The Rut Addiction Services	970-331-4469
Peaks Recovery Centers	888-506-9818
Recovery 360	720-412-3513
Sandstone Care- MH, SBTX	720-642-8335
Springs Recovery Connection	719-367-3292
Stout Street Foundation	303-321-2533
Valley Hope Residential and IOP	303-694-3829

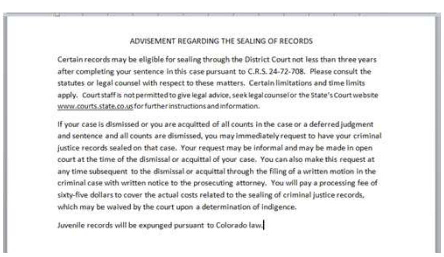
SHELTERS

Age road UMC shelter Woodland Park	301-422-2132
Catholic Charities	720-215-4521
Crawford House Vet Shelter	719-477-1639
DC Cares	303-660-7460
Douglas Elbert Task Force	303-688-1114
Family Promise of Colorado Springs	719-329-1244
Family Tree for families and youth	303-422-2133
Mercy Housing	303-830-3300
Parker Task Force	303-841-3460
RJ Montgomery Shelter	719-955-9512
Salvation Army	719-578-9190
SECOR	720-842-5621
Shelters in Pueblo	719-545-8195
Springs Rescue Mission	719-632-1822

Sealing/expungement Advisements
HB 19-1275 and HB 19-1335

CRS § 24-72-703 (9) Advisements.
(a) Whenever a defendant is sentenced following a conviction for an offense described in sections 24-72-706 to 24-72-708 [generally criminal convictions], the court shall provide him or her with a written advisement of his or her rights concerning the sealing of his or her conviction records pursuant to this section if he or she complies with the applicable provisions of this section.

CRS § 13-10-115.5
(2)(a) If a juvenile is sentenced by a municipal court, the municipal court, at sentencing, shall provide the juvenile and any respondent parent or guardian with a written advisement of the right to expungement and the time period and process for expunging the record. The municipal court may provide the notice through a municipal diversion program, the city attorney, or a municipal probation program.


ADVISEMENT REGARDING THE SEALING OF RECORDS

Certain records may be eligible for sealing through the District Court not less than three years after completing your sentence in this case pursuant to C.R.S. 24-72-708. Please consult the statutes or legal counsel with respect to these matters. Certain limitations and time limits apply. Court staff is not permitted to give legal advice, seek legal counsel or the State's Court website www.courts.state.co.us for further instructions and information.

If your case is dismissed or you are acquitted of all counts in the case or a deferred judgment and sentence and all counts are dismissed, you may immediately request to have your criminal justice records sealed on that case. Your request may be informal and may be made in open court at the time of the dismissal or acquittal of your case. You can also make this request at any time subsequent to the dismissal or acquittal through the filing of a written motion in the criminal case with written notice to the prosecuting attorney. You will pay a processing fee of sixty-five dollars to cover the actual costs related to the sealing of criminal justice records, which may be waived by the court upon a determination of indigence.

Juvenile records will be expunged pursuant to Colorado law.

Which leads us to. . .

Legislation related to sealing and expungement of records in municipal cases

Recent legislation has made it possible for Defendants to have their cases expunged, if juvenile criminal matters, or sealed, if adult criminal matters.

- Sealing Criminal Justice Records Other Than Convictions
- Sealing Criminal Justice Records Related to Convictions
- Expungement of Juvenile Court Records With or Without a Conviction

No such record exists….or does it?

Adult Records

HB 17-1208 CRS §24-72-702.5 repealed by HB 19-1275

HB 19-1275

HB 17-1360

CRS §24-72-705 Sealing criminal justice records other than convictions

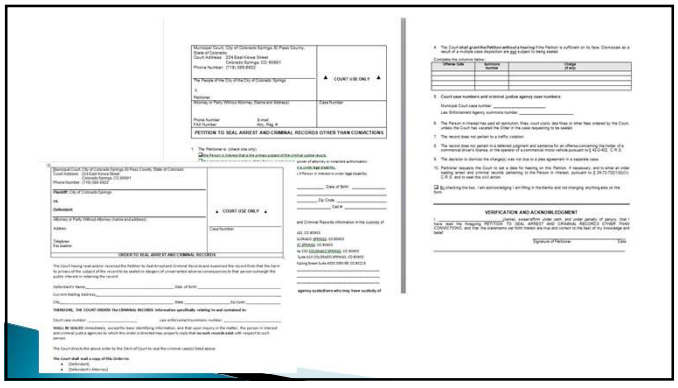
CRS §24-72-708 Sealing of Criminal Conviction Records information for municipal offenses for convictions

Adult criminal justice records other than convictions – CRS §24-72-705

In Court – Record can be sealed upon request if:
- The defendant has been acquitted on all charges; or
- All charges have been dismissed independent ally and not as a result of a plea agreement in a separate case; or
- Charges are dismissed as part of a deferred sentence; and
- The defendant has paid all restitution, fines, court costs and fees ordered; and
- The defendant has paid the $65 court cost for sealing

Out of Court – Records can be sealed by completion a written petition to seal arrest and criminal records other than convictions form and the payment of $65. The same requirements above apply.

Law Enforcement, Court and Prosecution may be able to view a sealed record, but when ask must respond. . .*No such record exists*


PETITION TO SEAL ARREST AND CRIMINAL RECORDS OTHER THAN CONVICTIONS

ORDER TO SEAL ARREST AND CRIMINAL RECORDS

VERIFICATION AND ACKNOWLEDGMENT

Adult – Sealing of criminal conviction records information for municipal offenses CRS §24-72-708

Motion filed in District Court:
- 3 or more years after final disposition of all criminal proceedings; and
- The defendant has not been charged or convicted of a felony, misdemeanor, or misdemeanor traffic offense in the 3 or more years; and
- The conviction records to be sealed are not for a misdemeanor traffic offense by a CDL driver.
- Does not apply to municipal assault or battery offenses in which the underlying factual basis involves DV.

Law Enforcement, Court and Prosecution may be able to view a sealed record, but when ask must respond. . .*No such record exists*

Juvenile Records

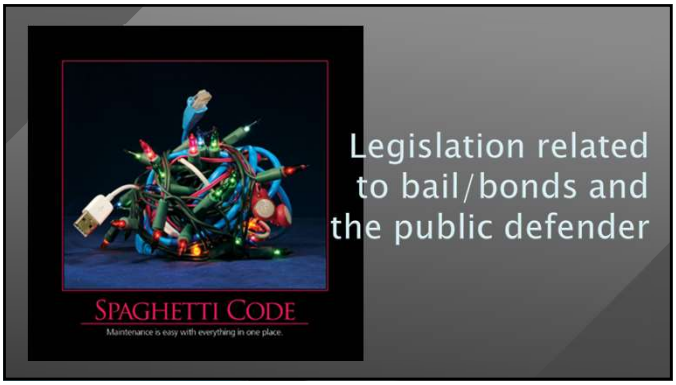
HB 17–1204, HB 19–1335, CRS §19–1–306(9) Municipal court records.

(a) Municipal court records are expunged pursuant to section 13-10-115.5.
(b) If municipal court records have not been expunged within seventy days from the end of the case pursuant to section 13-10-115.5, an individual may petition the juvenile court in the judicial district where the municipality is located to expunge records of a municipal case brought against a juvenile. Expungement proceedings pursuant to this subsection (9) must be initiated by the filing of a petition requesting an order of expungement. A filing fee, notarization, or other formalities are not required. If the petition is not granted without a hearing, the court shall set a date for a hearing on the petition for expungement and shall notify the appropriate prosecuting attorney.
(10) Upon the entry of an order expunging a record pursuant to this section, the court shall order, in writing, the expungement of all case records in the custody of the court and any records related to the case and charges in the custody of any other agency, person, company, or organization. The court may order expunged any records, but, at a minimum, the following records must be expunged pursuant to every expungement order:
(a) All court records;
(b) All records retained within the office of the prosecuting attorney;
(c) All probation and parole records;
(d) All law enforcement records;
(e) All department of human services records;
(f) All division of youth services records;
(g) All department of corrections records; and
(h) References to the criminal case or charge contained in the school records.
Law Enforcement, Court and Prosecution may be able to view a sealed record, but when ask must respond. . .*No such record exists*

HB 19–1335, CRS §13–10–115.5. Expungement of juvenile delinquent records

- Court must provide a written advisement concerning the right to expungement
- Prosecution can not require as a condition of a plea agreement that a juvenile waive the right to expungement
- Can not order expungement if there is a pending case
- Applies to all municipal court cases except traffic cases
- Applies to convictions and dismissals – only condition is that the sentence is complete
- Cases will be expunged forty-two days after completion of the municipal sentence unless the court finds by clear and convincing evidence, that the juvenile has not been rehabilitated and that expungement is not in the best interests of the juvenile or community (presumably based on the sentence not being complete or a pending municipal court charge)
- The municipal court shall, on the first day of every month, review all juvenile municipal court files for that same month for the previous two years that resulted in a finding of not guilty or guilty or resulted in diversion, deferred adjudication, dismissal, or other disposition or resolution, and enter an expungement order for all juveniles eligible for expungement pursuant to this subsection (4) if the expungement order was not previously made.

Law Enforcement, Court and Prosecution may be able to view a sealed record, but when ask must respond. . .*No such record exists*



Legislation related to bail/bonds and the public defender

There have been some pretty dramatic changes in the areas of Bail/Bond and Court Appointed Counsel.

- Defendants Must Be Seen Within 48 Hours of Notification of Detention on a Warrant Is Received by the Court
- Defendants Must Be Granted a Personal Recognizance Bond When Seen by a Judge for Certain Municipal Charges
- Defendants Must Be Provided Court Appointed Counsel During a First Appearance If the Defendant Is In Custody
- Defendants Must Be Provided Independent Indigent Court Appointed Counsel If there Is a Possible Sentence of Incarceration

Municipal Court Bond Hold Notification and Hearing HB 17–1338

CRS §13-10-111.5 Notice to municipal courts of municipal holds

(1) If a person is detained in a jail on a municipal hold and does not immediately receive a personal recognizance bond, the jail shall promptly notify the municipal court of any municipal hold; except that, if the municipal hold is the sole basis to detain the person, the jail shall notify the municipal court of the municipal hold **within four hours**...
(2) Once a municipal court receives notice that the defendant is being held solely on the basis of a municipal hold, the municipal court shall hold a hearing **within two calendar days**, excluding Sundays and federal holidays; except that, if the defendant has failed to appear in that case at least twice and the defendant is incarcerated in a county different from the county where the demanding municipal court is located, the demanding municipal court shall hold a hearing within four calendar days, excluding Sundays and federal holidays...
(4) If the defendant does not appear before the municipal court for a hearing within the time frames required by subsection (2) of this section, the jail holding the defendant shall release the defendant on **an unsecured personal recognizance bond** with no other conditions returnable to the municipal court...

How are Municipalities accomplishing this?

No Monetary Bail for Certain Low-Level Offenses
HB 19-1225

CRS §16-4-113 Type of bond in certain misdemeanor cases

(2)(a) For a defendant charged with a traffic offense, a petty offense, or a comparable municipal offense, a court shall not impose a monetary condition of release. If the comparable municipal offense is a property crime and the factual basis reflects a value of less than fifty dollars and the offense would be a petty offense under state law, this subsection (2)(a) applies.
(b) For a defendant charged with a municipal offense for which there is no comparable state misdemeanor offense, the court shall not impose a monetary condition of release.
....
(e) The provisions of this subsection (2) do not apply to:
(I) A traffic offense involving death or bodily injury or a municipal offense with substantially similar elements;
(II) Eluding or attempting to elude a police officer … or a municipal offense with substantially similar elements;
(III) Operating a vehicle after circumventing an interlock device as described in … or a municipal offense with substantially similar elements; and
(IV) A municipal offense that has substantially similar elements to a state misdemeanor offense.

Right to Counsel in Municipal Court
HB 16-1309, SB 18-203

CRS §13-10-114.5 Representation by counsel – independent indigent defense

(1) At the time of first appearance on a municipal charge, if the defendant is in custody and the charged offense includes a possible sentence of incarceration, the court shall appoint counsel to represent the defendant for purposes of the initial appearance unless, after a full advisement pursuant to C.M.C.R. 210 and section 16-7-207, C.R.S., the defendant makes a knowing, intelligent, and voluntary waiver of his or her right to counsel.
(2) If the defendant remains in custody, the appointment of counsel continues until the defendant is released from custody. If the defendant is released from custody, he or she may apply for court-appointed counsel, and the court shall appoint counsel if the court determines that the defendant is indigent and the charged offense includes a possible sentence of incarceration.
(3) (a) On and after January 1, 2020, each municipality shall provide independent indigent defense for each indigent defendant charged with a municipal code violation for which there is a possible sentence of incarceration. Independent indigent defense requires, at minimum, that a nonpartisan entity independent of the municipal court and municipal officials oversee or evaluate indigent defense counsel.

What constitutes "independent indigent defense"?

Independent Indigent Defense
SB 18-203

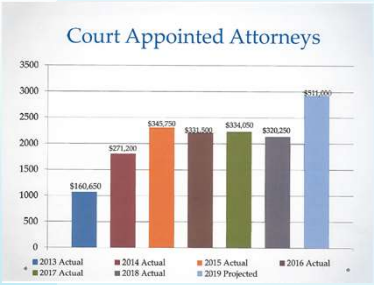
In a nutshell, independent indigent defense is the following:

- Office of Alternate Defense Counsel
- Legal Aid Clinic at any Colorado Law School Accredited by the American Bar Association
- Contract with a Private Law Firm if:
  - The selection process is transparent and base on merit
  - Each selected defense attorney must be periodically evaluated by an independent entity for "competency and independence." This evaluation must be completed within one year of date of hire, and then at least once every three years going forward, but **what independent entity can conduct these evaluations**?
    - Office of Alternate Defense Counsel
    - An attorney or group of attorneys with five years of experience in criminal defense who are not affiliated with the municipality
    - A local or regional independent indigent defense commission with three members selected by the Chief Municipal Judge, in consultation with the defense bar, Office of Alternate Defense Counsel, or the State Public Defender. All members must be approved by the Office of Alternate Defense Counsel.

What is the impact of this legislation on municipalities?

- The constant deluge of legislative changes to how our Municipal Courts function has caused us to reevaluate what we do and how we do it.

MONETARY IMPACT



DECRIMINALIZATION OF CERTAIN ORDINANCE VIOLATIONS

ORDINANCE NO. 1-2018

AN ORDINANCE AMENDING SECTIONS 1-17, 1-18, 2-38(d)(1), 3-10 , 4-178, 11-121(a), 11-171(f), 13-28, 13-54, 13-57, AND 14-23(d) OF THE *CODE OF ORDINANCES OF THE CITY OF ALAMOSA* CONCERNING PENALTIES FOR ORDINANCE VIOLATIONS

WHEREAS, the jurisdiction of the Alamosa Municipal Court as established by Article VI, Section 1 of the *Charter* of the City of Alamosa, consistent with the provisions of C.R.S. § 13-10-101 *et seq.* is to hear and determine all cases arising under the Charter or the ordinances of the City; and

WHEREAS, most matters arising under the Charter and Ordinances of the City involve laws concerning quality of life issues and public health issues, for which fines are generally a more appropriate punishment than imprisonment, at least until repeated violations by an individual indicate a recalcitrance to correction that might be addressed by imprisonment ; and

WHEREAS, a more efficient and effective system of enforcement of the Charter and Ordinances of the City of Alamosa occurs when a defendant is aware that imprisonment is not a possibility for punishment in circumstances where imprisonment is not likely to be imposed; and

WHEREAS, Council deems it in the best interests of the citizens of Alamosa to ensure that the municipal judge has flexibility in sentencing, especially in the sentencing of repeat offenders, so as to provide proper punishment and deterrence to the violation of City ordinances; and

WHEREAS, Section 13-54 of the Alamosa *Code of Ordinances* concerning imprisonment for failure to pay fines has not been enforced since imprisonment for failure to pay fines was prohibited by state statute, and before, and the section should be amended to reflect current practice; and

MUNICIPAL COURT NO LONGER INVOLVES A SIMPLIFIED PROCESS

COLORADO SPRINGS
OLYMPIC CITY USA

John W. Suthers
Mayor

June 21, 2019

Colorado Supreme Court Civil Rules Committee
Ralph L. Carr Colorado Judicial Center

RE: Opposition to proposed changes to Colorado Municipal Court Rule 216

Members of the Committee:

The purpose of this letter is to make you aware that the City of Colorado Springs is opposed to the proposed changes to Colorado Municipal Court Rule 216. The proposed changes are inconsistent with the scope and construction of the Municipal Court Rules.

Municipal courts serve an important function in our communities. Our municipal courts, by design, are the courts that address our communities' quality of life issues. Our municipal courts are often times a citizen's only contact with our judicial system. The existing Colorado Municipal Court Rules of Procedure recognize that our municipal courts are unique and different from State courts. Our municipal courts have been provided their own rules of procedure precisely because they are different from State courts.

Colorado Municipal Court Rule 202 provides:

"These rules are intended to provide for the just determination of all municipal charter and ordinance violations. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay."

Changes in the actual consequences imposed by Municipal Courts

- Rejection of jail offer plea bargains / increase in cases being set for trial
- Issues in calculating fair jail credit when held on State charges and released on Municipal as a result of PRs
- Sentencing options and alternatives
- Erosion of suspended sentences:

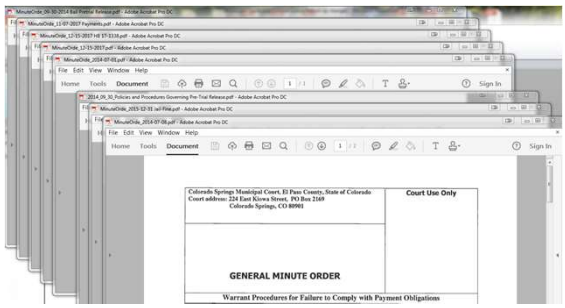
READ *People v. Mazzarelli*, 2019 CO 71: Plea agreements are merely "sentence recommendations." The court must evaluate each case and determine if the sentence is appropriate. When the court determines that the sentence should be longer, the defendant may withdraw his plea. When the court determines that the sentence should be shorter or less, the People may NOT withdraw the plea and are bound.

Essentially, the plea agreement acts as a sort of cap

The prosecution MAY NOT draft a provision allowing withdrawal if the court does not abide by the agreement. The People may still add provisions like "Defendant may not argue for a lesser sentence" and if that is breached they may withdraw.

*******The only fix to this is a legislative change**********

What processes have we been forced to adopt as a result?



What can or should we and CML do about it?

- Attend CMCR rule meetings and express your opposition to the proposed rule changes and encourage your executive branch to take a position in opposition
- Monitor and be active with CML and our municipal lobbyists to oppose legislation that changes the very nature of our municipal courts
- Get involved with the greater prosecution community – CDAC
- Foster and build a coalition between CML and CDAC on issues of criminal justice reform to help align with a shared vision moving forward

We are all in this together!

For support documents to this presentation go to http://bit.ly/2I7aWk3

CML Municipal Law Annual Seminar
September 28, 2019
Regulatory Takings Refresher
Moratoria in Colorado

Barbara J.B. Green
Sullivan Green Seavy
Barbara@sullivangreenseavy.com

A. Meaning of Moratorium

Coined in the late 19th century as a legal term, coming from the Latin verb *moratorius* 'delaying.'

B. Local Government Authority to Enact Moratoria in Colorado

1. C.R.S. §30-28-121 allows a moratorium on development within the context of adopting the initial County zoning plan for a duration of up to six months only. But see *Droste*, below.

2. *City of Fort Collins v. Colorado Oil & Gas Ass'n*, 369 P.3d 586 (Colo. 2016) ("Fort Collins"). A citizen initiative imposed a moratorium of five (5) years on hydraulic fracturing in Fort Collins. The plaintiff claimed that moratorium was preempted by the Colorado Oil and Gas Conservation Act. The court ruled that the moratorium "operationally conflicted" with the Act as a matter of law because it "rendered the state's regulatory scheme superfluous, at least for a lengthy period of time. . ." *Fort Collins* at 593. The court rejected plaintiff's "implied preemption" argument because the Act does not preempt all local land use authority, implicitly recognizing the moratorium as a legitimate exercise of land use authority.

3. *Droste v. Bd of County Com'rs of Pitkin*, 159 P.3d 601 (Colo. 2007) ("*Droste*"). Pitkin County had authority under the Colorado Land Use Enabling Act, C.R.S. §§ 29-20-101 to -107 to adopt ordinances imposing a ten-month temporary moratorium on land use applications in a portion of the County while it prepared a master plan. The court upheld the moratorium as an exercise of land use authority and rejected Plaintiff's argument that the only authority for moratoria is C.R.S. § 30-28-131.

` 4. *Dill v. Bd of County Com'rs of Lincoln County,* 928 P.2d 809 (Colo.App.1996). The Areas and Activities of State Interest Act, C.R.S. § 24-65.1-404(4), provides for a moratorium on development between the time a matter of state interest has been designated and guidelines for such area or activity are "finally determined."

5. *Williams v. Central City*, 907 P.2d 701, 706 (Colo. App. 1995) ("*Williams*"). Central City enacted a ten (10) month moratorium on further development in the gaming district. All pending special use permit applications were suspended until certain studies were completed

concerning Central City's capacity to absorb the impacts of limited stakes gambling. When review of his application for a special use permit was suspended, the plaintiff property owner brought a takings claim, discussed in Part C., below. The plaintiff never challenged the underlying authority of the City to enact a moratorium and the court never questioned such authority.

C. Moratoria and Takings - *Tahoe-Sierra* and *Williams.*

1. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002) ("*Tahoe-Sierra*").

Because of increasing degradation of Lake Tahoe associated with land development, the Tahoe Regional Planning Agency (TRPA) imposed two moratoria totaling 32 months while it prepared a comprehensive land use plan. Plaintiff property owner groups claimed that TRPA actions constituted a *per se* takings because the moratoria deprived them of all use of their property under the categorical rule of *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992) ("*Lucas*"). The District Court rules that the moratoria did not constitute a partial taking under the analysis set forth in *Penn Central Transp. Co. v. New York City*, 438 U. S. 104 (1978) ("*Penn Central*") but that the moratoria were a taking under the categorical rule of *Lucas* because the petitioners were deprived of all of the value of their land during the moratorium. The Ninth Circuit found that no categorical taking had occurred because the regulations only had a temporary impact on the property.

The Supreme Court rejected the petitioners' claims and decided as follows:

a. Categorical taking analysis in *Lucas* does not apply to moratoria. The ad hoc, fact based analysis in *Penn Central* applies *unless* there is a total taking of the entire property.

b. Property cannot be disaggregated into temporal segments. In determining the "entire property," the 32-month segment should not be severed from the fee simple estate to determine whether there was a taking. "With property so divided, every delay would become a total ban; the moratorium and the normal permit process alike would constitute a categorical taking." *Tahoe-Sierra* at 331.

c. Careful examination of all circumstances is required. Assuming all use of property was lost for the duration of the moratorium, analysis of temporary takings claims for compensation "requires careful examination and weighing of all the relevant circumstances." *Tahoe-Sierra* at 336.

d. No set formula. The interest in protecting property owners from bearing public burdens that should in all fairness be borne by the public as a whole does not justify creating a new categorical rule. There is no set formula for determining when "justice and fairness" require that economic injuries be compensated by the government. *Tahoe-Sierra* at 333-342. See also *Penn Central* at 124.

2. *Williams v. Central City,* 159 P.3d 601 (Colo. 2007) ("*Williams*").

a. Temporary delay not a categorical taking. A temporary limitation of ten months on property use within the newly-formed gaming district, resulting from the otherwise good faith, reasonable institution of a moratorium in order to bring about effective governmental decisionmaking does not result in a categorical taking. *Williams* at 705.

b. No investment-backed expectations because Plaintiff was on notice. Under the *Penn Central* analysis (character of the challenged governmental action, its economic impact, and the extent to which the regulation has interfered with the reasonable investment-backed expectations of the land owner) Plaintiff was not entitled to compensation because he did not have a reasonable investment-backed expectation that he could avoid the new regulations in the gaming district. *Williams* at 707.

D. Legitimate Governmental Purpose of Moratoria

1. Preserve the status quo.

"[M]oratoria [. . .] are used widely among land use planners to preserve the status quo while formulating a more permanent development strategy. In fact, the consensus in the planning community appears to be that moratoria, or 'interim development controls' as they are often called, are an essential tool of successful development." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337-38, (2002) ("*Tahoe-Sierra"*). "Zoning boards, cities, counties and other agencies use [moratoria] all the time to 'maintain the status quo pending study and governmental decision making.'" *Tahoe-Sierra*, 535 U.S. 316 (quoting lower U.S. district court opinion, 34 F. Supp. 2d at 1248-49, and *Williams v. Central City*, 907 P.2d 701, 706 (Colo. App. 1995)("*Williams*").

2. Avoids race to develop during planning efforts.

A moratorium "counters the incentive of landowners to develop their land quickly to avoid the consequences of an impending land use plan for the jurisdiction." *Droste v. Board of County Comm'rs of Pitkin County*, 159 P.3d 601, 606 (Colo. 2007) (citing *Tahoe-Sierra*).

3. Provides time to study and plan for unforeseen or novel uses.

"Generally speaking, a moratorium is used when a novel type of business or construction----not foreseen in the city's 'general plan'- arrives in the jurisdiction." Skye L. Daley, *The Gray Zone In The Power Of Local Municipalities: Where Zoning Authority Clashes With State Law*, 5 Journal of Business, Entrepreneurship & the Law 221 (May 2012).

4. Avoids hasty adoption of land use regulations**.**

"The interest in informed decisionmaking would counsel against adopting a *per se* rule that would treat [moratoria] as takings regardless of the planners' good faith, the landowners' reasonable expectations, or the moratorium's actual impact on property values." *Tahoe-Sierra* at 338. Planning and implementation process can run its full and natural course with widespread citizen input and involvement, public debate, and full consideration of all issues and points of

view." Garvin & Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, 48 Land Use Law & Zoning Digest 3 (June 1996) (quoted in *Tahoe-Sierra*, 535 U.S. 338, n. 33).

E. Unresolved Issues

1. How will the court evaluate whether the purposes of the moratorium are legitimate?

a. Are there some purposes for a moratorium that are more "legitimate" than others such as protecting a special environment such as Lake Tahoe from environmental degradation?

b. Is there a difference between a moratorium on all development vs. a moratorium on particular uses?

c. Would a development moratorium for master planning purposes be weighed differently from a moratorium on permitting? "[T]he interest in protecting the decisional process is even stronger when an agency is developing a regional plan than when it is considering a permit for a single parcel." *Tahoe Sierra* at 340.

d. What constitutes "good faith" on the part of the government?

2. How long can a moratorium be?

a. The length of a moratorium is only one factor in regulatory taking claims - the length must be "reasonable." *Tahoe Sierra* at 304. Does reasonable mean that the length of the moratorium should be no greater than the articulated purpose for enacting the moratorium?

b. Ten months was reasonable in *Droste* and *Williams.*

c. Is five years too long? In *Fort Collins* the Colorado Supreme Court equated a five-year moratorium to a ban which was preempted by the Colorado Oil and Gas Conservation Act as a matter of law. The Court was concerned about the length of the moratorium, finding that five years constituted a prohibition rather than a temporary time-out. Is this finding limited to the operational effect of the five -year moratorium on the state's interest in developing oil and gas resources? After Oil and Gas Conservation Act and the Colorado Land Use Enabling Act were amended in 2019 by SB 19-181, is *Fort Collins* still viable precedent in evaluating moratoria?

d. Would a rolling moratorium be subject to increased judicial scrutiny?

3. Should the Colorado General Assembly provide express authority to enact moratoria, or is it well-settled that moratoria are just one aspect of basic land use

authority? *See* dissent in *Droste*. Does it make a difference whether the municipality is home rule or statutory?

4. Within the context of deciding the proper analysis of takings claims for mineral rights, does it matter whether the mineral rights owner owns both the surface and the minerals of an area subject to a development moratorium?

REGULATORY TAKINGS AND EXACTIONS
(Last Updated October 2018)

Brian J. Connolly
(With updates by Thomas Macdonald)
Otten, Johnson, Robinson, Neff & Ragonetti, P.C.
950 17th Street, Suite 1600
Denver, Colorado 80202
bconnolly@ottenjohnson.com
mac@ottenjohnson.com
(303) 575-7589
(303) 575-7520

I. Takings Law Generally

A. Authority: Under the Fifth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, the government is prohibited from taking private property for a public use "without just compensation."

B. Primary questions:

1. When does government action constitute a taking of private property?

2. Is the government taking private property for a public use?

3. What is "just compensation" for the taken property?

C. Concepts

1. Terminology

a. ***Condemnation*** or ***eminent domain*** refers to the situation where the government initiates eminent domain proceedings to take private property.

b. ***Regulatory taking*** occurs when a regulation deprives an owner of all or substantially all of the economically viable use of property.

c. ***Inverse condemnation*** occurs when the government does not institute eminent domain proceedings, but takes private property.

2. Public Use Clause

a. Takings are generally upheld so long as the taking is rationally related to a conceivable public purpose. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *see also Kelo v. City of New London*, 545 U.S. 469 (2005); *Berman v. Parker*, 348 U.S. 26 (1954).

b. Whether a taking is for a public use is not generally at issue in regulatory takings cases.

3. Which branches can be liable for a taking?

a. Legislative. *See infra, passim.*

b. Administrative. *See infra, passim*.

c. Judicial. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010).

II. Regulatory Takings

A. Generally

1. "Taking by regulation" is a judicially-created concept; Fifth Amendment does not address takings by regulation.

2. Where a regulation goes "too far" the Court will recognize regulation as a taking. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

a. *Pennsylvania Coal* acknowledged that virtually all regulation of property deprives the owner of some rights.

b. Determination of when a regulation goes too far requires balancing (1) importance of the governmental purpose; against (2) extent of the diminution in value of the property.

B. Types of regulatory takings

1. Physical occupation

a. A permanent physical occupation authorized by government is a per se taking, regardless of the public interests that it may serve. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

2. Complete regulatory taking

a. In the "relatively rare" circumstance in which a regulation denies a property owner of all economically viable use of his land, the Fifth Amendment requires the payment of compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *see also Van Sickle v. Boyes*, 797 P.2d 1267, 1271 (Colo.1990); *Sellon v. City of Manitou Springs*, 745 P.2d 229, 234 (Colo.1987).

(1) The one notable exception to this rule is that denial of all economically viable use of property does not constitute a

taking when any economically viable use of the property would constitute a nuisance under the applicable state's nuisance law.

3. Partial regulatory taking (*Penn Central* taking)

a. Three-prong test to determine whether a compensable taking has occurred: (i) the character of the governmental action; (ii) the economic impact of the regulation upon the claimant; and (iii) the extent to which the regulations interfered with distinct "investment-backed expectations." *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978); *see also Animas Valley Sand and Gravel v. Bd. of Cnty. Comm'rs*, 38 P.3d 59 (Colo. 2001).

b. Amendment 74

(1) Citizen-initiated measure appearing on Colorado ballot in November 2018 would have amended Colorado Constitution to allow landowners to seek compensation when a law or regulation reduces property's fair market value.

(2) Voter approval of Amendment 74 would have modified much prior state and federal law holding that a property owner may not obtain compensation for partial takings.

(3) Unclear issues

(a) Would Amendment 74 have applied retroactively?

(b) Who could have brought a claim?

(c) Threshold for showing deprivation of property value?

(d) Would other, well-established regulatory takings doctrines apply (e.g. requirement that a landowner show interference with reasonable investment-backed expectations)?

(e) Could the government demonstrate that a regulation *benefits* property?

C. Key concepts in regulatory takings analysis

1. "Parcel as a whole" analysis

a. To determine whether a partial or *per se* taking occurs requires considering the extent to which the use or value of the whole parcel has been impaired.

(1) Where historic landmark law prohibited development above the existing Grand Central Terminal in New York City, the property owner cannot sever air rights from the entire "bundle of sticks" of property ownership to claim a total taking its interest in the air rights. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

(2) Where state statute required some coal to be left in place to avoid subsidence, but coal company held recoverable interests in coal, cannot sever the coal interests that were required to remain in order to claim a total taking of those interests. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987).

(3) Where landowners commonly owned two adjacent subdivision parcels, parcels must be treated as a single parcel for purposes of parcel as a whole analysis. *Murr v. Wisconsin*, 582 U.S. ___, 137 S. Ct. 1933 (2017).

(4) Regulation prohibiting use of 31 acres of a 41-acre property is insufficient to establish a partial taking. *Animas Valley Sand and Gravel v. Bd. of Cnty. Comm'rs*, 38 P.3d 59 (Colo. 2001).

(5) S.B. 181. Does the revised definition of "waste" constitute a regulatory taking under the logic of *Pennsylvania Coal*, 260 U.S. 393.

2. Reasonable investment-backed expectations

a. Where existing use of property has not been interfered with, a landowner's reasonable investment-backed expectations are realized. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

b. The "reasonable investment-backed expectations" of the regulated party is the dispositive factor in takings analysis when the regulated party is "on notice" of the extent of the government's regulatory authority over its property. *State Dep't of Health v. The Mill*, 887 P.2d 993 (Colo. 1994).

c. A property owner aware that the government has regulatory authority and might take regulatory action cannot later claim that it

did not expect such action. *State Dep't of Health v. The Mill*, 887 P.2d 993 (Colo. 1994).

3. Temporary takings

   a. Temporary moratoria do not *per se* constitute a taking of property. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 202 (2002).

   b. Where government activities have temporarily taken all use of property, the government must provide compensation for the period during which such taking occurred. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987).

      (1) Temporary prohibition on all development in order to mitigate flood risk constituted a temporary taking. *First English Evangelical Lutheran Church of Glendale v. Los Angeles*, 482 U.S. 304 (1987).

      (2) Temporary use of property by local government for staging of construction equipment without prior eminent domain action constituted a temporary taking. *Fowler Irrevocable Trust v. City of Boulder*, 17 P.3d 797 (Colo. 2001).

4. Timing of owner's acquisition of the property

   a. Property owner may raise regulatory takings challenge with respect to regulation that predated the owner's acquisition of title to the property. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

5. Takings versus due process considerations

   a. Prior formulations of the *per se* takings rule held that if a law does not substantially advance legitimate state interests, it could constitute a taking without just compensation. *Agins v. City of Tiburon*, 447 U.S. 255 (1980).

   b. Supreme Court clarified in 2005 that consideration of a law's advancement of governmental interests is more properly a part of due process analysis and is not cognizable under a Fifth Amendment takings analysis. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

6. Regulatory takings and water

a. Dredging of property and establishment of navigational servitude constitutes a taking of private property. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

b. Beach renourishment that results in state ownership of land between water and properties that previously abutted waterfront does not affect a taking. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010).

c. Low priority of water rights does not effect a regulatory taking of farmlands that may otherwise not be irrigated. *Kobobel v. State*, 249 P.3d 1127 (Colo. 2011).

III. Exactions and Unconstitutional Conditions

A. Generally

1. Addresses a special area of takings where the government is not

2. Constitutional law acknowledges that individuals should not required to give up constitutional rights in exchange for government privileges.

3. Concerns rooted in Due Process Clause and Takings Clause.

4. Common feature of land use approval process: government issues an approval upon the condition that a landowner dedicate property, pay money, or perform services for some public benefit.

a. Government could take property and pay just compensation, but instead chooses to require that it be dedicated as part of an approval.

B. Application

1. Where applicable

a. Required dedications of real property in exchange for zoning and development approvals. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

b. Required dedications of money or services in exchange for zoning and development approvals. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

c. Denials of permits where landowner refuses to dedicate property, money, or services. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

d. Ad hoc conditions imposed as part of adjudicative decisions. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001).

2. Where inapplicable

a. Taxes and user fees. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013).

b. Legislatively-formulated public improvements fees. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001).

c. Some states hold that legislative action, such as a generally-applicable fee, can never constitute a taking under the *Nollan/Dolan* formulation. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

C. Requirements for conditional approvals ("heightened scrutiny")

1. Permit conditions must bear an **essential nexus** to the end advanced as the justification for such condition. Unless the permit condition serves the same purpose as denial, the condition is not a valid regulation of land use but an "out-and-out plan of extortion." *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

a. *Nollan* holds that conditions abridging property rights must substantially advance a legitimate state interest. This is especially true where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

b. Requirement of beachfront easement along property's boundary with ocean was not rationally related to the state's interest in preserving views to the ocean. *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

2. Rough proportionality is required as between the impact of the permitted activity and the property taken as a condition of the permit. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

a. Requirement that property owner dedicate land for a public greenway to offset expected increases in flooding was not roughly proportional to impact of issuance of building permit for plumbing and electrical supply store. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

D. Colorado Regulatory Impairment of Property Rights Act, C.R.S. § 29-20-201 *et seq.* (RIPRA)

1. Codifies *Nollan* and *Dolan*, and applies to required dedications of money or services

2. "In imposing conditions upon the granting of land-use approvals, no local government shall require an owner of private property to dedicate real property to the public, or pay money or provide services to a public entity in an amount that is determined on an individual and discretionary basis, unless there is an *essential nexus* between the dedication or payment and a legitimate local government interest, and the dedication or payment is *roughly proportional* both in nature and extent to the impact of the proposed use or development of such property." C.R.S. § 29-20-203(1).

    a. Does not apply to legislatively-formulated fees or assessments. *Wolf Ranch v. City of Colorado Springs*, 220 P.3d 559 (Colo. 2009).

3. "No local government shall impose any discretionary condition upon a land-use approval unless the condition is based upon duly adopted standards that are sufficiently specific to ensure that the condition is imposed in a rational and consistent manner." C.R.S. § 29-20-203(2).

4. Challenges to imposition of conditions upon land use approvals pursuant to RIPRA

    a. Procedure (C.R.S. § 29-20-204(1)(a))

        (1) Must provide notice to local government of alleged RIPRA violation within 30 days of subject decision

        (2) Local government must then provide written notice to governing body of allegation

        (3) Local government has 30 days from the date of the notice to respond

        (4) Within 60 days after the response deadline, property owner may file a petition in district court seeking relief

    b. May proceed as an on-the-record review or may conduct discovery. C.R.S. § 29-20-204(1)(b).

    c. Burden is on the local government to establish by substantial evidence that the dedication in question is roughly proportional to the impact of the proposed use. C.R.S. § 29-20-204(1)(c).

    d. Available relief (C.R.S. § 29-20-204(1)(e))

        (1) Modification of required dedication.

(2) Invalidation of application of law or regulation.

(3) Other remedies.

(4) Attorneys' fees. C.R.S. § 29-20-204(1)(f).

e. Government may bring an eminent domain proceeding to accomplish takings that might be subject to RIPRA challenge. C.R.S. § 29-20-204(2)(a).

f. RIPRA action may be brought jointly with certiorari appeal pursuant to C.R.C.P. 106(a)(4). C.R.S. § 29-20-204(2)(b).

(1) Plaintiff must amend a C.R.C.P. 106(a)(4) complaint after availing itself of RIPRA procedure in order to comply with 28-day jurisdictional deadline pursuant to C.R.C.P. 106(b).

IV. Procedural Matters

A. Burden

1. Burden of proving that a regulatory taking occurred is on the plaintiff. *Jafay v. Bd. of Cnty. Comm'rs*, 848 P.2d 892 (Colo. 1993).

B. Ripeness

1. *Knick v. Township of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019), overruled the state litigation requirement of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

2. *Williamson County* imposed two ripeness requirements for a plaintiff seeking to recover for a regulatory taking in federal court.

a. First, *Williamson County* is generally understood to require a landowner to seek a variance prior to petitioning a federal court for relief in a regulatory taking claim. *See Knick*, 139 S. Ct. at 2169. That holding was not at issue in *Knick*. *Id.*

b. Second, if state law allowed a plaintiff to seek compensation for a regulatory taking, *Williamson County* also required that a plaintiff pursue state litigation prior to filing a claim in federal court.

c. As the Supreme Court recognized in a later case, a plaintiff who lost his state claim was then barred from pursuing a federal claim because the federal court was required to give preclusive effect to the state court's decision. *San Remo Hotel, L.P. v City and County of San Francisco*, 545 U.S. 323, 347 (2005).

d. One of the primary reasons given by the Court for overruling the state-litigation requirement was the unfairness highlighted by the *San Remo* decision. *Knick*, 139 S. Ct. at 2169 ("The adverse state court decision that, according to *Williamson County*, gave rise to a ripe federal takings claim simultaneously barred that claim, preventing the federal court from ever considering it.").

C. Remedies

1. Under the Fifth Amendment, remedy for a regulatory taking is just compensation, which is generally equivalent to the fair market value of the property taken.

   a. Challenge to determine fair market value of property in cases of temporary takings, or where government regulation *benefits* the subject property.

2. Colorado Constitution allows for recovery of damages to the remainder of property in an eminent domain action.

3. Invalidation of the subject law is not typically the appropriate remedy

   a. RIPRA allows the government to modify conditions of approval, and allows for invalidation.

Dealing ethically with conflicting client demands:

Juggling, prioritizing and reconciling the myriad demands placed upon your time and attention as a municipal attorney

By

Marty McCullough, former Westminster City Attorney
Clay Douglas, former Longmont/Loveland City Attorney
David Broadwell, former Denver Asst. City Attorney

CML Annual Seminar on Municipal Law
September 28, 2019

This session will focus on the kind of day-to-day conflicts a municipal attorney may encounter when interacting with the individual officers and employees of a municipality, mindful of the attorney's ultimate ethical responsibility to the organization as client under Rule 1.13, C.R.P.C. Litigation-specific conflicts are beyond the scope of this presentation.

Scenario #1: Accusations of wrongdoing against one member of council

Arguably violating the First Amendment and City Council's Social Media Policy, Council Member deletes and blocks citizen's postings on Council Member's City Facebook page. Citizen complains to Mayor, and Mayor individually contacts you. After you confirm to the Mayor that the councilmember likely violated the law and policy, the Mayor asks you to admonish the Council member and "make him stop doing it."

- How and where should the admonition be delivered? Individually, or collectively with the entire council present? In executive session or in open session? In writing, in person or both?
- If the offending council person is admonished and corrected privately and individually, should the rest of council be informed that the incident took place?
- What if the offending Council Member refuses to comply? What if anything can the city attorney or the city council do to force the issue?

- What do you advise as to the best ways to mitigate litigation risks and costs to the city arising out of the unlawful or *ultra vires* behavior of an individual member of Council?

Scenario #2: Conflicting demands for your time and attention to legislative drafting

Controversial legislation which you have drafted is pending before your city council. You believe it has the support of the majority. Dissenting council member(s) ask you to draft amendment to undermine the original ordinance proposal, or perhaps draft an entirely different ordinance on the same subject.

- Do you oblige or find some sort of workaround?
- What if the dissenting member(s) ask that you keep it a secret from other council members until they spring the amendments on their colleagues?

Scenario #3: Council-Manager conflicts

You have a strong working relationship with the long-time city manager, and consider the manager a friend and confidant. An election occurs and new council members are elected who have expressed concern about the performance of the manager, likely with an eye toward getting rid of the manager. New council members seek your advice and counsel, and ask to strategize with you while keeping discussions confidential from the manager.

- In general, how do you navigate a situation like this?
- Even though the manager is at-will, what if you have reason to believe that the proposed termination will lead to litigation, e.g. the termination may be based on a discriminatory or other unlawful motivation?

Scenario #4: Inter-agency conflicts

A prime piece of city-owned real estate was legally dedicated "for parks purposes only." The city library director proposes to locate a library on the property. The director of your parks department is adamantly against this. Each director presses you for a legal opinion. Case law is fuzzy on whether or not a library is a legitimate "park purpose." Each director is so entrenched in their position, they have threatened to seek a "second opinion" if you don't give them the answer they want.

- In this kind of zero-sum game where one agency is bound to be unhappy, what strategies do you use to reconcile and defuse the conflict.

Scenario #5: Pressure from individual officials for a "legal opinion"

A controversial ordinance is pending before the City Council, perhaps one that "pushes the envelope" in terms of the boundaries of municipal authority. An individual Council Member who intends to vote no on the ordinance for policy reasons also doubts the ordinance's legality. She presses you for a legal opinion about the legality of the ordinance. Your honest opinion is that the ordinance may result in a legal challenge if adopted, but is arguably defensible.

- What if she asks for the opinion in writing? Do you generate a legal opinion at the request of a single member of council?
- What if she insists that you state your opinion on the record at an open meeting (to bolster her arguments against the adoption of the ordinance)?
- What if it's the city manager, nervous about his authority to enforce a dubious ordinance that the council insists on adopting, seeking your legal opinion?

Scenario #6: Campaigns and Elections

An incumbent councilmember asks you to attend a fund raiser for his reelection or otherwise make a donation. Meanwhile, a long-time friend of yours in the community also says she intends to run for council and asks for your support "as a private citizen" by making a donation to her campaign.

- Under any scenario, do you participate in campaigns for election to the governing body?
- Related scenario: Incumbent council member asks you a question regarding an interpretation of state or city campaign finance laws. You suspect the question relates to the member's own campaign. Do you answer?
- Related scenario: One council member accuses another of violating a campaign finance law, for example §1-45-117, C.R.S. prohibiting use of city resources in a campaign. What is your role in terms of advising either the accuser or the accused?

Scenario #7: Advising on compliance with ethics codes

A consultant under contract with the city has just been elected to the city council. The city manager values the work of the consultant and wants the contract to continue, but some council members are dubious about whether or not their newly-elected colleague should be allowed to "wear both hats." Your local code of ethics is ambiguous on this point.

- How would you reconcile a conflict of this nature?
- Related scenario: One council member asks you whether another council member should be required to recuse himself from a vote due to a conflict of interest. Do you answer the question or find some way to deflect it?

Scenario #8. Inquiries about municipal court cases

A member of your governing body calls you wanting to talk about the son of a friend who will be appearing in municipal court next week. The member says he is not trying to influence you one way of the other about disposition of the case, he is just trying to gather information for his friend about what is likely to happen in court.

- Do you engage in this conversation at all?

- Related scenario: Council member herself says she will be appearing in municipal court herself on a traffic ticket, doesn't expect any special treatment, just wants "the same deal anybody else would get." How do you handle?

APPENDIX

Excerpts from Colorado Rules of Professional Conduct

PREAMBLE: A LAWYER'S RESPONSIBILITIES

[2] As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

[9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law. Zealousness does not, under any circumstances, justify conduct that is unprofessional, discourteous or uncivil toward any person involved in the legal system.

RULE 1.13 Organization as Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to the information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

COMMENT

Government Agency

[9] The duty defined in this Rule applies to governmental organizations. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules. Although in some circumstances the client may be a specific agency, it may also be a branch of government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the

bureau is a part or the relevant branch of government may be the client for purposes of this Rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. This Rule does not limit that authority.

Other relevant excerpts from the C.R.P.C.

Preamble

…

[8] A lawyer's responsibilities as its a representative of clients, an officer of the legal system and a public citizen are usually harmonious. Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done. So also, a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.

…

[18] Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships. For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.

…

Rule 1.0. Terminology

…

(c) "Firm" or "law firm" denotes a partnership, professional company, or other entity or a sole proprietorship through which a lawyer or lawyers render legal services; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

…

COMMENT

…

[3] With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed. A similar question can arise concerning an unincorporated association and its local affiliates.

…

Rule 1.7. Conflict of Interest: Current Clients

…

COMMENT

…

Identifying Conflicts of Interest: Material Limitation

…

[16] Paragraph (b)(2) describes conflicts that are nonconsentable because the representation is prohibited by applicable law. For example, in some states substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients, and under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client. In addition, decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.

…

Informed Consent

…

[34] A lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary. See Rule 1.13(a). Thus, the lawyer for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the lawyer, there is an understanding between the lawyer and the organizational client that the lawyer will avoid

representation adverse to the client's affiliates, or the lawyer's obligations to either the organizational client or the new client are likely to limit materially the lawyer's representation of the other client.

…

Rule 1.11. Special Conflicts of Interest for Former and Current Government Officers and Employees

…

COMMENT

…

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [6].

…

Rule 3.6. Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

…

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).