

The Year 2000 Crisis:

The Millenium Bug and the Public Sector

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What activities does your client have under way to assess its Year 2000 readiness? If your client is not currently engaged in a Year 2000 compliance project, you need to recommend it begin one.

First, for those of you who do not know what the Year 2000 crisis (aka the Millennium Bug or Y2K) is all about, here it is in a nutshell: Most business applications written over the last twenty years for mainframes, client/server and personal computers use only two digits, rather than four, to specify the year. Accordingly, on January 1, 2000, unless the software is corrected, many computers with time-sensitive software programs will recognize the year as "00" and may assume the year is 1900 instead of 2000. The result of this mistake could either force the computer to shut down, delete data or cause incorrect calculations. In the past, two digits were used by programmers to designate the year to save, what was then, expensive memory during processing. The problem is not restricted to what is typically regarded as computing devices but may affect all types of equipment having imbedded chips technology that are dependent on dates. These may include elevators, heating and cooling systems, financial systems, security systems, manufacturing systems, traffic lights, medical equipment, card key entry systems, communications systems, fax machines, and even automobiles.

Many people perceive the Y2K issue as a technical problem. However, it is more than that; it is a business issue due to the potential it has to disrupt business operations and to reduce the integrity of financial transactions. It is necessary to gain sufficient understanding and acceptance of this fact at all levels of your government. Executive management participation and sponsorship of the effort is essential to empower the Y2K team so it can accomplish its goals, to assure adequate funding and to provide high level risk management experience. If the Y2K bug affects key systems in your government,



What A Lawyer Needs to Know and Do Now

finding and implementing the solution in time, unlike some other goal your government has set to achieve, is not optional or merely strongly advisable. Your client's survival depends on it.

The primary role of the attorney in the Y2K compliance process is risk assessment and reduction. Some of the key legal issues associated with a compliance project are discussed here.

Due Diligence

To protect itself against Y2K litigation, your client will need to be able to show that it exercised due diligence in addressing the Y2K issue. To establish due diligence your client must show that it acted with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

This standard is borrowed from the private sector which has to show due diligence in order to protect its directors and officers from liability for their actions in regard to most business matters. It seems an appropriate standard in the Y2K context for public bodies. By showing that it "acted with the care an ordinarily prudent person in a like position would exercise under similar circumstances", your client should be able to face most litigation evolving from the Y2K issue in a good posture to minimize its exposure to liability. This is a kissing cousin to the "reasonable man" standard with which we are all familiar in the negligence context.

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Federal Immunity For State & Local Governmental Volunteers

By Clyde J. Robinson, Battle Creek Deputy City Attorney

In remarks made by Michigan's U. S. Senator Spencer Abraham in support of the Volunteer Protection Act of 1997, the following examples were cited:

In New Jersey an umpire was forced by a court to pay a catcher \$24,000 because the catcher was hit in the eye by a softball while playing without a mask. The catcher asserted the umpire should have lent him his mask.

That according to Dr. Creighton Hale, CEO of Little League Baseball, a coach was sued after two youngsters collided in the outfield chasing a fly ball and that in another instance a woman won a cash settlement when struck by a ball, a player, her own daughter, failed to catch.

On June 18, 1997, the legislation became federal law. Under its terms the Act became effective on the conduct of volunteers 90 days later. The Act is intended to provide a national liability standard for volunteers of both nonprofit organizations and governmental entities. However, in regard to the latter, Congress may have overstepped its authority.

Congress, in enacting a federal standard of tort liability for volunteers, explicitly did so pursuant to its Commerce Clause powers under Article I, Section 6, of the U.S. Constitution. Though exercise of this power has been broadly interpreted in the past, more recent cases decided by the Supreme Court suggests a narrowing of Congress' Commerce clause prerogative. In particular is the Court's decision in *United States v Lopez*, 514 US 549 (1995), the Gun-Free School Zone Act case. In *Lopez* the Supreme Court held that the federal criminal statute forbidding the knowing possession of a firearm in a school zone was an unconstitutional exercise of Congress' Commerce Clause authority. The Court noted that the legislation did not regulate an economic activity that had a substantial effect on interstate commerce, but instead was a usurpation of general police authority held by the individual States.

Although many nonprofit organizations operate nationally, governmental services are usually inherently local. As the Volunteer Protection Act attempts to legislate tort liability standards for state and local governmental volunteers, such could likely be viewed as an unconstitutional attempt to exercise of power in an area traditionally left to the individual States. Thus, it remains to be seen whether the Volunteer Protection Act, which preempts State law in the area of tort liability, at least as to governmental volunteers, will withstand constitutional scrutiny.

In relevant part the Act explicitly "... preempts the law of any State to the extent that such laws are inconsistent with this Act, except that this Act shall not preempt any State law that provides additional protection from liability relating to volunteers . . . in the performance of services for a . . . governmental entity." 42 USC 14502. States may, by legislative enactment, opt out of the reach of

the federal statute those cases brought within that State's Courts where all parties are citizens of that particular State. To date, it appears that Michigan has not elected to exercise this option. However, as under the Act State law may provide greater liability protection, an examination of the relevant law of Michigan governmental immunity must be undertaken to determine the scope of protection available to governmental volunteers in this state.

The Michigan Governmental Tort Liability Act, MCL 691.1401, *et. seq.*; MSA 3.996 (101), *et. seq.* specifically addresses the issue of volunteer liability. Under Michigan law, "volunteer means an individual who is specifically designated as such and who is acting solely on behalf of a governmental agency." MCL 691.1401(g). This definition is broader than that found under the Federal Act. 42 USC 14505(6) defines a "volunteer" as an individual performing services for a nonprofit organization or a governmental entity who does not receive (a) compensation, other than reasonable reimbursement or allowance for actually incurred expenses, or (b) anything of value in lieu of compensation in excess of \$500 a year. Although not required, it may be advisable for governmental agencies to adopt policies defining their governmental volunteers using the language of the Federal law. In so doing, the open question under Michigan law of how and by whom a volunteer is "specifically designated" is in large part answered.

Although the Michigan Legislature has extended specific immunity to unarmed State park volunteers pursuant to MCL 324.74105, the scope of a volunteer's liability under Michigan law is generally defined at MCL 691.1407(2). This latter section states that a volunteer acting on behalf of a governmental agency is immune from tort liability, personal injury or property damages while the volunteer is acting on behalf of the governmental agency if the following three tests are met: (a) the volunteer is acting, or reasonably believes he or she is acting, within the scope of his or her authority; (b) the governmental agency is engaged in the exercise or discharge of a governmental function, and (c) the volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. "Gross negligence" is defined under the Statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." Upon meeting all three parts of this test a volunteer is immune from tort liability. However, whether an individual meets these tests will usually be a factual issue for a jury to determine.

Under the Federal Act, 42 USC 14503(a), immunity is premised

upon a different test. Under this section, a volunteer is not liable for harm caused by their acts or omissions made on behalf of the organization or entity if:

- The volunteer was acting within the scope of his or her responsibilities in the governmental entity at the time of the act or omission;
- If appropriate or required the volunteer was properly licensed, certified or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, or the activities were or practice was undertaken within the volunteer's responsibilities in the governmental entity;
- The harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and

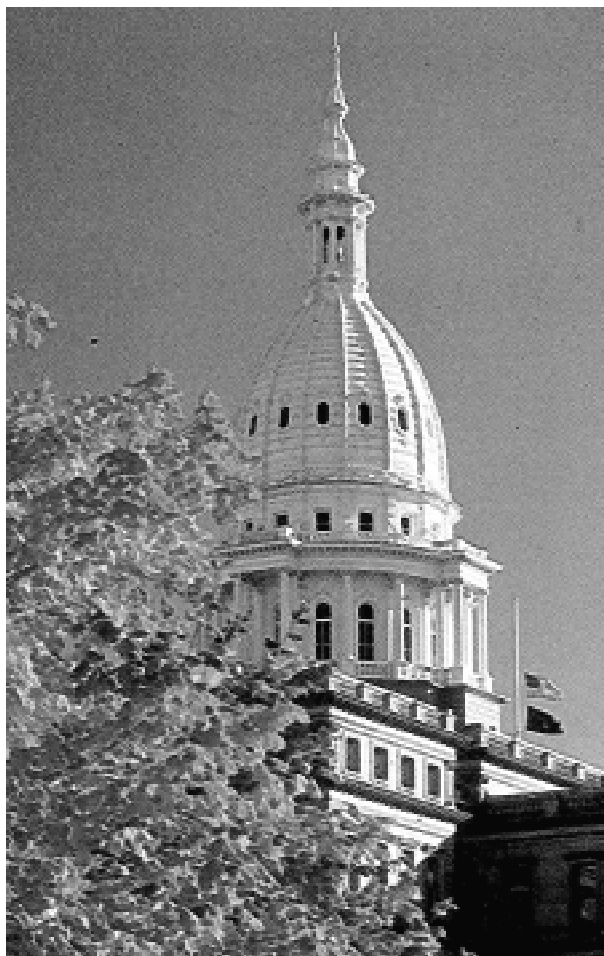
■ The harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft or other vehicle for which the State requires the operator of same to possess an operator's license or maintain insurance.

In contrasting the requirements of the Federal Act with Michigan law, four points can be made. First, unlike the Michigan law, Federal law requires a volunteer to be properly licensed or certified if the activities they are engaged in requires same. However, while this requirement does not appear under State law, arguably any person who, without appropriate certification or licensure, engages in practices which require same are acting outside the scope of his or her authority.

Second, under the Federal statute, harm caused by criminal misconduct or conduct beyond simple negligence subjects the volunteer to liability. It can be argued that

Michigan's standard provides more protection from liability because it defines the elements of what constitutes "gross negligence" and requires the harm complained of to have been proximately caused by that gross negligence. In practical terms, conduct that is criminal in nature or which exhibits a degree of negligence that approaches wantonness or an intentional disregard for the safety of another will meet the Michigan gross negligence standard and is likely to be beyond the scope of the volunteer's authority.

However, as noted above, the issue as to whether particular conduct amounts to gross negligence under the Michigan statute is



usually a question for the trier of fact. In this regard, the legal and factual issues of determining intentional conduct versus that which is grossly negligent, at least in the context of providing nonproprietary governmental services, can be difficult to draw under both laws.

This problem was recently addressed in *Sudal v City of Hamtramck*, 221 Mich App 455; 562 NW2d 478 (1997), where a jury instruction defining "assault and battery by gross negligence" was found by the court to taint the verdict rendered by the jury. This result leads to the following queries: Is a police officer committing an intentional tort or engaging in grossly negligent conduct when placing a person under arrest based on a mistake of fact or law? Or in the use of some degree of non-malicious force that the arrestee asserts was "unreasonable" in the case of a lawful arrest?

In these examples the officers clearly intended to arrest or use force, but the decision and execution of same present more a question concerning the exercise of judgment, *i.e.*, a negligent act, rather than an intentional tort. Isn't it therefore possible that the assault and battery which of necessity accompanies an unlawful arrest can be the result of gross negligence? If so, how should those issues be framed for judges and juries? The courts have yet to adequately address these questions.

Third, the Federal Act does not provide immunity if the harm was caused by a volunteer operating a motor vehicle or other craft requiring a license or insurance. Under the Michigan law, a governmental entity has vicarious liability for the negligent operation of a motor vehicle. See MCL 691.1405. For liability to attach to employees or volunteers operating governmentally owned motor vehicles requires a finding that the individual was operating the vehicle in a grossly negligent manner. Thus, the Michigan Governmental Immunity Statute provides greater protection than the Federal law in regards to the operation of motor vehicles.

Fourth, because the Federal Act, unlike the Michigan Statute, does not limit its protection to volunteers engaged in a governmental function, volunteers engaged in proprietary or non-governmental activities on behalf of governmental agencies now have a measure of protection

Another area where the Federal Act provides greater protection than the Michigan Statute is for volunteers who are presumably "agents" of public hospitals and county medical care facilities. Under the terms of the Michigan Statute, MCL 691.1407(4), only agents and employees of department of mental health or department of corrections hospitals are protected by the State immunity law, agents of other public medical care facilities do not have immunity. Presumably this conscious policy decision of the Michigan Legislature has now been abrogated by Congress if the agent is a volunteer.

Although broad in scope, the immunity granted under the Federal Act is subject to several exceptions, see 42 USC 14503(c), (d) and (f), some of which are not pertinent to Michigan. As to all States, the Act permits a civil action:

- brought by a governmental entity against a volunteer of the agency;

- when the volunteer engaged in a crime of violence or international terrorism as those terms are defined under Federal law and the individual has been convicted of same;
- if the volunteer engaged in conduct which constitutes a hate crime under Federal law;
- if the conduct giving rise to the action involves a sexual offense as defined by State law for which the volunteer has been convicted;
- when the volunteer engaged in misconduct for which the individual has been found to have violated Federal or States civil rights law; or
- where the individual was under the influence, as determined by applicable State law, of intoxicating alcohol or any drug at the time of misconduct.

However, even when liability does attach to a volunteer, the amount of damages available is limited. Although economic damages (defined at 42 USC 14505(1) as pecuniary losses such as the loss of earnings, medical expenses, and the cost of replacement services), are not limited, noneconomic and punitive damages are. In what may be an unintended consequence in the drafting of the legislation, unlike 42 USC 14503(a) which limits the protection of the Act to simple negligence provided the four-part test is met, those sections addressing punitive damages, 42 USC. 14503(e), and noneconomic damages, 42 USC. 14504, are applicable when a volunteer acting within the scope of the volunteer's responsibilities, which is only the first element of the four-part test. Presumably, a volunteer who failed one of the remaining three parts for purposes of exposure to liability could still claim protection from damages.

Aside from the inconsistency described above, punitive damages are not available unless a plaintiff establishes by "clear and convincing evidence" that the harm proximately caused by the actions of the volunteer constituted willful or criminal misconduct, or was a conscious, flagrant indifference to the rights or safety of the individual injured. Additionally a volunteer for noneconomic loss is limited. A volunteer is liable only for the amount of noneconomic loss allocated to that particular individual in direct proportion to the percentage of responsibility of that individual. Thus, there is no joint and several liability for defendant volunteers. They are only responsible for damages in an amount which reflects their percentage of the total harm suffered by the plaintiff.

In summary, although it may ultimately be unconstitutional as to governmental agency volunteers, for the time being the Volunteer Protection Act broadens the categories of volunteers to whom immunity is afforded as well as the degree of protection available. However the Act may not actually reduce the number of suits brought against governmental volunteers because by exempting from its protection allegations of civil rights violations, volunteers or governmental agencies on the volunteers' behalf are still likely to incur significant costs in the defense of claims as most governmental actions are taken under the color of State law and give rise to a suit brought pursuant to 42 USC. 1983.

WHAT IS THE INTERNET & HOW DO I "SURF" IT?

By **Hurticene Hardaway**
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During the course of the departmental Internet training I conduct, I respond to many questions. I will share some of these questions (Q) and answers (A) with you to speed you along on your trek to the information superhighway.

Q: What is the Internet?

A: A vast network of individual computers and computer networks that communicate with each other using the same communications language, TCP/IP. It is estimated there are 50 million or more computers around the world using TCP/IP protocols.

Q: How did the Internet get started?

A: It evolved from a network of computers established by the Defense Department and academic institutions to keep track of federally funded research projects.

Q: Who owns and controls the Internet?

A: The Internet isn't owned or controlled by any private or public body. It's open and continually expanding.

Q: If no one controls it, how does it work?

A: It works through the use of uniform operating standards developed and adopted by teams of individuals, organizations, businesses and government agencies throughout the world.

Q: I keep hearing about the "World Wide Web." What is it?

A: It's a part of the Internet that uses hypertext markup language (HTML) to link together files containing text, sound, graphics and/or video. It's the most popular and fastest growing part of the Internet.

Q: What is HTML?

A: It's language on a web page that you can click on and go to another page or web site.

Q: I still don't understand. How does it work?

A: If you come to the Public Corporation Law Section Spring Seminar, I'll demonstrate how it works for you.

Q: Well, what equipment do I need to get on the Internet?

A: First, you need to have a personal computer (PC).

Q: Why do I need a PC? Can't I access the Internet on my television?

A: Yes, you can access the Internet

running Windows 3.1 or Windows 95. The PC should have at least 8 MB of memory. The ideal machine is a 233 MHZ or higher Pentium II with a minimum of 32 MB of memory. You should have at least a 33.6K modem although the ideal is a 56K modem.

Q: What is a modem?

A: A modem is a device, which may be internal or external to your PC, which is required for your PC to communicate with other computers and fax machines via telephone lines.

Q: Are there other types of modems which do not require telephone lines?

A: Yes, some cable companies provide Internet service and provide cable modems to access the service.

Q: I'm uncomfortable about how to select the right hardware because I don't know from megahertz or memory. Is there any place I can learn more about what type of hardware options I should consider for my office?

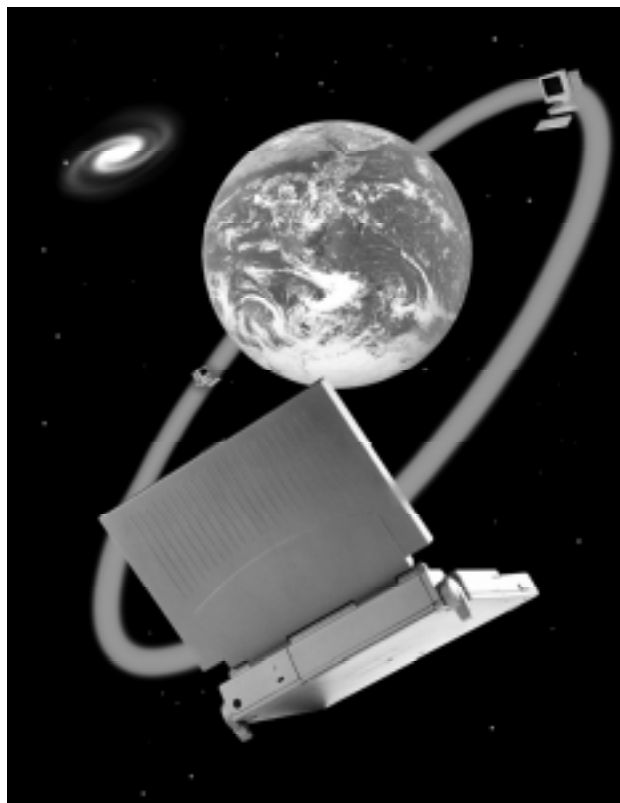
A: Yes. Visit the ICLE web site at <http://www.icle.org> on the Internet. This is a good source of information on technology for the law office. Use someone else's Internet access to visit this web site for help on technology issues.

Q: Okay, once I've got my PC with a modem, what else do I need?

A: You'll need the software required to browse the Internet. This software is a web browser.

Q: How do I get one?

A: If you have a PC with Windows 95



without a PC via your television and a device designed to connect to your television and telephone line. But a PC is still the primary means of access so I'll tell you about PC requirements.

First, you need a 486 PC or higher model

on it you have a web browser installed, Microsoft Internet Explorer. However, there is another major player in the web browser field you should know about, Netscape Communicator. Explorer and Communicator are the predominant, but not the only, players among web browsers. In order to compete with Explorer, you can now get Communicator free from the Netscape web site.

Q: Is there anything else I need before I can “surf the web”?

A: Yes, you need an Internet service provider (ISP).

Q: Why do I need an ISP?

A: An ISP is necessary to actually provide you with the means of accessing the Internet. You need to select an ISP and establish an account with it and pay its service fees.

Q: I thought the Internet was free. Why do I have to pay an ISP?

A: The ISP is your gateway to the Internet. Once you are “surfing the net”, the vast majority of the information on it is free.

Q: How much will I have to pay an ISP?

A: That’s difficult to say with any certainty because it will depend on the size of your organization, how many people you will have accessing the Internet, whether you want unlimited access and whether you are using a modem, a cable, an ISDN or T-1 connection with your service provider.

Q: Whoa. What is an ISDN and a T-1 connection? I thought my connection options were telephone or cable.

A: An ISDN and a T-1 connection are telephone connections. However, they are not your traditional telephone connection. They are faster and more expensive telephone connections.

Q: What is the advantage of an ISDN or T-1 line over a regular telephone line?

A: In addition to speed, you don’t have to fight with the general public relative to capacity on the telephone network and they provide very reliable performance.

Q: Are there any other things I need to know about access options?

A: Yes. If you use a T-1 line to access the Internet, you can set up access in a

manner that does not require modems.

Q: But I thought you said I need a modem in order to communicate with other computers over the phone lines and that a T-1 line is a phone line. Did I miss something?

A: No, you didn’t miss anything. What you have said is true. However, if your organization has a local area network (LAN) and establishes a proxy server for all Internet access, it can be set up so that modems aren’t required. Exactly how this is done is far more than you want or need to know now but it is an option for you to consider since you can have many persons on the Internet simultaneously without a bunch of modems and telephone lines.

Q: How does this allow many people to access the Internet simultaneously?

A: If you are accessing the Internet via a modem connected to a telephone line, you need a modem for each PC and a telephone line for each PC. If you’re a 10 attorney office, you’ll need 10 modems and 10 phone lines so everyone can access the Internet simultaneously. If you have a proxy server on your network, which doesn’t require the use of modems, you don’t have the expense of maintaining the modems and the phone lines. Did I mention that the telephone lines you need must be single line phones (the same as required for fax machines) since you can’t use modems on your multi-line telephone systems? This means that you must install separate phone lines solely for use by your modems.

Q: Isn’t there a way I can use modem banks to limit the number of modems and telephone lines I need?

A: Yes. You can set up a system with any number of modems. The only down side is that you have to share so you won’t necessarily be able to get to the Internet whenever you might need it.

Q: You mentioned cable modems earlier. What are they?

A: A cable modem may be required for you to have access to the Internet with a cable company as your ISP. If you have cable access to the Internet, it is significantly faster than a 56K modem. It provides “dedicated access” to the Internet because it is always on so

whenever you open your browser you are on the Internet. With other types of ISPs you must enter a password and dial in to access the service.

Q: The cable access sounds good. Are there any down sides to it?

A: Since the PC is always connected to the Internet, there are security concerns about data being transmitted to or from your hard drive without your knowledge. Your cable ISP should be able to tell you how to properly configure your PC for maximum security.

Q: How much does it cost for cable access to the Internet?

A: Again, I can’t give you a figure that will apply to everyone. However, one Michigan cable company is providing Internet access to home users for \$39.95 per month for unlimited use.

Q: Can I watch cable TV while my son is accessing the Internet via the cable system?

A: Yes.

Q: If I just want to get a single PC connected to the Internet via a modem, how much is it likely to cost a month for unlimited access?

A: You should be able to find an ISP to provide unlimited access for \$12-25 per month. Go to <http://www.isp.com> for more information on ISPs.

Q: Okay, I’ve got a PC, I’ve got a browser, I’ve got an ISP and the required equipment to communicate with the Internet. Can you tell me how to “surf the net” now?

A: Before we go surfing you need to have virus and firewall protection for your PC.

Q: What are those and why do I need them?

A: A computer virus can cause serious damage to your files or your hard drive if your PC becomes infected. Some viruses can delete files; some can cause hard drives to crash and some are harmless. Since the potential for significant damage to your programs, data files and hardware is present, virus detection and removal software to protect your PC is advised.

As for firewall protection, it is designed to keep harmful elements from the Internet from getting into your PC. These elements can attach themselves to your hard drive, read the data and transmit it

from your PC back to a web site. They can also be programmed to do other nasty things to your PC. Needless to say, it's important to protect your PC against them. Firewall protection prevents these elements from entering your PC. If your PC has Internet access via a LAN using a proxy server, the firewall protection is built into the proxy server. If you are using a standalone PC, you need to install firewall software on the PC. For information on the type of firewall and virus software available, visit <http://cnet.tv.com>. This web site provides a wealth of information on a broad range of technology issues.

Q: Okay, I've got a PC, I've got a browser, I've got an ISP and the required equipment to communicate with the Internet and virus and firewall protection. Am I ready to "surf the net"?

A: There's one last thing you'll need if you're going "surfing" in your office and that's an Internet usage policy.

Q: Why do I need an Internet usage policy?

A: In your office the Internet is a business tool. Unfortunately, it can be abused. An Internet usage policy should state the Internet is for business use and limit personal use.

Q: Is there any way to prohibit access to sites which might be considered "inappropriate" for a business setting or children?

A: Yes. There is filtering software available which can prohibit access to specific web sites or specific types of material on the Internet.

Q: Is there any way to monitor Internet usage in an office?

A: Monitoring software is available which can provide detailed reports on what web sites have been visited and how long each visit lasted. Employees should be informed of the monitoring software's use in the Internet usage policy.

Q: Okay, I've got a PC, I've got a browser, I've got an ISP and the required equipment to communicate with the Internet and I've got virus and firewall protection and an Internet usage policy. Am I ready to "surf the net" NOW?

A: Yes, but it's easier to show you how than to tell you. So, if you come to the

Public Corporation Law Section's Spring Seminar Friday, June 5, 1998, I'll give you an online demonstration of how to "surf the net". I'll show you the fascinating world of URLs, HTML, cookies, favorites, search engines and directories. I'll also show you how to find information and people and give you some web sites you might find useful in your practice.

Just so you can keep up with what will be a fast paced demonstration, I'm giving you a copy of some essential terminology for you to review. I suggest you read it on Thursday evening or Friday morning before the demonstration so it's fresh in your mind.

See you in June; we're going "surfing".

ESSENTIAL INTERNET TERMINOLOGY

- Browser or web browser - software program that provides access to the Internet. The primary browsers are Netscape Communicator and Microsoft Internet Explorer.
- Button Bar - set of graphic buttons at the top of the screen that provides shortcuts to getting around on the Internet.
- Cookie - bits of information that are passed to your browser by a web server to be stored on your hard drive and returned to the server when requested.
- Domain Name - a key component of the Internet address for sending e-mail and accessing a web site.
- Download - to copy a file from a web site on the Internet onto the computer.
- FAQ (Frequently Asked Questions) - a list of frequently asked questions and their answers.
- Favorite or bookmark - a button or menu item to mark a site so it can be selected later from a list by clicking on it.
- Find - Button or menu item that allows you to search the web page on your screen (as opposed to searching a web site or the entire Internet).
- Home Page - the first or main page of a web site.
- HTTP (Hypertext transfer protocol) - the protocol used by web servers to transfer hypertext documents (including text, graphics, sound and video) on request from a web browser.
- Hypertext Link - a system in which documents contain links that allow readers to move between areas of the document, following subjects of interest in a variety of different paths. Use the mouse to click on a text or image (usually in color and/or underlined) to follow the link. The WWW is a hypertext system.
- ISP (Internet Service Provider) - a business which provides access to the Internet, i.e., American Online, Compuserve, Ameritech, AT&T, MCL, etc.
- Print - Button or menu item to print the file that appears on the screen.
- Search (Internet) - go to search by selecting a menu or Button Bar on the screen. Uses a search engine.
- Search (Web Site) - an option within a web site to find information on a topic at that web site.
- Search Engine - a program that indexes information about web sites throughout the world.
- Start Page - the web page which comes up whenever the web browser is opened.
- TCP/IP (transmission control protocol/Internet protocol) - language used by all computers on the Internet to communicate with each other; enables any type of computer to communicate with any other type of computer on the Internet.
- URL (Uniform Resource Locator) - the address for a web file. Usually begins with the characters "http://" followed by the web address. E.g. the State Bar of Michigan's URL is <http://www.michbar.org>.
- Web Site - the location on the Internet.

Michigan's Public Funds Investment Law Improved by Bullard Initiative

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As a way to expand the investment options of local units of government, while simultaneously increasing the security of municipal investments, Senator Bill Bullard (R-15th District), former Highland Township Supervisor, sponsored Senate Bill 664. The bill was signed into law by Governor Engler on December 30, 1997, becoming Public Act 196 of 1997, and takes effect on June 28, 1998.

PA 196 requires municipal governments to adopt an "investment policy" guiding investments of surplus funds. ("Surplus" funds are not surplus in the budgetary sense, but are funds that are generally needed on a short term basis.)

Prior to PA 196, the legislative or governing body of a county, city, village, township or special assessment district could authorize its treasurer or other chief fiscal officer to invest surplus funds. Under the legislation sponsored by Senator Bullard, the treasurers of public corporations will have the authority to invest surplus funds in a much broader range of investment instruments. For example, the Act will expand the variety of authorized investments to include, among other instruments, federal agency securities and investment grade state and local obligations. The Act also changes standards for commercial paper investments and eliminates the current cap that limits such investments to fifty percent of a public corporation's investment portfolio.

Although PA 196 expands the investment options of public corporations, the Act does require local governments to pass a resolution adopting an investment policy. This policy must include a statement of purpose, scope and objectives (including safety, di-

versification, liquidity and return on investment); define who is authorized to make investments; list authorized investment instruments; and contain a statement concerning safekeeping, custody and prudence. This policy must be adopted no later than 180 days after the end of the first fiscal year ending after June 28, 1998. The Act does provide, however, that public corporations that have already adopted investment policies substantially complying with the requirements of the Act need not adopt a new policy so long as the old one remains in effect.

In addition to guiding investment decisions, a public corporation's investment policy will increase the accountability of vendors, brokers and dealers. Under the Act, before a broker, dealer or financial intermediary may execute an offer to purchase or otherwise invest the funds of a public corporation, that person must be provided a copy of the public corporation's investment policy. After receiving a copy of that policy, the investor must acknowledge receipt of the policy and agree to abide by the terms of the policy concerning the buying and selling of securities. These provisions impose a higher and more specific duty than that under current law on those who market products for investment of public funds.

All in all, PA 196 should benefit all public corporations by clarifying the law concerning public investments, allowing public corporations to invest in a broader range of instruments and improving accountability of financial professionals dealing with public corporations.

State Court Decisions of Interest

By R. Lance Boldrey
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GOVERNMENTAL IMMUNITY—PUBLIC BUILDING EXCEPTION—AREAS ADJACENT TO ENTRANCES

Horace v City of Pontiac and Adams v State of Michigan, ____ Mich ____ (April 7, 1998).

In these consolidated cases, the Supreme Court addressed the issue of whether the public building exception to governmental immunity applies to injuries arising from a dangerous or defective condition existing in an area adjacent to an entrance or exit of a public building. The court explored a number of conflicting Court of Appeals decisions that generally held that no public building claims could be maintained when the area where a plaintiff was injured was not "immediately" adjacent to a public building. In clearing up any disagreement among various Court of Appeals decisions, the Supreme Court narrowly construed the public building exception as applying only to a dangerous or defective condition "of a public building." Thus, the Supreme Court limited the public building exception to injuries caused by dangers presented by a physical con-

dition of the building itself and held that injuries arising from a dangerous or defective condition existing in an area adjacent to an entrance or exit, but nevertheless still not a part of a public building, do not come within the public building exception to governmental immunity.

GOVERNMENTAL IMMUNITY—TRESPASS-NUISANCE EXCEPTION—SEWER BACKUP

CS&P, Inc. v City of Midland, ____ Mich App ____ (March 31, 1998).

Plaintiffs leased property in the lower level of a commercial building located in the City of Midland. Broken risers in the City's sewer caused a blockage, diverting water and sewage into the building. The City admitted that it owned the sewer system, was responsible for maintaining the sewer, and that the section of sewer that failed had been cleaned and inspected. In ruling on motions for summary disposition, the trial court held that Plaintiffs had stated a

cause of action under the trespass-nuisance exception to governmental immunity and that negligence was not an element plaintiffs would need to prove at trial.

Following a jury verdict in Plaintiffs' favor, the City appealed, arguing that Plaintiffs were required to prove negligence to establish their trespass-nuisance case. The Court of Appeals, after examining prior decisions, affirmed the trial court, holding that negligence is not a necessary element of a trespass-nuisance cause of action.

LOCAL HISTORIC DISTRICTS ACT— INDIVIDUAL PROPERTIES

Draprop Corp. v City of Ann Arbor, Michigan Court of Appeals No. 198235 (Unpublished, March 13, 1998).

The City of Ann Arbor adopted an historic preservation ordinance and, pursuant to the terms of that ordinance, designated two apartment buildings owned by Plaintiff as historically significant sites, incorporating them within the City's register of historic places. Plaintiff filed suit against the City, alleging that the City's actions constituted a taking of its properties and violated Plaintiff's due process and equal protection rights. The trial court granted the City summary disposition, ruling that the City's ordinance and actions were constitutional and comported with the Local Historic Districts Act.

On appeal, the Court of Appeals examined the scope of the Local Historic Districts Act. The court found that the Act legitimately permits municipalities to regulate acts that may be taken with respect to buildings located within historic districts. Under the Act, a historic district is defined as "an area, or group of areas not necessarily having contiguous boundaries, that contains one resource or a group of resources that are related by history, architecture, archaeology, engineering, or culture." In construing the provisions of the Act, the Court of Appeals ruled that the Act only permits regulation of properties or sites located within historic districts, and does not authorize regulations aimed at individual historic buildings. Accordingly, the Court of Appeals remanded the case to the trial court for further proceedings.

MASSAGE PARLORS REGULATIONS— CONSTITUTIONALITY

Gora v City of Ferndale, ____ Mich ____ (April 1, 1998).

The City of Ferndale passed an ordinance regulating the operation of massage parlors. Among other things, the ordinance prohibits massage of members of the opposite sex except under limited circumstances and upon a written order from a licensed health care practitioner and provides for periodic warrantless inspections of massage parlors. As reported in the September 1996 issue of *Public Corporation Law Quarterly*, the Court of Appeals ruled that the prohibition on opposite sex massage discriminates on the basis of gender and violates the state and federal equal protection clauses. The Court of Appeals also held that the warrantless inspection provisions violate constitutional protections against searches and seizures.

On appeal, the Supreme Court first addressed the issue of

whether the prohibition and regulation of opposite sex massages violates equal protection guarantees. While the Supreme Court did not disagree with the Court of Appeals' statement of the heightened scrutiny test (requiring that gender-based classifications serve an important governmental purpose and be substantially related to achieving the government's objection), the Supreme Court disagreed that the test was not met in this case. The Court found that on numerous occasions, the United States Supreme Court has dismissed appeals from state court decisions on this issue, ruling that no substantial federal question was involved. Thus, the United States Supreme Court has repeatedly ruled that ordinances prohibiting opposite sex massage are not unconstitutional. Because the equal protection provisions in the Michigan Constitution are identical in scope to the equal protection guarantee afforded by the United States Constitution, the Michigan Supreme Court concluded that neither state nor federal equal protection clauses were violated.

The Supreme Court next turned its attention to whether the ordinance's authorization of warrantless searches was constitutionally valid. Under both federal and state case law, an exemption from the search warrant requirement exists for administrative inspections of closely regulated industries. Although the Court of Appeals concluded that the massage parlor industry is not subject to pervasive regulation, the Supreme Court disagreed. In reaching this decision, the Supreme Court relied upon the United States Supreme Court's dismissal of a similar Indiana case for want of a substantial federal question. The Michigan Supreme Court concluded that this ruling of the United States Supreme Court constituted an implicit holding that the massage parlor industry is subject to pervasive regulation. Although the Michigan Supreme Court did hold that the ordinance must be construed as permitting only periodic inspections conducted in a reasonable fashion solely for the purposes of determining compliance with the ordinance, the Court ultimately found the warrantless search provisions constitutionally valid, reversing the decision of the Court of Appeals.

OPEN MEETINGS ACT AND FREEDOM OF INFORMATION ACT—EMPLOYEE INTERVIEWS

The Herald Company v City of Bay City, ____ Mich App ____ (February 24, 1998).

Bay City's charter provides that the City Commission shall appoint a fire chief "on the recommendation of the City Manager." In selecting a new fire chief, the City Manager established a committee to set hiring criteria, solicit, screen and interview applicants. The committee screened 34 applicants and interviewed seven semi-finalist candidates. The committee then advised the City Manager that three candidates deserved second interviews. The City Manager interviewed these three finalists and subsequently presented his recommendation to the City Commission. Throughout the interview process, interviews were conducted in private and without public notice.

During the course of the hiring process, Plaintiff submitted a Freedom of Information Act ("FOIA") request asking for the "names, current job titles, cities of residence, and age of the seven final candidates for the job of Bay City Fire Chief." After the City

denied this FOIA request and hired a new fire chief, Plaintiff filed a complaint alleging that the City had violated the Open Meetings Act (“OMA”) and the FOIA. The trial court granted the City’s motion for summary disposition on the OMA claim, ruling that Defendants were not a public body under the Act. The trial court also denied Plaintiff’s motion for summary disposition on the FOIA claim.

In reviewing the OMA claim, the Court of Appeals determined that it needed to resolve the following issues: (1) whether the City Manager acted as a “public body,” (2) whether there was a “meeting” of a public body, (3) whether a “decision” effectuating public policy was made by the City Manager, and (4) whether any statutory exceptions are applicable. In addressing the first issue, the court held that the key factor in determining whether an entity is a public body is whether the body exercises governmental or proprietary authority. The court held that, under the facts of this case, the City Manager and Commission together constituted a public body when acting to appoint a fire chief. The court further held that, because the OMA requires all interviews to be open, even if not conducted by a quorum, the interviews by the City Manager satisfied both the public body and meeting prongs of the OMA test. The court also held that the actions of the City Manager in setting hiring criteria, reviewing applications, and narrowing the field of candidates were decisions under the OMA even if the City Commission could later revisit these decisions. Finally, the court noted that the OMA has no statutory exception permitting a municipal body to conduct closed interviews. The court, therefore, found that the City Commission and City Manager violated the OMA.

With respect to Plaintiff’s FOIA claim, the court addressed two issues. First, the court questioned the City’s contention that Plaintiff failed to request any specific document and that the City is not required to create a record containing the information demanded by Plaintiff. The court held that Plaintiff sufficiently described the information requested, and remanded the matter to the trial court to determine further details, such as whether the requested information appeared on documents in the City’s possession. Second, the Court of Appeals reversed the trial court’s determination that publicly identifying the “personal information sought about the seven finalists would constitute an invasion of their right to privacy.” The Court of Appeals concluded that disclosure of the fact that a particular person is being interviewed for a public position is not information of a “personal nature.” The court further held that, even if requested documents contained personal information, that information could be redacted by the City before the documents were turned over to Plaintiff.

REGULATORY TAKINGS—NONSEGMENTATION AND BALANCING TEST

K & K Construction, Inc. v Department of Natural Resources,
____ Mich ____ (March 24, 1998).

This takings case involves four contiguous parcels owned by Plaintiffs. Parcel one, consisting of fifty five acres and containing significant wetlands, is zoned for commercial use. Parcel two, consisting of sixteen acres and containing a small portion of wetlands, is zoned for multiple family residential housing. Parcel three, con-

sisting of nine acres and containing no wetlands, is also zoned for multiple family residential housing. Parcel three is the only one of the four parcels that has already been developed. Finally, parcel four, consisting of three acres and containing no wetlands, is also zoned for multiple family residential housing.

Plaintiffs plan to develop parcels one, two and four by building a restaurant and sports complex on most of parcel one and multiple family residential structures on parcels two and four. When Plaintiffs applied for a permit to fill part of parcel one, however, the DNR denied the permit based on its finding that a significant portion of parcel one consisted of protected wetlands. Rather than filing an administrative appeal, Plaintiffs filed a takings action in the Court of Claims. A year and one-half after filing their Complaint, Plaintiffs submitted a second application for a permit that would have left most of the wetlands intact and mitigated any fill by converting upland acreage to wetland. The DNR denied this permit application as well.

At trial, the Court of Claims ruled that only parcel one should be considered in a takings analysis and found that denial of the initial permit rendered the property commercially worthless. Once the DNR was faced with having to compensate Plaintiffs for the full value of their property, the DNR decided to allow development under the terms of Plaintiffs’ second permit application. The trial court, nevertheless, held that the DNR was liable for both a “temporary taking” and for the full value of wetlands that were not usable under the second plan. The trial court awarded Plaintiffs approximately \$4 million dollars, plus interest, a judgment that was affirmed by the Court of Appeals.

On appeal, the Supreme Court first engaged in a review of federal takings jurisprudence. The Court then turned its attention to two issues. First, the Court noted that where a property owner owns multiple contiguous parcels, the trial court must engage in a factual inquiry to determine what constitutes the “denominator parcel” for the takings analysis. Based on the facts of this case, the Court ruled that parcels one, two and four, despite different zoning classifications, should be included in the denominator parcel. The Court relied on the fact that these parcels are contiguous, under common ownership, and are bound together by Plaintiffs’ proposed development plan. (Although a plaintiff’s proposed use for property is not the sole factor in determining the denominator parcel, the Court ruled that this factor is entitled to significant weight.) The Court then remanded the case to the Court of Claims to determine whether parcel three shared a sufficient ownership interest and connection with the other parcels to be included in the denominator parcel. In doing so, the Court set forth a list of non-exhaustive factors that should be considered, including whether the parcels were initially purchased at the same time, the extent of development relative to the date of regulations that burden the property, and the zoning of the parcels.

The Supreme Court next analyzed whether the DNR’s actions constituted a regulatory taking. The Court noted that a regulatory taking exists when (1) the regulation fails to advance a legitimate state interest, or (2) the regulation denies an owner economically viable use of his land. The Court held that only the second type of taking could apply in this case and explained that this second type

of taking can occur either as a categorical taking or as a taking recognized on the basis of application of a traditional balancing test. The Court ruled that the lower courts were mistaken in concluding that the DNR's regulation of Plaintiffs' property constituted a categorical taking. For a categorical taking to exist, plaintiffs must be completely deprived of all economically beneficial or productive use of their land. In this case, however, Plaintiffs were actually allowed to develop the majority of parcel one, and most of parcels two and four; thus, Plaintiffs' land was not left economically idle.

After concluding that a categorical taking had not occurred with respect to Plaintiffs' property, the Supreme Court examined whether a taking had occurred on the basis of the balancing test. The Court noted that this analysis recognizes that regulations that do not rise to the level of a categorical taking may still be so burdensome as to rise to the level of a taking. Proof of such a taking requires factual inquiry into three factors: (1) the character of the governmental action, (2) the economic effect of the regulation on the claimant, and (3) the extent to which the regulation interferes with distinct investment-backed expectations. While there is no set formula for determining when a taking has occurred under this test, a court must at least compare the value removed by virtue of the regulation with the value that remains. Accordingly, the Supreme Court reversed the decision of the Court of Appeals and remanded the case to the Court of Claims to compare the relevant values and then reevaluate the case under the three-part balancing test.

SPECIAL USE PERMIT—APPEALS—TIME FOR APPEAL

Moore v Three Oaks Township, Michigan Court of Appeals No. 188693 (Unpublished, February 27, 1998).

Plaintiffs, residents of Three Oaks Township, are neighbors of the Deer Creek Hunt Club. When the owners of the Hunt Club applied for a special use permit to operate the Club, the Township failed to give proper notice of the hearing on the special use permit to some of the Plaintiffs. Although most, if not all, of the Plaintiffs became aware of the hearing and the Township's ultimate decision to grant the special use permit within a short time after the hearing, Plaintiffs waited approximately ten months to challenge the Township's decision on the grounds that they were not given proper notice of the public hearing. The Township Zoning Ordinance, however, required appeals from special use permit decisions to be filed with the Township's Zoning Board of Appeals within 60 days. Consequently, the ZBA dismissed Plaintiffs' appeal. Plaintiffs then waited 62 days before filing an appeal of the ZBA's decision with the Circuit Court. The Circuit Court dismissed Plaintiffs' appeal, finding that the ZBA had correctly dismissed the first appeal as untimely and that the appeal of the ZBA's decision was also untimely.

On appeal, Plaintiffs argued that the Township's failure to pro-

vide proper notice of the special use permit hearing violated Plaintiffs' due process rights and rendered the permit void *ab initio*, thus excusing Plaintiffs' failure to timely appeal the decisions of the Planning Commission and ZBA. Citing a long line of case law, the Court of Appeals disagreed. The Court noted that timely perfection of an appeal from a ZBA's decision is a jurisdictional prerequisite to the Circuit Court hearing the action. While the Township Zoning Act does not set a timeframe for such appeals, courts must apply the 21 day time limit contained within MCR 7.101. The Court of Appeals accepted the Township's argument that, even if the lack of proper notice could have operated to excuse Plaintiffs' untimely appeal to the ZBA, the lack of notice could not similarly excuse the untimeliness of Plaintiffs' second appeal. Accordingly, the Court of Appeals affirmed the decision of the trial court.

ZONING—PREEMPTION OF LOCAL ORDINANCES— PUBLIC ACCESS

Township of Burt v Department of Natural Resources, _____ Mich App _____ (December 30, 1997).

The DNR obtained options on two lots on Burt Lake for the purpose of constructing a boat launch facility for public access. The Township asked the DNR to submit an application for review pursuant to the Township's zoning ordinance. After the DNR informed the Township that it believed it did not need the Township's approval of the project, the DNR began construction on the boat launch. The Township filed an action for declaratory judgment in Circuit Court, contending that the DNR was required to comply with the Township's zoning ordinance. The trial court granted the Township the sought-after judgment, declining to accept the DNR's argument that, as a state agency, the DNR was not subject to local zoning.

On appeal, the Court of Appeals noted that legislative intent is the test for determining whether a state agency is immune from local zoning requirements. The court found that the Township Zoning Act allows a township to regulate land development to, among other things, "meet the needs of the state's citizens for . . . recreation," and held that nothing in the Township Zoning Act appeared to exempt the DNR from local zoning provisions. The court also examined the Natural Resources and Environmental Protection Act, which gives the DNR the power to acquire, construct and maintain recreational boating facilities. The court held that, although the DNR was granted power with respect to public access facilities, nothing in that grant of power indicated a legislative intent to exempt the DNR from local zoning. The court also noted that, should a township, through its zoning, attempt to completely exclude public access facilities, the DNR would have a cause of action against the Township for engaging in exclusionary zoning. Consequently, the Court of Appeals affirmed the decision of the trial court.

Opinions of Frank J. Kelley, Attorney General

AUDITS and AUDITING RECORDS

1996 PA 341, section 502, to the extent that it requires the Auditor General to audit local units of government, violates Const 1963, art 4, § 53, and is therefore unconstitutional.

1996 PA 341, section 502, does not authorize the Auditor General to audit county road commissions and other local units of government in order to conduct a performance audit of the Michigan Departments of Transportation and Treasury.

The Auditor General may, in the discharge of his duties to audit the state and its departments, access public records of local units of government under the Freedom of Information Act, 1976 PA 442.

Opinion No. 6970

January 28, 1998

COUNTIES

County Road Commission—Emergency Assistance

A county road commission is authorized to use its resources to provide emergency assistance to township ambulance personnel on private roads.

Opinion No. 6975

March 25, 1998

COUNTIES

Sheriff's Qualifications

The Legislature lacks authority to prescribe qualifications for the constitutional office of county sheriff. A constitutional amendment is necessary in order to prescribe the qualifications for such office.

Opinion No. 6964

January 6, 1998

ELECTIONS

Assistants to serve as deputies in registering electors

County, city and township clerks, following the repeal of the deputy registrar law, 1989 PA 142, remain authorized by the Michigan Election Law to appoint and to compensate assistants to serve as deputies in registering electors.

County, city and township clerks are not eligible for reimbursement under the National Voter Registration Act of 1993 for appointing and com-

pensating assistants to serve as deputies in registering electors.

Opinion No. 6972

February 20, 1998

FREEDOM OF INFORMATION ACT

Collecting fees under the Freedom of Information Act

Once copies of documents have been prepared pursuant to the FOIA, a public body may require that its fees be paid in full prior to actual delivery of the copies. However, a public body may not refuse to process a subsequent FOIA request on the ground that the requestor failed to pay fees charged for a prior FOIA request.

A public body may refuse to process a FOIA request if the requestor fails to pay a good faith deposit properly requested by the public body pursuant to section 4(2) of the FOIA.

It is within the sound discretion of the public body to determine how long it should wait before taking steps to collect fees charged for complying with a FOIA request. Although the FOIA does not specify a limitations period within which a public body must commence a lawsuit to collect fees charged for complying with a records request, the 6-year limitations period applicable to contract claims governs such a cause of action.

Opinion No. 6977

April 1, 1998

INCOMPATIBILITY

Township supervisor and township assessor in different townships

Township supervisor and school district superintendent

Township assessor and school district superintendent

The incompatible public offices act, 1978 PA 566, does not prohibit a person from simultaneously serving as a township supervisor in one township and a township assessor in another township, unless a matter arises that prevents this person from protecting, advancing and promoting the interests of either position.

The incompatible public offices act does not prohibit a person from simultaneously serving as a township supervisor and school district superintendent, unless a matter arises that prevents

this person from protecting, advancing or promoting the interests of either position.

The incompatible public offices act does not prohibit a person from simultaneously serving as a school district superintendent and a township assessor, unless a matter arises that prevents this person from protecting, advancing and promoting the interests of either position.

Opinion No. 6967

January 27, 1998

SCHOOL DISTRICTS

Charter Schools—Conflict of Interest

The public servant conflicts of interest act, 1968 PA 317, applies to officers and employees of public school academies.

Opinion No. 6966

January 26, 1998

SNOWMOBILES

Regulation of off-highway operation of snowmobiles

The speed limit provisions of the Michigan Vehicle Code, 1949 PA 300, do not apply to the operation of snowmobiles on nonhighway portions of public and private lands. The speed limit provisions of the Natural Resources and Environmental Protection Act, Part 821, 1995 PA 58, govern the speed of snowmobiles operated on nonhighway portions of public and private lands.

Opinion No. 6973

March 20, 1998

VILLAGES

Vacancies—Abandonment of Office

Where a general law village council trustee accepts an appointment as village council president and occupies such office, an abandonment of the office of trustee has occurred whereby that office is vacated.

A village council president, upon subsequent resignation from that office, may resume his or her former office of village council trustee only by election to that office or, assuming a vacancy in that office, by appointment of the village council.

Opinion No. 6974

March 23, 1998

Federal Decisions of Interest

By Gregory K. Need

Adkison, Need, Green, Allen & Schneider P.L.L.C., Bloomfield Hills, Michigan

ATTORNEY/CLIENT PRIVILEGE: MUNICIPAL ATTORNEYS

Two white fire fighters appealed the dismissal of their reverse discrimination action brought against the city and the city's fire chief. Among other things, they claimed the lower court misapplied the law of attorney/client privilege in excluding statements made in a meeting attended by the city attorney, city manager, fire chief and two city council members. Plaintiffs contended that the council members participated in the meeting as third parties rather than as clients and, therefore, the discussion was not held in confidence and not entitled to protection from disclosure under the attorney/client privilege.

The Sixth Circuit reversed the District Court and held the privilege did not apply. In making its determination, the court noted that the two council members played no role in the promotion of the African-American fire fighter that gave rise to the reverse discrimination complaint. The city charter vested the authority for promotions with the city manager exclusively. The court also stated that the council members initiated the meeting not to obtain the advice of the city attorney (who apparently participated in the meeting at the request of the fire chief and city manager), but to inquire into the basis for the promotion of the fire fighter. The court then concluded that the interests of the two council members were adverse to those of the city manager and fire chief and the two council members were not clients of the city. Thus, as the statements made in the meeting were in the presence of third parties, the attorney/client privilege was waived.

The dissenting opinion noted that agents of the client should be covered by the attorney/client privilege to the same extent as the client and referenced to several rulings that held that a city and a city council were the same entity for the purposes of the attorney/client privilege.

Reed v. Baxter, 143 F.3d 351 (6th Cir. 1998).

CIVIL RIGHTS: ARREST

Plaintiffs filed a 42 U.S.C. 1983, 1985 and 1986 claim against undercover police officer, police department and city. An undercover officer in plain clothes identified himself as a police officer and began questioning one of the plaintiffs. Plaintiff allegedly requested to see police identification, which the officer declined to provide. The officer then grabbed plaintiff by the shirt. Plaintiff then "body slammed" the police officer to the ground, at which point the police officer arrested the individual for disorderly contact, resisting arrest, battery and fleeing. Plaintiff was convicted of disorderly conduct in the municipal court, which conviction was later overturned on appeal.

The Court of Appeals, reversing the District Court, held that the police officer lacked probable cause to arrest plaintiff for disorderly conduct or any of the offenses. The court described the body slam

to the police officer as a "forceful yet limited response to the officer's unjustified initiation of physical contact."

Rogers v. Carter, 133 F.3d 1114 (8th Cir. 1998)

CIVIL RIGHTS: IMMUNITY - LOCAL OFFICIALS

Respondent filed suit under 42 U.S.C. 1983 against city, city mayor, city council vice president and other officials contending that the elimination of the city department in which she was the sole employee was motivated by racial animus and a desire to retaliate against her for exercising First Amendment rights. The mayor and city council vice president introduced, voted for and signed an ordinance eliminating the department. In an unanimous decision, the Supreme Court reversed the Court of Appeals and held that local legislators are entitled to the same absolute immunity from civil liability under 42 U.S.C. 1983 for legislative activities as long as has been accorded federal, state and regional legislators. The court noted that the time and energy required to defend against this kind of lawsuit were of a particular concern at the local level where the part-time citizen legislator remained commonplace and that the threat of liability might significantly deter service in local government.

Bogan v. Scott-Harris, 118 S.Ct. 966; 1998 U.S. LEXIS 1596 (dec. March 3, 1998)

FREE SPEECH: ADULT ENTERTAINMENT

Tennessee enacted an adult oriented establishment act which limited the hours and days during which adult entertainment establishments could remain open and required such establishments to eliminate closed booths in which patrons could watch sexually explicit videos or live entertainment. Plaintiff, an adult book store, challenged the constitutionality of the law on the grounds that it violated the First Amendment and the Equal Protection Clause. The regulation prohibited adult oriented establishments from being open before 8:00 a.m. or after midnight Monday through Saturday, and from being open at all on Sundays or legal holidays.

The Sixth Circuit, vacating and remanding to the District Court, held that the regulation promoted a substantial governmental interest in reducing crime, open sex, the solicitation of sex and preserving the aesthetic and commercial character of the neighborhood and that the statute was a reasonable means of furthering that interest. The statute, although content based, was not reviewed under the strict scrutiny standard, the court noting the decision of Justice Powell in *Young v. American Mini Theaters* that sexually explicit speech is different from other kinds of speech and, although protected to a certain degree, is offered less protection because other important social interests were at stake.

Richland Bookmart, Inc. v. Nichols, 137 F.3d 435 (6th Cir. 1998)

Continued on next page

FREE SPEECH: ADVERTISEMENTS

Plaintiff, a magazine publisher, brought a 42 U.S.C. 1983 claim against the City of New York and their Metropolitan Transportation Authority ("MTA"). The basis of the suit was the MTA's refusal to display on its buses an advertisement for New York Magazine. The advertisement, which displayed the magazine's logo, read: "Possibly the only good thing in New York Rudy hasn't taken credit for" referring to New York Mayor Rudolph Giuliani. Giuliani's office notified the MTA that New York civil rights law prohibited the use of a person's name, portrait or picture for advertising purposes without having first obtained the written consent of the person. As a result, the MTA removed the advertisements.

The Second Circuit, affirming and vacating in part, held that the refusal to display the advertisement was an invalid prior restraint. The court determined that MTA intended to designate its advertising space as a "public forum" and held that the regulation was more extensive than necessary even assuming that the New York civil rights law was violated. The court noted that the New York civil rights act allowed for remedies for violation which may be asserted by a person who feels that his rights have been affected.

The dissenting opinion stated "my respected colleagues have circled the wagons on this appeal, seeing the government regulators as though they were a long line of raiders poised on a nearby hilltop threatening to swoop down and attack innocent advertisers attempting to exercise their constitutional right of free speech. Seeing no arrow aimed at the heart of the First Amendment, I must respectfully dissent."

New York Magazine v. City of New York and Metropolitan Transportation Authority, 136 F.3d 123 (2nd Cir. 1998)

FREE SPEECH: PROTECTION OF MINORS

A county law prohibited the sale to minors of any trading cards that depicted a heinous crime, an element of a heinous crime or a heinous criminal. Plaintiff was a publisher of various card sets, including those dealing with theories pertaining to the assassination of President Kennedy, U.S. support of authoritarian regimes and murderous dictators, crimes associated with prohibition and drug trafficking, serial killers and the like.

The Second Circuit, affirming the District Court held that the ordinance was a content-based prohibition on speech and that the ordinance was neither necessary nor narrowly tailored to meet a compelling state interest.

The court agreed that the County had a legitimate interest in protecting the psychological well-being of minors and combating juvenile crime. However, the court noted that the government must present substantial supporting evidence in order for a regulation of threatened speech to be upheld. Because the ordinance in question was not based on any empirical support, it was invalid.

Eclipse Enterprises, Inc v. Gulotta, 134 F.3d 93 (2nd Cir. 1997)

PUBLIC EMPLOYMENT

Three undercover police officers filed a 42 U.S.C. 1983 action against city which had disseminated information from their personnel files, including names, addresses, telephone numbers of family members, personal references, bank records and drivers license copies. The information was provided to a defense attorney defending a drug gang being investigated by the three officers. The city contended that Ohio's Public Records Act required it to release the officers' file upon request of any member of the public.

The Sixth Circuit, reversing and remanding to the District Court held that the plaintiffs had a constitutionally protected privacy interest under the Fourteenth Amendment and concluded that the Fourteenth Amendment prohibited the city from disclosing that information absent a showing that such disclosure served a compelling state interest.

Kallstrom v. City of Columbus, 136 F.3d 1055 (1998)

ZONING AND PLANNING: TAKING ISSUES

Plaintiffs, owners of property within a forest use zone area, filed suit against defendants based upon denial of their request to build a retirement home. The case was extensively litigated based upon taking claims under Oregon law. While pending a ruling from the Oregon Supreme Court, plaintiffs filed suit under 42 U.S.C. 1983 in the Federal District Court raising takings claim under the Fifth and Fourteenth Amendments.

The Third Circuit, affirming the District Court, first noted that the regulation in question prohibiting dwellings in the forest use zone area advanced a legitimate interest. The court held that the regulation was enacted to promote commercial timber practices by limiting dwellings that could adversely affect forest use and practices, including fire protection and the application of chemicals. The court then noted that the plaintiffs had no reasonable investment backed expectations in building their retirement home. The land in question still had value for timber purposes, thus, any investment backed expectations plaintiffs had were "minimal at best and ephemeral at worst." The court also noted that in 1996 the county finally granted a permit to build a home, thus, at best, the only damages suffered were delay in building the home. While plaintiffs completed the purchase of the land in 1984, they waited until 1990 to file applications with the county to build the home. Even following the county's 1996 decision to allow them to build, they had failed to commence construction.

The court also noted that the Court of Appeals were not created to be the "Grand Mufti" of local zoning boards.

Dodd v Hood River County, 136 F.3d 1219 (9th Cir. 1998)

Legislative Update

By Kester K. So and Todd A. Svanda

Dickinson Wright PLLC

Over the course of the last several months, the state Senate and House of Representatives have introduced numerous Bills of municipal interest. Some of those Bills have been enacted into law. The following is a summary detailing select legislation.

A. LEGISLATION ENACTED:

■ Public Act No. 51 of 1998 (formerly Senate Bill No. 614) introduced June 24, 1997 adds § 128, § 129, § 130 and § 131 to the Community College Act of 1966, PA 331. This Act provides that a community college board of trustees may grant to the public safety or police officers of that community college the powers and authority of a peace officer under the Code of Criminal Procedure, 1927 PA 175. Officers granted the powers and authority of a peace officer under this Act must meet the minimum standards of the Michigan Law Enforcement Officers Training Council Act of 1965, 1965 PA 203. The Act also provides that the public safety or police department of each community college shall submit monthly uniform crime reports pertaining to crimes within the department's jurisdiction to the Department of State Police. 1998 PA 51 was approved by the Governor and filed with the Secretary of State on March 31, 1998 and ordered to take immediate effect.

■ Public Act No. 52 of 1998 (formerly Senate Bill No. 758) introduced October 16, 1997 adds § 1606(b), § 1606(c), § 1606(d) and § 1606(e) to the Revised School Code, 1976 PA 451. This Act provides that the board of a school district which operates a community college may establish a department of public safety and may grant to the public safety officers the authority of peace or law enforcement officers. The jurisdictions of such public safety or police officers granted powers hereunder is limited to the protection of persons and property on property owned or leased by the community college and extending to the public right of way traversing or contiguous to that property. Their authority shall not extend beyond these limits unless an emergency response is made off campus at the specific request of another law enforcement agency. Officers granted the powers and authority of a peace officer under this Act must meet the minimum standards of the Michigan Law Enforcement Officers Training Council Act of 1965, 1965 PA 203. 1998 PA 52 was approved by the Governor and filed with the Secretary of State on March 31, 1998 and was ordered to take immediate effect.

■ Public Act No. 53 of 1998 (formerly Senate Bill No. 759) introduced October 16, 1997 amends § 1 and § 33(c) of the Michigan Liquor Control Act, 1933 (Ex Sess) PA 8. In addition to minor linguistic changes this Act provides that a peace officer or law enforcement officer of this state or a county, township, city, village, state university or community college or an inspector of the commission is authorized and has the duty to enforce the provisions of the Liquor Control Act within his or her respective jurisdiction. The Act goes on to provide that a peace officer or law enforcement officer as previously described under § 1 of the Act who witnesses a violation of § 33(b) or a local ordinance corresponding to § 33(b) may stop and detain a person to obtain satisfactory identification, to

seize illegally possessed alcoholic liquor and to issue an appearance ticket. 1998 PA 53 was approved by the Governor and filed with the Secretary of State on March 31, 1998 and ordered to take immediate effect.

■ Public Act No. 57 of 1998 (formerly House Bill No. 5607) introduced February 24, 1998 requires contractors to provide certain notices to governmental entities concerning improvements on real property and provides for the modification of contracts for improvement to real property. The Act defines contractor as anyone contracting with a governmental entity to improve real property or perform or manage construction services; provided, however, that contractor does not include a person licensed under Article 20 of the Occupational Code, 1980 PA 299. This Act provides that if a contractor discovers a subsurface or a latent physical condition that is materially different from those indicated in the improvement contract or finds that an unknown physical condition is of an unusual nature, differing materially from those ordinarily encountered in the type of improvement, the contractor, before disturbing the physical condition, must promptly notify the government entity in writing. The governmental entity must then promptly investigate the physical condition and if they determine that it will cause an increase or decrease in costs or additional time needed to perform the contract an equitable adjustment shall be made to the contract in writing. The Act provides that a contractor cannot make a claim for additional costs or time because of a physical condition unless the contractor has complied with the notice requirements. Under no circumstances may a contractor make a claim for an adjustment under the contract after receiving the final payment under the contract. If a contractor does not agree with a governmental entity's determination the contractor may nevertheless with the governmental entity's consent complete performance on the contract. At the option of the governmental entity the parties shall arbitrate the contractor's entitlement to recover the actual increase in contract time and costs incurred because of the physical condition of the improvement site. This Act does not limit the rights or remedies otherwise available to a contractor or the governmental entity under any other law or statute. The Act is repealed effective December 31, 2001. 1998 PA 57 was approved by the Governor and filed with the Secretary of State on April 21, 1998 and ordered to take immediate effect. This Act takes effect 180 days after the date of enactment.

B. PENDING LEGISLATION:

■ Senate Bill No. 494 introduced May 7, 1997 would amend § 302 of the Elliott-Larsen Civil Rights Act, 1976 PA 453. This Bill provides that § 302 of the Elliott-Larsen Civil Rights Act pertaining to the denial of goods, services, facilities, privileges, advantages or accommodations in a place of public accommodation or public service does not prohibit an enclosed mall or shopping center from enforcing a rule or policy that prohibits a minor less than 16 years of age from being present after 6:00 p.m. on a Friday or Saturday unless

that minor is a parent or is accompanied by a parent or another individual 19 years of age or older. This section does not apply to a movie theater. Senate Bill No. 494 was introduced and referred to the Committee on Local, Urban and State Affairs on May 7, 1997 and was subsequently reported by the Committee favorably with amendments on June 11, 1997 and passed by the Senate on July 1, 1997. Senate Bill No. 494 was referred to the House Committee on Commerce on July 2, 1997 and subsequently was reported with a recommendation and referred to a second reading on March 25, 1998.

■ Senate Bill No. 752 introduced October 14, 1997 would amend § 23 and add § 23A to the Michigan Uniform Municipal Court Act, 1956 PA 5. This Bill makes certain minor linguistic changes. The Bill applies only in a city that maintains a municipal court and that by resolution of its legislative body agrees to assume local financial obligations arising out of this section, and applies only to actions commenced on or after the date that resolution is submitted to the state court administrative office. The Bill provides that the Act does not take effect until House Bill No. 5271 is also enacted into law. Senate Bill No. 752 was passed by the Senate and then referred to the House Committee on Judiciary which Committee reported the Bill with recommendation and referred to a second reading on March 10, 1998. The Bill was amended, passed and returned to the Senate on March 26, 1998.

■ Senate Bill No. 753 introduced October 14, 1997 would amend sections of the Code of Criminal Procedure, 1927 PA 175. The Bill provides that for any misdemeanor or ordinance violation case appealable as of right from a municipal court in a city that adopts a resolution under § 23 of the Michigan Municipal Court Act, 1956 PA 5 (Senate Bill 752), a motion for a new trial shall be made within 20 days after entry of the judgment. The Bill provides that for any misdemeanor or ordinance violation case tried in a municipal court in a city that adopts a resolution an aggrieved party shall have a right of appeal from a final judgment to the circuit court in the county in which the misdemeanor or ordinance violation was committed. The Bill provides that in a misdemeanor or ordinance violation case tried in municipal court in a city that does not adopt such a resolution, there shall be a right of appeal to the circuit court for a trial de novo even if the sentence has been suspended or the fine or cost, or both, have been paid. The Bill provides that if a defendant who appeals a conviction in a municipal court in a city that does not adopt a resolution is found not guilty on appeal in circuit court, the circuit court shall discharge the defendant. Finally, the Bill provides that if a defendant takes an appeal from a municipal court in a city that does not adopt a resolution of approval and withdraws the appeal, or if the circuit court dismisses the appeal leaving the municipal court conviction in effect, the circuit court may enter an order revoking a recognizance and may also direct that the sentence of the municipal court be carried out. This Bill does not take effect unless Senate Bill No. 752 is also enacted into law. Senate Bill No. 753 was passed by the Senate and then referred to the House Committee on Judiciary on February 26, 1998.

■ House Bill No. 5138 introduced September 30, 1997, would add § 488 to the Michigan Election Law, 1954 PA 116. The Bill provides that § 544c applies to a nominating petition for an office in a

political subdivision under a statute that refers to this section, and to the circulation and signing of the petition. Section 544c specifies allowable size and print type, as well as required circulator certifications. The Bill also provides that § 482(1), (4), and (5) applies to a petition to place a question on the ballot before the electorate of a political subdivision under a statute that refers to this section, and to the circulation and signing of the petition. Finally, the Bill provides that a person who violates a provision of the Act applicable to a petition pursuant to subsection 1 or 2 is subject to the penalties prescribed for that violation in the Act. House Bill No. 5138 was passed by the House and referred to the Senate Committee on government operations on April 23, 1998.

■ House Bill Nos. 5139 through 5203 introduced September 30, 1997, would amend the title and add: § 9 to 1846 RS 16 regarding the powers and duties of townships, the election and duties of township officers, and the division of townships, § 2a of the Charter Township Act, 1947 PA 359, § 14 to Chapter III of the General Law Village Act, 1895 PA 3 § 10c to 1851 PA 156 regarding the powers and duties of county boards of commissioners, their local administrative and legislative powers, and the penalties for violation of the provisions of the Act, § 2a to 1966 PA 293 regarding the establishment of charter counties, the election of charter commissioners and providing for the powers, duties and authority to be exercised, § 2a of the Home Rule Village Act, 1909 PA 278, § 11 to Chapter VI of the Fourth Class City Act, 1895 PA 215, § 25a of the Home Rule City Act, 1909 PA 279, § 12a to the County Zoning Act, 1943 PA 183, § 12a to the Township Zoning Act, 1943 PA 184, § 3a to 1959 PA 168 regarding the organization, powers and duties of township planning commissions, § 20u to 1941 PA 107 regarding township water supply and sewage disposal services and facilities, § 33b to the Revenue Bond Act of 1933, 1933 PA 94, § 5 to 1921 PA 50 regarding the authorization and empowerment of townships to own and acquire land for the establishment of memorials to soldiers and sailors, § 1a to 1965 PA 246, regarding the establishment of a civil service system in certain townships, § 17b to 1935 PA 78, regarding the establishment of a board of civil service commissioners in cities, villages and municipalities having full time, paid members in the fire or police departments, or both, § 11(a) to the Firefighters and Police Officers Retirement Act, 1937 PA 345, § 3(a) of 1973 PA 139, § 4(a) to the County Public Improvement Act of 1939, 1939 PA 342, § 11(b) to 1966 PA 261 regarding the apportionment of County Board of Commissioners, § 16(a) to 1966 PA 298 regarding the Board of Civil Service Commissioners for Sheriff's Departments in certain counties, § 12 to 1921 PA 378 regarding systems of abstracts of title of lands in the counties, § 3(d) to chapter one of the City Income Tax Act, 1964 PA 284, § 1(a) to 1921 PA 144 regarding the primary election system for the nomination of village officers, § 6(a) to 1978 PA 485 regarding the county officers compensation commission, § 3(c) to the Township and Village Public Improvement and Public Service Act, 1923 PA 116, § 5(a) to 1905 PA 157 regarding township parks and places of recreation, § 1(a) to 1951 PA 33 regarding police and fire protection for townships and certain incorporated villages and cities under 15,000 population, § 1(a) to 1974 PA 160 regarding the adjustment of county boundaries, § 5(m) to the Property Tax Limitation Act, 1933 PA 62, § 10 to 1923 PA 161 regarding county sinking fund commissions, § 12(a) to the Industrial Development Revenue

Bond Act, 1963 PA 62, § 3(a) to 1933 (Ex Sess) PA 18 regarding certain housing projects, § 13(a) to the Metropolitan Council Act 1989 PA 292, § 4(a) of 1988 PA 57 regarding the incorporation by two or more municipalities of certain authorities for the purpose of providing emergency services, § 8(a) to the Public Transportation Authority Act, 1986 PA 196, § 2(a) to the 1925 PA 234 regarding port districts, § 5(b) to the Urban Cooperation Act, 1967, 1967 (Ex Sess) PA 7, § 12 to the 1939 PA 1947 providing for the incorporation of certain metropolitan authorities or metropolitan districts, § 9(b) to the Metropolitan District Act, 1929 PA 312, § 2(a) to the 1991 PA 180 regarding the financing of stadia or convention facilities, § 1(a) to Chapter IV of 1909 PA 283 regarding public highways and private roads and providing for district highway officials, § 8(a) to 1957 PA 206 authorizing two or more units of local government to combine to incorporate an airport authority, § 2(a) to 1956 PA 197 regarding the promotion of agricultural interests of various townships, § 10(a) to the District Library Establishment Act, 1989 PA 24, § 11(a) to 1877 PA 164 authorizing local units of government to establish, maintain, or contract for the use of free public libraries and reading rooms, Section 18(b) to the Michigan Liquor Control Act, 1933 (Ex Sess) PA 8, Section 2 to 1967 PA 179 authorizing local units of government to expend funds for youth centers, Section 4 to 1891 PA 186 authorizing local units of government to provide for lighting of their streets and other public places, Section 1(a) to 1929 PA 199 authorizing certain local units of government to levy a tax for a community center, Section 1(a) to 1923 PA 230 authorizing certain local units of government to levy a tax for the maintenance and employment of a band for the benefit of the public, Section 8(a) to 1955 PA 233 regarding the incorporation of certain municipal authorities to operate sewage disposal systems, water supply systems and solid waste management systems, Section 16(a) to the Metropolitan Transportation Authorities Act of 1967, 1967 PA 345, Section 2(a) to 1927 PA 165 authorizing the consolidation of township libraries in adjoining townships, Section 4(a) to the Township Water System Act of 1956, 1956 (Ex Sess) PA 6, Section 10 to 1945 PA 47 authorizing two or more local units of government to incorporate a hospital authority, Section 1102(a) to the Natural Resources and Environmental Protection Act, 1994 PA 451, Section 14(a) to the Hertel-Law-T. Stopczynski Port Authority Act, 1978 PA 639, Section 14(b) to the Charter Water Authority Act, 1957 PA 4, Section 8(c) to 1948 (1st Ex Sess) PA 31 providing for the incorporation of building authorities, Section 7(a) to 1968 PA 191 regarding the state boundary commission, Section 5(a) to 1984 PA 425 providing for the conditional transfer of property by contract between certain local units of government, Section 14 to the Revised School Code, 1976 PA 451, Section 2 to the Community College Act of 1966, 1966 PA 331 and Section 42(a) to the Michigan Energy Employment Act of 1976, 1976 PA 448, respectively. The Bills provide that the circulation and signing of a petition under the various statutes is subject to § 488 (See House Bill 5138) of the Michigan Election Law, 1954 PA 116; a person violating a provision of the Michigan Election Law applicable to a petition is subject to the penalties prescribed for that violation in the Michigan Election Law, 1954 PA 116. Finally, the Bills provide that they shall not take effect unless House Bill 5138 is enacted into law. House Bill Nos. 5139 through 5151 were passed by the House and referred to the Senate Committee on Government Operations on

April 23, 1998. House Bill Nos. 5152-5162 were passed by the House, but had not yet been referred to a Senate Committee as of April 23, 1998. House Bill Nos. 5163-5203 were ordered to a third reading on April 23, 1998 (except for HB 5166, HB 5175 and HB 5201 which remain in the House Committee on Local Government).

■ House Bill No. 5437 introduced November 10, 1997 would amend various sections of the General Law Village Act, 1895 PA 3 (the "Act"). In addition to minor linguistic changes, the Bill provides that an action to contest or enjoin the collection of a special assessment shall be instituted under the Tax Tribunal Act, 1973 PA 186. The Bill provides that the village council may, by special assessment upon the lands benefited, defray the expense of constructing and maintaining streets, sidewalks, curbs, gutters, lighting, drains, water mains, sanitary and storm water sewer systems and disposal plants and other local improvements authorized by law. The Bill provides that the fiscal year of a village shall commence on March 1 of each year but that the council may adopt another date for the commencement of the fiscal year by adoption of an ordinance. The fiscal year of any village subject to the Act which commences on a date other than March 1 on the effective date of this Bill shall be ratified and shall continue until changed or modified pursuant to this section.

The Bill would make the treasurer of a village rather than the assessor the individual responsible for making an assessment roll containing the description of all the real and personal property liable for taxation and the name of the owner, agent or other person liable to pay the taxes.

The Bill provides that subject to the Municipal Finance Act, 1943 PA 202, the council may borrow money and give notes in anticipation of the receipt of revenue sharing payments under the state Revenue Sharing Act of 1971, 1971 PA 140, and/or the collection of taxes under the Municipal Finance Act, 1943 PA 202. The Bill provides that the council may adopt ordinances and regulations to protect against fires, employ and appoint firefighters, make and establish rules and regulations for the governance of the department, the employees, firefighters and officers of the department, and for the care and management of the vehicles, equipment and buildings of the department. The council may also provide by ordinance for the storage and handling of combustible, explosive or other hazardous substances and for the prevention and suppression of fires, including provisions to prescribe the manner of construction of buildings within the village.

The Bill provides that the council may establish a police force and may delegate authority to a police chief to employ police officers and other personnel. The police force must comply with the minimum employment standards for law enforcement officers under the Michigan Law Enforcement Officers Training Council Act of 1965, 1965 PA 203. The president may nominate and the council may appoint a chief of police of the village who shall serve at the pleasure of the council and shall see that all ordinances and regulations of the council are promptly enforced. The council shall adopt rules for the governance of the police, prescribe the powers and duties of police officers, and vest them with authority necessary for the preservation of quiet and good order in the village. A peace officer

within the village is vested with all powers conferred upon sheriffs for the preservation of quiet and good order and has the power to serve and execute all process directed or delivered to the police chief in all proceedings for violations of the ordinances of the village. A police officer of a village has the same authority within the village as a deputy sheriff to execute a bench warrant for arrest issued by a court of record or a municipal court.

The Bill provides that the council may also by ordinance create a department of public safety and delegate to it all power and duties which may be exercised by a fire department or a police department or both, said department to be headed by a director of public safety who shall be the commanding officer. If a department of public safety is established any reference to the chief of police or to the chief of the fire department contained in a state statute or village ordinance shall be considered to refer to the director of public safety. The council may structure the department of public safety so that separate police and fire entities may be continued.

The Bill would also eliminate the role of street commissioner and provide that a council could replace that position with a street administrator (as that role is described in 1951 PA 51). The Bill also provides that the council may by ordinance establish a department of public works to perform the duties of the street administrator.

The Bill provides that for villages wishing to initiate the acquisition of private property the council shall adopt a resolution describing the private property, declaring that the acquisition is necessary for a public improvement and designating said public improvement. The resolution shall direct that procedures to acquire the property be commenced under the Uniform Condemnation Procedures Act, 1980 PA 87. The condemnation provisions of the Bill would not prohibit a village from obtaining property for a public use by negotiation and purchase.

The Bill also provides for the disincorporation of a village by filing with the village clerk a petition signed by not less than 25% of the registered electors of the village requesting a vote on disincorporation. The petition would designate the township or townships into which the village is proposed to be disincorporated. Not more than 14 days after the petition is filed the village clerk must verify the signatures and determine the sufficiency of the petition. If the clerk determines the petition is sufficient the question of disincorporation shall appear on the ballot at the next general or special election to be held in the village. If at such election a majority of the electors voting on the question vote yes, a Disincorporation Commission shall be appointed consisting of three members representing each township into which the village is proposed to be disincorporated and a number of members representing the village equal to the number of members representing townships.

Not more than two years after the election approving the preparation of a disincorporation plan the Disincorporation Commission shall adopt said plan for the village. A disincorporation plan requires a two-thirds vote from the members representing the village and a two-thirds vote of the members from each township involved.

Upon adoption of a disincorporation plan, a copy shall be submitted to the Governor who shall approve the plan if it complies with

state and federal law. The Governor shall submit a statement of approval or disapproval of the plan not more than 60 days after receipt of the plan and a statement of disapproval shall include an explanation of the reasons therefore. If the plan is disapproved by the Governor the Disincorporation Commission may revise the plan of disincorporation and submit the revised plan to the Governor not more than 90 days after their receipt of the statement of disapproval. If the Governor approves the disincorporation plan then within 14 days after receipt of the statement of approval, the clerk of the Disincorporation Commission shall prepare and certify to the county clerk of each county where the village is located ballot language describing the proposed disincorporation. The ballot proposal shall appear on the ballot at the next general election, the state primary immediately preceding the general election, or a special election not occurring within 45 days of a state primary or general election. The proposal shall be submitted to the qualified and registered electors residing in the village and each township into which the village is proposed to be disincorporated. The disincorporation must be approved by a majority of the votes cast by electors of the village and a majority of votes cast by the electors of each township into which the village is proposed to be disincorporated. The Bill provides that if a Disincorporation Commission fails to adopt a plan of disincorporation, or if the Disincorporation Commission fails to obtain the Governor's approval for either a plan of disincorporation or a revised plan of disincorporation, or if the electors disapprove of the proposed disincorporation, a petition shall not be filed within four years after the election approving the preparation of a disincorporation plan.

Finally, the Bill provides that if a person wants his or her property placed outside the corporate limits of any village he or she may apply for such a boundary change to the County Board of Commissioners of the county in which the village is located. Not less than 21 days after the notice is given to the county clerk, the person shall file with the clerk an application to have his or her property placed outside the corporate limits of the village which application must be signed by 100 registered electors of the village or 10% of the registered electors of the village whichever is greater. The County Board of Commissioners shall consider the application at a meeting held not less than 21 days after the application is filed with the county clerk and may by resolution change the boundaries of such village as described in the application. The Bill would also repeal the following sections of the General Law Village Act, 1895 PA 3: Chapter IX, Section 22(a), Chapter X, Sections 7 and 8, Chapter XII, Section 2, Chapter XIII, Sections 6 through 36, and Chapter XIV, Sections 9, 11, 13, 15 and 18(a) through 21. House Bill No. 5437 was passed by the House on March 4, 1998 and referred to the Senate Committee on Local, Urban and State affairs on March 5, 1998.

■ House Bill No. 5438 introduced December 10, 1997 would amend the title and various sections of the General Law Village Act, 1895 PA 3. In addition to linguistic changes, this Bill would allow villages to reduce the size of their council from seven to five. The council by a vote of two-thirds of the members could provide by ordinance for the reduction in the number of the trustees to four who along with the president would constitute the council. The ordinance may extend but shall not shorten the term of an incum-

bent trustee and may extend a prospective term but shall not shorten or eliminate a prospective term unless the nomination deadline for that term is not less than 30 days after the effective date of the ordinance.

The Bill also provides that the council by a vote of two-thirds of the members may pass an ordinance for the nomination by the president and the appointment by the council of the clerk or the treasurer or both for such a term as the ordinance may provide. Either type of ordinance would take effect 45 days after the date of adoption unless a petition signed by not less than 10% of the registered electors of the village is filed with the clerk within the 45 day period, in which case the ordinance takes effect upon approval at an election held on the question. If a petition bearing the required number of valid signatures is filed the question of adoption of the ordinance shall be submitted at the next general or special election with the ballot language being prepared by the village clerk (unless the question concerns the appointment of the clerk in which case the ballot language shall be prepared by the village council).

The Bill provides that although a person shall generally not be elected or appointed to an office unless he or she is an elector of the village, the council by resolution may waive residency of an appointed officer. The Bill also provides that a person in default to the village is not eligible for any office and election or appointment of a person who is in default to the village is void.

The Bill provides that the council by a vote of two-thirds of the members may provide by ordinance that village elections shall be nonpartisan. The ordinance shall apply beginning with the first village election for which the nomination deadline is not less the 30 days after the effective date of the ordinance. The Bill provides that an individual who is a registered elector of the township in which the village is located and who is a resident of the village may vote at any election in the village. The Bill also provides that the council may enter into an employment contract with the village manager extending beyond the terms of the members of the council. Such employment contract with a manager shall be in writing and shall specify the compensation to be paid, any procedure for changing compensation, any fringe benefits, and any of the conditions of employment. The contract shall state that the manager serves at the pleasure of the council. The contract may provide for severance pay or other benefits in the event the employment of the manager is terminated at the pleasure of the council.

The Bill provides that unless otherwise limited in its charter, the village shall be vested with all powers and immunities expressed or implied which villages are permitted to exercise under the Constitution and the laws of the State of Michigan. The village may exercise all municipal powers in the management and control of municipal property and in the administration of the municipal government whether such powers are expressly enumerated or not. The village may do any act to advance the interest, good government and prosperity of the village and through its regularly constituted authority pass and enforce all laws, ordinances and resolutions relating to its municipal concerns subject to the Constitution and the laws of the State. The Bill provides that the powers of the village shall be liberally construed in favor of the village and shall include those fairly

implied and not prohibited by law or constitution. Finally, this Bill would repeal the following sections of the General Law Village Act, 1895 PA 3; Chapter I, Section 2 through 11 and 15, Chapter III, Section 13, Chapter IV, Sections 13 through 20, Chapter VI, Section 5, and Chapter VII, Sections 28, 32 and 44 through 46(a). House Bill No. 5438 was passed by the House on March 4, 1998 and was referred to the Senate Committee on Local, Urban and State Affairs on March 5, 1998.

■ House Bill No. 5465 introduced January 14, 1998 would amend § 31 of the Charter Township Act, 1947 PA 359. In addition to some minor linguistic changes this Bill would expand the types of local public improvements which a charter township may undertake, to include separating storm water drainage from sanitary sewers on privately owned property for a public purpose. House Bill No. 5465 was introduced and referred to the Committee on Tax Policy on January 14, 1998. House Bill No. 5465 was reported with recommendation and referred to a second reading on February 25, 1998.

■ House Bill No. 5506 introduced January 28, 1998 would amend § 8 of 1965 PA 166, regarding prevailing wages and fringe benefits on state projects. The Bill provides that the Act does not apply to either of the following: (a) a contract entered into or a bid made before March 31, 1966 or (b) a state project for construction of a school building if bonding for that construction was approved by a majority of voters voting on the issue at an election that occurred after November 21, 1994 and before June 27, 1997. House Bill No. 5506 was introduced and referred to the Committee on Education on January 28, 1998. House Bill No. 5506 was subsequently reported with recommendation for referral to the Committee on Labor and Occupational Safety on April 1, 1998.

■ House Bill No. 5566 introduced February 11, 1998 would amend § 2 of the Local Development Financing Act, 1986 PA 281. This Bill would expand the definition of urban township to include a township meeting all of the following requirements: has a population of less than 20,000; is located in a county with the population of 250,000 or more but less than 400,000, and that county is located in a metropolitan statistical area; has within its boundaries a parcel of property under common ownership that is 800 acres or larger and is capable of being served by a railroad, and located within three miles of a limited access highway. House Bill No. 5566 was passed on March 11, 1998, was referred to the Senate Committee on Economic Development, International Trade and Regulatory Affairs on March 12, 1998 and was placed on order of third reading on April 14, 1998.

■ House Bill No. 5613 introduced February 25, 1998 would amend § 7 and § 16 of 1846 RS 83, entitled "Of Marriage and the Solemnization Thereof." In addition to some minor linguistic changes, the Bill provides that any county clerk or an employee of the clerk's office designated by the county clerk may solemnize a marriage, if done in the county in which the clerk serves. This would be a change from the current Act which applies only to county clerks in a county having more than 2,000,000 inhabitants. The Bill would provide that a marriage solemnized before a person professing to be a person authorized to solemnize a marriage under § 7 is not void and the validity of the marriage is not affected for lack of jurisdiction or authority in that person, if the marriage was consum-

mated with the full belief by one or both of the persons married that they were lawfully joined in marriage. House Bill 5613 was referred to the House Committee on Local Government, which Committee reported the Bill with recommendation for substitute H1 and referred the Bill to a second reading on March 31, 1998.

■ House Bill No. 5620 introduced March 3, 1998 would add Part 795 to the Natural Resources and Environmental Protection Act, 1994 PA 451. The Bill would provide for the establishment of waterfront redevelopment grants which local units of government could apply for in order to provide for: response activities on waterfront property consistent with a waterfront redevelopment plan; the demolition of buildings and other facilities along the waterfront that are inconsistent with the waterfront redevelopment plan; the acquisition of waterfront property or the assembly of waterfront property consistent with the waterfront development plan; or public infrastructure and public facility improvements to waterfront property consistent with the waterfront redevelopment plan. The Bill provides that any grant issued by the Department of Environmental Quality shall require the local unit of government to provide at least 25% of the project's total cost from other public or private funding sources.

The Bill provides that it will not take effect unless House Bill Nos. 5621, 5622 and 5623 are all enacted into law. House Bill No. 5620 was introduced and referred to the Committee on Conservation, Environment and Recreation on March 3, 1998. House Bill No. 5620 was subsequently reported with recommendation for a substitute (H3) and referred to a second reading on April 1, 1998.

■ House Bill No. 5694 introduced March 17, 1998 would amend § 1300a and § 1312 and add § 1310 to the Revised School Code, 1976 PA 451. This Bill provides that the board of each school district and each public school academy shall adopt and implement a written sexual harassment policy. The Bill also provides that the Office for Safe Schools shall develop and distribute to school districts and public school academies a model sexual harassment policy that sets forth specific reporting, enforcement and due process procedures and that defines conduct that should be reported to law enforcement officials. The Bill also requires that not later than July 1, 1999 a school board shall develop, publish and distribute to each pupil and to each pupil's parent or legal guardian a suspension/expulsion policy describing the types of disciplinary violations that may result in suspension or expulsion and shall develop, publish and distribute a due process policy describing the due process that will be provided to a pupil before a pupil is suspended or expelled from school. To the extent practicable the school board shall obtain and keep on record a written acknowledgment from each pupil and parent or legal guardian indicating receipt of a copy of these policies.

The Bill will not take effect until Senate Bill Nos. 313 and 689 and House Bill Nos. 4075, 5424, 5428, 5478, 5482 and 5695 through 5700 are all enacted into law. House Bill No. 5694 was introduced and referred to the Committee on Education on March 17, 1998.

■ House Bill No. 5710 introduced March 19, 1998 would amend the title and § 1, § 2, § 3 and § 10 of 1969 PA 312 regarding compulsory arbitration of labor disputes. In addition to minor linguistic changes, the Bill would provide that compulsory arbitration of labor

disputes be extended to the public schools. Public school is defined under the Bill as a school district, intermediate school district or public school academy or a joint endeavor or a consortium consisting of any combination of school districts, intermediate school districts or public school academies. The Bill provides a new definition of public police and fire departments to include any department of a city, county, village or township that has employees engaged as police officers or fire fighters or has employees who are subject to the hazards of fire fighting. Emergency medical service personnel and emergency telephone operators employed by a police or fire department are considered employees of police and fire departments who are subject to this Act. Emergency medical service personnel does not include a person employed by a private emergency medical service working under a contract with a governmental unit nor does it include a person who works in an emergency service organization if their duties are solely of an administrative or supporting nature. This Bill would provide that if during the course of mediation of a dispute (other than a grievance dispute) between a public police or fire department or between a public school and its employees, the dispute has not been resolved to the agreement of both parties within 30 days after submission of the dispute to mediation, the employees or employer may initiate binding arbitration proceedings by making a written request to the other party and providing a copy to the Employment Relations Commission. As used in the Bill grievance dispute means a dispute concerning the interpretation or application of an existing agreement. House Bill No. 5710 was introduced and referred to the Committee on Labor and Occupational Safety on March 19, 1998.

■ House Bill No. 5719 introduced March 31, 1998 would add Part 716 to the Natural Resources and Environmental Protection Act, 1994 PA 451. This Bill would provide that the Department of Natural Resources establish a local recreation grant program to local units of government to provide for one or more of the following: (a) public recreation infrastructure improvements, meaning the restoration of the natural environment or the renovation, repair, replacement, upgrading or structural improvement of an existing facility not less than 15 years old including but not limited to recreation centers, sports fields, beaches, trails, playgrounds and park support facilities; (b) the construction of community public recreation facilities including but not limited to playgrounds, sports fields and courts, community and senior centers, picnic facilities, nature centers, non-motorized trails and walkways, amphitheatres and fishing piers and sites; (c) the development of public recreation improvements to attract tourists and increase tourism where such developments are reasonably expected to have a substantial impact relative to costs on a local, regional or state economy, including but not limited to campgrounds, beaches and fishing access sites. The Bill provides that grants will not be provided for land acquisition or for a project that is located on land sited for use by a casino or a stadium or arena for use by a professional sports team.

The Bill provides the following limitations on the effectiveness of this legislation: (a) this amendatory act takes effect December 1, 1998; (b) this amendatory act does not take effect until the question provided for in the Clean Michigan Initiative Act is approved by a majority of the registered electors voting on the question at the

November 1998 general election; and (c) this amendatory act does not take effect unless House Bill No. 5620, House Bill No. 5622, Senate Bill No. 902 and Senate Bill No. 904 of the 89th Legislature are enacted into law. House Bill No. 5719 was introduced and referred to the Committee on Conservation, Environment and Recreation, was reported with recommendation with substitute (H2) and referred to a second reading on April 22, 1998.

■ House Bill No. 5722 introduced March 31, 1998 would amend § 1211(c) and repeal § 750 of the Revised School Code, 1976 PA 451. This Bill provides that a school district may levy in addition to the millage authorized under § 1211, not more than three additional mills

for enhancing operating revenue if approved by school electors at an election held after 1993. This Bill eliminates the prior limitation on application to the years 1994 through 1996. The Bill also provides that a school district that is not a school district described in § 20(8) or (9) of the State School Aid Act of 1979, shall not levy any millage under this section that was approved by the school electors after September 30, 1994 unless the district levies for the same tax year, the maximum number of mills under § 1211 that does not exceed the limitations imposed by § 1211(3). House Bill No. 5722 was introduced and referred to the Committee on Appropriations on March 31, 1998.

The Year 2000 Crisis:

Continued from page 1

To begin the due diligence process, a comprehensive audit of all hardware, software, and embedded technology currently in use needs to be undertaken to identify all mission critical systems.

A plan should be developed to solve the mission critical problems. The plan should include specific deliverables, test plans and timetables as well as contingency plans to continue mission critical operations manually. The plan's focus should be on fixing the problem now and preserving litigation rights, if necessary. This plan must encompass all of your client's operation; not just the information systems. Your role here is to assist the client in developing this plan and with the documentation of the client's efforts to implement the plan throughout the project.

This assessment of mission critical functions should include department management to assist in risk identification for each individual department. They are closest to the operation and uniquely qualified to help assess which systems are mission critical to the department.

All of the legal issues that follow relate to establishing that your client exercised due diligence in addressing the Y2K issue.

Determining Your Client's Rights Under Existing Maintenance, Out Sourcing, Licensing & Other Contracts

One of the first questions your client will have is who is responsible for the cost of fixing a non-compliant item. One of the first areas to investigate in answering the question is that of existing contracts with third parties.

Licenses and other agreements need to be identified and located for each hardware component, software program, and equipment with embedded technology. Once all of these documents are located, your role is to review them, including scope, warranties, representations, limitations on liability and other key provisions and identify vendors who may have a legal responsibility to participate in solving the problem and put them on legal notice in writing as soon as possible.

The purpose of this, as it relates to due diligence, is to show that

your client sought to have third parties share in the cost of remediation of the Y2K problem to save taxpayer dollars. It is clearly the prudent thing to do under the circumstances.

Relationships with Others

Internal Y2K compliance does not ensure there will not be system problems after January 1, 2000, because of the linkages between systems. If a compliant system acquires data from a non-compliant system, there is a potential for problems in the compliant system.

Interfaces with others raises a host of legal issues related to your client's potential liability for passing non-compliant data to others and potential damage to your client's own system as a result of receiving non-compliant data from others.

System linkages is not the only area in which your client may encounter problems due to relationships with others. Your client's suppliers' Y2K problem may become your client's problem if it relies on the suppliers for uninterrupted service. For example, assume your client is operating a water treatment facility and places an order in October, 1999, for the chemicals necessary for water purification, with a delivery date of January 15, 2000. If the supplier's system is not Y2K compliant and does not recognize the delivery date of 1/15/00 as January 15, 2000, but instead as January 15, 1900, your order may not arrive on time, if it arrives at all, since the system may cancel your order because it believes the delivery date has long since passed.

Your client needs to inventory all of its supply contracts. You need to analyze these contracts to determine how suppliers' non-performance might be legally excused or limited. If appropriate, the supplier should be placed on notice that failure to achieve Y2K compliance will not excuse performance.

This inventory will assist in identification of the suppliers to which inquiries about their plans for Y2K compliance should be sent.

As it relates to due diligence, it is prudent to ensure that your client's compliant systems are not contaminated by others and that

it seeks to ensure availability of the goods and services it needs to perform governmental functions.

Communications with Third Parties

As legal counsel, you need to work with your client to develop inquiries about the Y2K status of hardware, software, or other equipment. These inquiries should include letters and questionnaires tailored to address the different issues presented by each type of supplier. The letters need to include your client's definition of compliance, which should be developed with input from your client's technical staff, and ask if the subject of the inquiry meets the standard. You need to ensure that appropriate definitions of compliance are developed for particular types of equipment; a generic definition will not address all types of equipment. As responses to the inquiries are received, your client should refer to you for review any that may need further communication to clarify the contents of the response or to clarify your client's position relative to the response.

You also need to work with your client to ensure consistency in communications with third parties or the media so that such communications do not create warranties or other contractual undertakings to third parties as to your client's Y2K compliance status.

This relates to due diligence in regards to overall reduction of potential liability.

Y2K Consultants

As you can imagine, there are now many companies in the business of assisting companies in fixing Y2K problems. There are companies who assist with the assessment of systems and equipment and others which perform the remediation work. If your client is considering retaining the services of a consultant, you need to be involved in the development of the solicitation and the negotiation of any contract. There are unique aspects to these contracts because the deadline is inflexible, qualified resources are scarce and expensive, and no professional standards have been established. Special attention needs to be given to limitation of liability, confidentiality, and indemnification provisions in these contracts. Also, to ensure the consultants do not raid your client's staff, a provision prohibiting the consultant from recruiting your client's employees needs to be considered. You may find the consultant wants a reciprocal provision.

The relation of ensuring the protection of your client's interests in contracts and retention of qualified personnel as it relates to due diligence is in the potential cost savings to your client and its taxpayers.

Regulatory Compliance Issues

You need to assist your client in determining the extent to which it is subject to the regulations of other governmental units or regulatory agencies in the area of Y2K compliance and what must be done to comply with any applicable requirements.

The relationship of this issue to due diligence is obvious.

Future Procurements

In the negotiation of all future licenses and agreements of all

computer-related products and services and equipment with embedded technology, Y2K compliance should be explicitly addressed and included in the contracts.

In the area of non-technology contracts, your client needs to think about the full range of contracts it enters in the ordinary course of business and determine where the Y2K problem needs to be addressed. The example cited earlier of the failure to deliver needed chemicals for water treatment is an illustration of a non-technology contract which has a Y2K implication. Your client needs to ensure its ability to perform its governmental functions and its ability to rely on its suppliers. Its suppliers must be Y2K compliant to prevent disruption of services.

The development of the language necessary to address future procurements requires legal and technical expertise. You need to work closely with your client's technical staff in drafting appropriate provisions to protect your client.

Ensuring the procurement of Y2K compliant goods in the future establishes due diligence in ensuring the continuation of public services and protecting public assets by risk reduction.

Insurance

If your client has insurance, it needs to be reviewed to ascertain your client's rights. All insurance policies, including first party property, casualty, business, third party liability, errors and omissions, fiduciary, and officers' liability, if applicable, need to be inventoried and analyzed. The legal analysis is to determine whether the policies provide coverage for the costs of fixing Y2K problems, whether Y2K liability claims are covered and whether they provide adequate protection from potential Y2K claims against elected officials and officers. Putting carriers on appropriate notice as soon as possible is also important. When renewing policies, your input may be required on whether your client is obligated to disclose Y2K problems.

Many software and hardware vendors have insurance to protect against Y2K liability. Your client should seek confirmation of coverage and copies of certificates of insurance from its vendors. This may be a means to recoup some of the costs of Y2K fixes.

Again, this activity shows due diligence is protecting the public by spreading the risk and costs associated with remediation of Y2K problems.

Human Resources

Most Y2K projects will be labor intensive and must be completed in a finite period of time. If contract or leased personnel are used, special attention needs to be paid to the unique legal issues related to such personnel.

The personnel to do Y2K remediation are in great demand at this time. As we draw closer to January 1, 2000, it may be difficult, if not impossible, to find qualified personnel to take on this task. Considering the critical nature of timely completion, it is important that key personnel involved in the project are motivated to stay until the project is completed. You may be asked to assist in developing incentives to retain these personnel.

This is important to due diligence to show that your client acted in a prudent manner in obtaining and retaining qualified personnel

to perform the work. This is due diligence in ensuring completion of the task and saving public dollars.

Proprietary Information and Intellectual Property

Protecting your client's proprietary information is critical. As a public body, your client may not have much, if any, proprietary information. However, this includes items such as software developed for your client. Protection of this information is not a simple matter of drafting and signing non-disclosure agreements. You may need to establish a legal framework for innovative escrow arrangements, monitored access and usage procedures and other new legal mechanisms to address this issue.

Simultaneously, you must ensure that your client does not infringe the intellectual property rights of others in achieving its Y2K fixes. If your client substantially modifies programs or hires consultants to do it, it may be liable for infringing the copyright owner's exclusive right to create derivative works under copyright law. Some vendors treat software source code as a trade secret. Your review of the client's licenses and other system-related agreements should be done with these issues in mind.

Due diligence in this area relates to safeguarding proprietary information and risk reduction.

Disclosure of Y2K Liability

Your counsel may be needed regarding the circumstances under which your client may be required to publicly disclose information about its Y2K project. This includes areas such as bond issues and audits.

Due diligence in this area relates to ensuring your client can continue to get the funding it needs to carry out governmental functions.

Oversight of Documentation

Although it may be down the road, the potential for litigation in this area is great. Many of our colleagues are waiting in the wings for what some believe will be an avalanche of litigation. Your role as legal counsel is to work with your client to put it in the best possible litigation posture should litigation become an eventuality. One of the most important ways in which you can do this is to ensure proper documentation of all Y2K compliance efforts. The documentation created throughout the compliance project is important as it may some day be scrutinized in a courtroom. You need to know who is creating what documents, for what purpose and with what safeguards; are the documents being directed to the appropriate decision-makers; are loopholes in one document closed in another; are appropriate retention policies being applied; and is the client's internal record consistent with its public statements. A disgruntled employee who zips off an e-mail message to a friend at another company about the chaos in the Y2K project of your client may come back to haunt you later.

Due diligence in risk reduction is accomplished through these tasks.

Liability Issues

Some of you may think this is a private sector issue because

your client has governmental immunity from tort liability when engaged in the exercise or discharge of a governmental function. Your client, the public body, may have governmental immunity to tort claims related to the Y2K issue even if it does not exercise due diligence in regards to the Y2K issue. But, what about your client's officers and employees? These individuals will have immunity if their actions do not constitute gross negligence. Gross negligence means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. Based upon this standard, if your client takes no action relative to the Y2K issue, although it may be immune from liability, its officers and employees may not have that protection.

Also, there is potential liability to your client for a 42 USC §1983 constitutional tort if it does not act with due diligence in addressing the Y2K issue. In order for your client's inaction in regard to the Y2K issue to create §1983 liability, it must be shown that this inaction is a policy or custom and constituted deliberate indifference as to the known or obvious consequences of its actions. In other words, the risk of a constitutional violation arising as a result of the inadequacies of the municipal policy, in this instance failure to address Y2K issues, must be "plainly obvious". It seems that your client may have a difficult time establishing it was unaware of the possible consequences of failing to address the Y2K issue in light of all of the publicity the issue is now receiving. The consequences of inaction could be found to be "plainly obvious" under the circumstances.

What kinds of legal actions may your client and its officers and employees find themselves faced with as a result of failure to exercise due diligence relative to the Y2K problem? If its payroll system malfunctions, it may have grievances from the unions. If its accounting system malfunctions and it cannot pay its vendors, it may be faced with litigation for breach of contract. If its retirement system malfunctions, it may face litigation from retirees and unions. If its fleet of emergency vehicles malfunction and cannot respond to emergency calls, it may face litigation from individuals impacted by the failure to respond. If its traffic signals malfunction, it may face litigation from individuals involved in accidents. If its medical equipment fails, it may face malpractice litigation. If its computer in its jails fail and it releases the wrong prisoner, it may face a §1983 suit if the person goes out and injures or kills someone. Get the point? The list is endless. This is not merely a private sector issue. The consequences to your public sector client can be significant.

Conclusion

As public servants entrusted with the management of public assets, your client has an obligation, on behalf of the people it serves, to address the Y2K issue with due diligence. As legal counsel to your client, you have an obligation to discuss this issue with your client to ensure you have provided appropriate legal advice on a critical business issue. Neither you nor your client can afford to dismiss this issue as merely a technical problem. The business problem is real and the time remaining to address it is short. Immediate action is required.

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