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# Municipal Lawyer

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## A Message from the Chair

Howard Protter

I am greatly honored to begin to serve my term as your Section's Chair. There is so much to accomplish and only two years within which to do it. Our immediate past Chair, Patricia Salkin, set a dynamic pace to increase our Section's services to our members, expand your Executive Committee's representation and promote our Section's relevance within the Bar Association and at the state and local governmental levels. Anyone who has watched Patty in action knows that she is a tough act to follow.

This is an exciting time to be practicing municipal law. New York State's recently approved property tax cap is likely to put additional pressure on local government financial operations already strained by declining state aid, weakened tax revenue, high fixed expenditures and state-mandated services. A weakened financial market has increased pressures on land use developers while reduced real property values feed a tax grievance frenzy. Municipal zoning is going through contortions to accommodate new energy initiatives such as solar, wind and natural gas. Smart growth and green development initiatives are refocusing many to the redevelopment of our smaller cities where foreclosures and brownfields create opportunities and new sets of challenges.

There are a number of specific initiatives the Section will be focusing on over the next few months to better position our membership to meet these challenging times. We are hoping to create liaison relationships with other Sections of common interest, such as Real Property Law, Business Law, Young Lawyers, Labor and Employment Law and Environmental Law. We will be working with NYSBA's Committee on Diversity and Inclusion to create action plans and develop relationships with specialty bar associations to expand our ability to serve a broader segment of New York's legal community. Our Technology Committee will be updating our website, experimenting with a Blog and recommending ways to reduce the expense of participating in Section activities by the improved use of technology. I encourage you to make the time to get involved with our Section. The networking, the intellectual stimulation and the ability to make a difference in the practice of municipal law are all invaluable rewards.

Our fall CLE meeting will be held October 21-23, 2011 at the Gideon Putnam Hotel in Saratoga Springs.

## Inside

Program Co-Chairs Lisa Cobb, Lester Steinman and Kenneth Bond have been working with the Environmental Law Section to create a really interesting and timely program. Not only do the Section's programs keep you up to date on the latest developments in municipal law, they provide great professional development opportunities—you'll meet leading colleagues in the field of municipal law and share with them common problems and solutions you face in your daily practice.

I also encourage you to make the most of your Section membership by becoming involved in the great work of our committees: Employment Relations, Ethics and Professionalism, Government Operations, Land Use and Environmental, Legislation, Membership, Municipal Finance & Economic Development, Green Development, Technology and Bylaws. This issue of the *Municipal Lawyer* contains names and contact information for members of the Executive Committee and committee leadership. Section members can conveniently join one or more of our committees online at ww.nysba.org/municipal. Contact NYSBA Membership Services if you need your Web site sign-in information: 518.487.5577 / 800.582.2452, or membership@nysba.org.

Please contact me at hp@jacobowitz.com with your suggestions or ideas for improving our Section. I look forward to meeting with you at an upcoming program.

**Howard Protter**

# From the Editor

Under General Municipal Law Section 103 and Town Law Section 122, all contracts for public work must be awarded to the lowest responsible bidder. In a recent case, the Court of Appeals reminds municipalities that subjective qualifications not contained in the bid proposal may not be relied upon to determine that a higher bidder is preferable and more responsible.[1]

Here, the Town of Southeast advertised for bids for garbage collection services. When the bids were opened AAA Carting & Rubbish Removal, Inc. ("AAA") was the low bidder. A resolution to award the contract to AAA was defeated 3-2. A subsequent resolution to award the contract to Suburban Carting ("Suburban"), whose bid exceeded AAA by more than $200,000.00, was approved. In its resolution, the Town Board stated as follows:

> [T]he Town Board has found that qualitative factors such as safety, professionalism, and the availability of spare vehicles are critical to ensure that the contract is executed in a consistent, safe and quality manner.

At no time during the debate on the resolutions, or at any other time prior to the award of the contract to Suburban, was any determination made by the Town Board that AAA was not responsible or that it did not meet any of the requirements set forth in the bid proposal.

After the Town Board awarded the contract to Suburban, AAA filed a written objection seeking an explanation why its bid was not considered responsible. After receiving no response to its letter, AAA sued to annul the award of the contract to Suburban and to mandate the award of the contract to AAA.

Responding to the petition, one of the Town Council members, citing Suburban's "impressive presentation," explained his and the Town Board's rationale for the award of the contract to Suburban:

> …Suburban conducted monthly training meetings and safety inspections, utilized a specific computer program for reports of accidents and violations, conducted regular alcohol and drug screening of its employees, was a union shop with uniformed employees, and had a large inventory of practically new equipment and a maintenance department with parts that were replenished daily.…
>
> [W]e as a Town Board chose a contractor that is more qualified, more "responsible and responsive," and who will provide a higher level of service at a slightly higher monthly cost over the apparent low bidder.[2]

In reply, AAA stated that it was equally qualified and that, had it been asked, AAA could have addressed the same criteria which the Town Board apparently found to be dispositive.

The Supreme Court granted AAA's petition finding that the award to Suburban was not based on substantial evidence and violated Section 103 of the General Municipal Law and Town Law Section 122. The Appellate Division reversed, opining that the Town did not act arbitrarily or capriciously when it examined the skill, judgment and experience of the bidders in determining the lowest responsible bidder. The Court of Appeals granted leave to appeal and reversed the Appellate Division's determination.

In its 5-2 ruling, the majority of the Court of Appeals agreed with the Appellate Division that, in determining bidder responsibility, a municipality "should consider the bidder's skill, judgment and integrity." Here, however, the Court found that "the record before the Town Board was devoid of good reason for rejecting the low bid from AAA":

> The disapproval, as stated by the Town Board was based on criteria not contained in the bidding proposal. Inclusion of those criteria would have ensured that every bidder had the information necessary to make an intelligent evaluation and bid (citations omitted). In this instance, none of the qualitative factors that the Town Board identified were in the bid request. Accordingly, it was improper for the Town Board to award the contract based on these qualitative factors. A contract subject to the competitive bidding statutes must be awarded to the lowest responsible bidder who fulfills the specifications contained in the proposal. In this case, it was AAA.

While the Town Board could have considered Suburban more responsible than AAA, the Town Board, prior to the initiation of this lawsuit, never found that AAA was not responsible. Thus, the Court declared, "there is no authority to support the Town Board's

rejection of AAA's bid for one that is considered *more* responsible."

Indeed, the majority observed, "accepting a higher bid based on subjective assessment of criteria not specified in the bid request" circumvents the competitive bidding process and "gives rise to speculation that favoritism, improvidence, extravagance, fraud or corruption may have played a role in the decision." The competitive bidding statutes are specifically designed to guard against the intrusion of such factors.

Contrary to the majority ruling, the dissenters found substantial evidence in the record to support the Town Board's determination that Suburban was not responsible. Moreover, the dissenters argued that a determination of responsibility requires "flexibility and discretion" and should not be limited to the criteria contained within the four corners of the bid specifications. In support of their position, the dissenters point to various precedents upholding determinations that a bidder is not responsible "for a large variety of reasons (e.g. misconduct or prior poor performance) that will elude easy capture in verbal specifications."

## In This Issue

With this issue of the *Municipal Lawyer*, it is my pleasure to introduce the new Chair of the Municipal Law Section, Howard Protter. Howard is the Managing Partner of the firm of Jacobowitz & Gubits, LLP in Walden, New York. Howard concentrates his practice in municipal, land use, employment and environmental matters. He also has an active real estate, litigation and intellectual property practice.

Active in the Section for many years, Howard was instrumental in establishing the Section's website. He currently serves as Tuxedo Town Attorney and formerly served for many years as Village Attorney for Cornwall-on-Hudson. In this issue, Howard outlines new initiatives being undertaken by the Municipal Law Section to enhance the services delivered to Section members.

The United States Supreme Court's recent rejection of a First Amendment challenge to a Nevada State ethics provision prohibiting a conflicted public officer from voting upon or advocating for or against the passage of a matter is examined in an article by Mark Davies, Executive Director of the New York City Conflicts of Interests Board. Recent decisions by the Appellate Division, Third Department interpreting the attorney's fee provisions of the Freedom of Information Law are examined by Robert Freeman, Executive Director of the Committee on Open Government of the New York State Department of State. Finally, a case of first impression in the Second Circuit regarding the liability of municipal land use consultants under the Federal Religious Land Use and Institutionalized Persons Act is chronicled by Tricia Gurahian of the firm McCullough Goldberger & Staudt, White Plains.

## Endnotes

1. *Matter of AAA Carting & Rubbish Removal, Inc. v. Town of Southeast*, 17 N.Y.3d 136 (2011).
2. According to the Court's opinion, the "slightly higher monthly cost" would have amounted to an additional $857,115.00 over the three year term of the contract and an additional $571,410.00 if the two year contract renewal period option was exercised.

**Lester D. Steinman**

# SCOTUS Delivers Victory for Municipal Ethics

By Mark Davies

On June 13, 2011, the U.S. Supreme Court upheld, against a First Amendment challenge, a Nevada state ethics provision prohibiting a conflicted public officer from voting on or advocating for or against the passage of a matter.[1] Specifically, the Nevada statute, section 281A.420(2) of the Nevada Revised Statutes, provided, in relevant part:

> [A] public officer shall not vote upon or advocate the passage or failure of, but may otherwise participate in the consideration of, a matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by:
> . . .
> (c) His commitment in a private capacity to the interests of others.[2]

Michael Carrigan, a Sparks City Council member, upon advice of the City Attorney, voted, after public disclosure, on the hotel/casino development of a client of Carrigan's long-time campaign manager and friend, Carlos Vasquez. Carrigan was subsequently censured by the Nevada Commission on Ethics for violating section 281A.420(2)(c) by failing to abstain from voting. In particular, the Commission found that Carrigan's relationship to Vasquez "equates to a 'substantially similar' relationship to those enumerated under [section 281A.420(8)(a)-(d)]" within the meaning of section 281.420(8)(e). Section 281A.420(8) provided:

> As used in this section, "commitment in a private capacity to the interests of others" means a commitment to a person:
>
> (a) Who is a member of his household;
> (b) Who is related to him by blood, adoption or marriage within the third degree of consanguinity or affinity;
> (c) Who employs him or a member of his household;
> (d) With whom he has a substantial and continuing business relationship; or
> (e) Any other commitment or relationship that is substantially similar to a commitment or relationship described in this subsection.

The Nevada District Court denied Carrigan's petition for judicial review, but the Supreme Court of Nevada reversed, holding that voting by public officers on public issues is protected speech under the First Amendment, that section 281A.420(8)(e) must therefore be strictly scrutinized, and that pursuant to that standard the provision was "unconstitutionally overbroad in violation of the First Amendment, as it lacks necessary limitations to its regulations of protected speech."[3] In view of its resolution of the overbreadth issue, the court did not consider Carrigan's vagueness and prior restraint arguments.[4]

This article will, first, examine the reasoning of the Supreme Court of Nevada, then review the U.S. Supreme Court's reversal, and, finally, discuss the impact of the decisions on municipal ethics laws.

## Supreme Court of Nevada Decision

The Supreme Court of Nevada first concluded that the act of voting by public officers on public issues is protected speech under the First Amendment because voting on legislation is a core legislative function. Second, rejecting the *Pickering v. Board of Education* balancing test, the court concluded that the strict scrutiny standard applies to a statute regulating an elected public officer's protected political speech of voting on public issues. *Pickering* held that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general" and accordingly set out a balancing test, whereby a court must balance "the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[5] But the Supreme Court of Nevada distinguished *Pickering* on the ground that for Carrigan, as an elected official, the employer is the public itself. Consequently, citing *Citizens United v. Federal Election Commission*, the court concluded that the appropriate standard of review is strict scrutiny.[6]

Under the strict scrutiny standard, the government must "prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest.'"[7] Applying that standard to section

281A.420(8)(e), the court held that the statute was facially overbroad. Although the statute furthers a compelling state interest—namely, the interest in promoting the integrity and impartiality of public officers—the statute fails to meet the "narrowly tailored" requirement. The definition of a "commitment in a private capacity" in section 281A.420(8)(e) fails to sufficiently describe what relationships are included within section 281A.420(2)(c), and there is no definition or limitation to section 281A.420(8)(e)'s definition of any relationship "substantially similar" to the other relationships in section 281A.420(8)(a)-(d). "This catchall language fails to adequately limit the statute's potential reach and does not inform or guide public officers as to what relationships require recusal."[8] The Supreme Court of Nevada therefore declared section 281A.420(8)(e) unconstitutionally overbroad in violation of the First Amendment.

A strong dissent by Justice Pickering stated that "no published decision has held that an elected local official engages in core political speech when he or she votes on an individual land use matter,"[9] that separation of powers issues do not arise when the state legislature enacts ethics restrictions on local government officials, that the First Amendment protects the communicative element in a public official's vote, such as against retaliation for *how* a legislator votes, that the Nevada statute therefore does not trigger strict scrutiny, that the statute passes muster under a rational basis or intermediate level of review standard, and that the overbreadth doctrine "applies only to 'statutes which, by their terms, seek to regulate only spoken words,' burden 'innocent associations,' or delegate 'standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints,'"[10] and thus that doctrine does not apply here.[11] Justice Pickering would also reject any void-for-vagueness argument because Carrigan had six months in which to ask for an opinion from the Commission on Ethics as to whether his relationship to Vasquez was a disqualifying conflict of interest and, in any event, his sanction was not a criminal penalty.[12]

## U.S. Supreme Court Decision

On petition for writ of certiorari, the U.S. Supreme Court reversed.[13] The Court noted the failure of either the Supreme Court of Nevada or Carrigan to cite "a single decision invalidating a generally applicable conflict-of-interest recusal rule—and such rules have been commonplace for over 200 years."[14] The U.S. House of Representatives and the U.S. Senate adopted recusal rules in 1789 and 1801, respectively, the latter by Thomas Jefferson as President of the Senate. So, too, the Court noted, "[a] number of States, by common-law rule, have long required recusal of public officials with a conflict.… Today, virtually every State has enacted some type of recusal law, many of which, not unlike Nevada's, require public officials to abstain from voting on all matters presenting a conflict of interest."[15]

Such restrictions upon a legislators' voting do not constitute restrictions upon legislators' protected speech. "The legislative power thus committed [to a legislator] is not personal to the legislator but belongs to the people; the legislator has no personal right to it." While action may convey a symbolic meaning, "the act of voting symbolizes nothing;" it is not an act of communication. Neither the fact that a nonsymbolic act is the product of a deeply held personal belief nor the fact that action may have social consequences transforms the action into First Amendment speech. The act of voting remains "nonsymbolic conduct engaged in for an independent governmental purpose." Furthermore, the First Amendment confers no right to use governmental mechanics to convey a message.[16]

The Supreme Court declined to consider Carrigan's arguments that section 281A.420(8)(e) unconstitutionally burdens the right of association of officials and supporters and is unconstitutionally vague, as neither argument was considered below.

Justice Alito, concurring in part and concurring in the judgment, disagreed with the Court's suggestion that restrictions upon legislators' voting are not restrictions upon legislators' speech; but he agreed "that legislative recusal rules were not regarded during the founding era as *impermissible* restrictions on freedom of speech."[17]

## Impact of Decisions on Municipal Ethics Laws

The *Carrigan* decisions provide a number of lessons for the municipal attorney in the context of municipal ethics laws. First, no First Amendment impediment exists to a well-drafted ethics law mandating recusal by legislators.

Second, as a practical matter, one should note that Carrigan acted upon the advice of the Sparks City Attorney rather than upon the advice of the Nevada Commission on Ethics. In *Carrigan*, as in the most ethics cases, advice of counsel did not—nor should it—insulate the public official from prosecution for violation of the ethics law. Except in crystal clear cases, public officials are well advised to seek ethics advice from the ethics body empowered to render such advice.

Third, as the dissent in the Supreme Court of Nevada decision points out, a significant difference exists between state and local legislators in regard to separation of powers and enforcement of ethics laws. In Nevada, as in New York, the state constitution vests in the legislature the authority to discipline its members and mandates separation of powers at the state

level.[18] By contrast, in Nevada, as in New York, "[a] local government exercises such powers as the Legislature and Constitution confer. A corollary proposition is that, '[u]nless restricted by the constitution, the legislature may prescribe the qualifications, tenure, and duties of municipal officers.'"[19] Thus, no such separation of powers and enforcement limitation exist for local government. In New York, therefore, no impediment exists to the enactment of state *or local* legislation requiring recusal by municipal legislators or empowering a local ethics board to interpret and enforce state and local ethics provisions as to municipal legislators.

Fourth, that said, is mandating such recusal wise? Unlike in the case of other officials, whether elected or appointed, when legislators recuse themselves, no one else may act in their stead; their recusal thereby disenfranchises their constituents. Even if the recusing legislator has been elected at large, such as a village trustee, those who voted for that legislator no longer have his or her voice in the legislative body. Moreover, recusal by a member of a body functions, in effect, as a negative vote since under the New York General Construction Law actions by a municipal body must be taken by a majority of the total membership of the body, not by a majority of those present and voting.[20] Thus, recusal by a legislator may prove illusory. In addition, while separation of powers may not exist as a legal matter at the municipal level, the concept nonetheless plays some role even at the municipal level, at least in those municipalities with a clear delineation between the executive and the legislative roles, such as in a city with a strong mayor form of government. New York City's ethics law therefore permits a City Council member to vote on a matter even where such a vote may advantage the member or a person or firm with whom or with which the member is associated, provided that the member discloses the interest to the City's ethics board and on the records of the Council and further provided that the member takes no other action, apart from voting, on the matter, such as sponsoring the measure or advocating for it.[21]

Fifth, the common law in New York State may prohibit a municipal legislator, or other municipal official, from taking an action that may advantage the official or someone with whom the official is associated.[22]

Finally, although the U.S. Supreme Court upheld the Nevada recusal statute against a First Amendment overbreadth challenge, the Court expressly did not consider the merits of Carrigan's arguments that the statute unconstitutionally burdens the right of association of officials and supporters and that the provision is unconstitutionally vague, as neither argument was raised by Carrigan in his brief in opposition to the petition for writ of certiorari. The Supreme Court of Nevada did not mention the former argument and did not address the latter because of that court's resolution of the overbreadth argument.[23] As noted, in her dissent Justice Pickering concluded that:

> Carrigan does not have a legitimate vagueness challenge. The Ethics Commission is available to rule in advance on whether a disqualifying conflict of interest exists; Carrigan admits he had six months lead time before the Lazy 8 application came to a vote; his sanction was a civil rebuke, not a criminal penalty. He thus cannot prevail on a void-for-vagueness challenge.[24]

Whether on remand of the case from the U.S. Supreme Court the Supreme Court of Nevada will consider any of those arguments remains to be seen.

But one may question whether, Justice Pickering's conclusion to the contrary notwithstanding, the Nevada statute was sufficiently specific to give notice of the exact conduct proscribed. Rather than risk the expense of a challenge, the careful municipal attorney should draft a recusal provision more narrowly tailored to the conduct intended to be prohibited. The ethics law may well contain a general or catch-all provision prohibiting, for example, interests or actions in conflict with one's official duties, provided that no penalty attaches to violation of such a provision, absent a rule adopted by the ethics board specifying the interest or conduct prohibited.[25]

## Conclusion

The Supreme Court's decision in *Carrigan* justifiably gives cause for celebration by municipal ethicists. It should not, however, lull municipal attorneys into a false sense of security that broad recusal provisions, particularly those aimed at municipal legislators, will always withstand constitutional scrutiny. A specific, clear and comprehensible, carefully drafted code of ethics will not only prevent a successful constitutional challenge but will also avoid a costly court battle over an ill-conceived provision.

## Endnotes

1. Nevada Comm'n on Ethics v. Carrigan, ___ U.S. ___, 131 S. Ct. 2343 (2011).
2. Nev. Rev. Stat. § 281A.420(2) (2007) (This provision at the time of the relevant events was actually codified at section 281.501 (2003), but the parties and the courts cited to the identical 2007 version. The Nevada Legislature further amended the statute in 2009. 2009 Nev. Stat. ch. 257, § 9.5, p. 1057.). Under the Nevada Revised Statutes,

   > "Public officer" means a person elected or appointed to a position which is established by the Constitution of the State of Nevada, a statute of this State or an ordinance of any of its counties or incorporated cities and which involves the exercise of a public power, trust or duty.

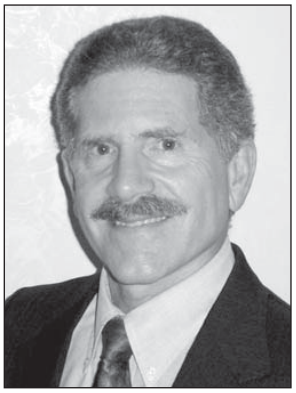
Nev. Rev. Stat. § 281A.160(1) (2007) (subsequent amendments, in 2009 Nev. Stat. ch. 257, § 8.2, p. 1047, are immaterial to the discussion in this article).

3. Carrigan v. Comm'n on Ethics, 236 P.3d 616, 618 (Nev. 2010), *rev'd sub. nom.*, Nevada Comm'n on Ethics v. Carrigan, __ U.S. __, 131 S. Ct. 2343 (2011).
4. *Carrigan*, 236 P.3d at 620 n.4.
5. Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 1734–35 (1968).
6. *Carrigan*, 236 P.3d at 622 (citing Citizens United v. Federal Election Comm'n, ___ U.S. ___, 130 S. Ct. 876, 898 (2010) (holding that "[l]aws that burden political speech are 'subject to strict scrutiny,' which requires the Government to prove that the restriction 'furthers a compelling interest and is narrowly tailored to achieve that interest'" (citation omitted))).
7. *Citizens United*, 130 S. Ct. at 898 (citation omitted). *See also Carrigan*, 236 P.3d at 622.
8. *Carrigan*, 236 P.3d at 623. The Court rejected the Ethics Commission's arguments that the statute should not be declared invalid—that is, that a facial challenge should not lie—because the statute could be constitutionally applied to Carrigan. The court noted that, "[w]hile generally a facial challenge cannot be maintained by someone whose conduct the statute could validly regulate, there is an exception to this rule under First Amendment overbreadth challenges based on the danger that an overbroad statute's 'very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Carrigan*, 236 P.3d at 622 n.8 (citations omitted).
9. *Carrigan*, 236 P.3d at 624 (Pickering, J., dissenting).
10. *Carrigan*, 236 P.3d at 630 (Pickering, J., dissenting) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 612–13, 93 S. Ct. 2908, 2916 (1973)).
11. Overbreadth analysis is an exception to the basic rule that "a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court." *Broadrick*, 413 U.S. at 610, 93 S. Ct. at 2915.
12. *Carrigan*, 236 P.3d at 631 n.7 (Pickering, J., dissenting).
13. Nevada Comm'n on Ethics v. Carrigan, __ U.S. __, 131 S. Ct. 2343 (2011), *rev'g* 236 P.3d 616 (2010).
14. *Carrigan*, 131 S. Ct. at 2348.
15. *Carrigan*, 131 S. Ct. at 2349 (citations omitted).
16. *Carrigan*, 131 S. Ct. at 2350-2351.
17. *Carrigan*, 131 S. Ct. at 2355 (Alito, J., concurring).
18. Nev. Const. art. 3, § 1(1) (2011); Nev. Const. art. 4, § 6; N.Y. Const. art. 3, § 1 (legislature's authority); N.Y. Const. art. 3, § 9 (providing that "[e]ach house shall determine the… qualifications of its own members"); N.Y. Const. art. 4, § 1 (executive's authority). *See also Carrigan*, 236 P.3d at 624; Maron v. Silver, 899 N.Y.S.2d 97, 111, 14 N.Y.3d 230, 258 (2010).
19. *Carrigan*, 236 P.3d at 624 (Pickering, J., dissenting) (citations omitted).
20. N.Y. Gen. Constr. Law § 41 (2011).
21. N.Y.C. Charter § 2604(b)(1)(a) (2011); N.Y.C. Conflicts of Interest Board Ad. Op. No. 2009-2 (2009). *See generally* Elizabeth Fine & James Caras, *The New York City Council's Approach to Ensure Compliance with Conflicts of Interest Laws in the Discretionary Funding Process*, NYSBA/MLRC Municipal Lawyer, Vol. 24, No. 1, 13, at 14–15 (Winter 2010).
22. *See*, *e.g.*, Tuxedo Conservation & Taxpayers Ass'n v. Town Board of Tuxedo, 418 N.Y.S.2d 638, 640, 69 A.D.2d 320, 324 (2d Dep't 1979) (invalidating, as contrary to the "spirit" though not the letter of section 809 of the New York General Municipal Law, a special permit where the town board member who cast the tie-breaking vote was vice-president of an advertising agency that had the parent of the applicant as a client and that would be a strong contender to obtain all advertising contracts on the $200 million project if it was approved). *See also* Zagoreos v. Conklin, 491 N.Y.S.2d 358, 363, 109 A.D.2d 281, 287 (2d Dept. 1985) (holding that "[i]t is not necessary, however, that a specific provision of [Article 18 of] the General Municipal Law be violated before there can be an improper conflict of interest"); Conrad v. Hinman, 471 N.Y.S.2d 521, 524, 122 Misc. 2d 531, 534–35 (Sup. Ct., Onondaga Co., 1984) (despite the lack of a violation of Article 18, annulling a village board of trustees' decision granting a zoning variance where the tie-breaking vote was cast by a trustee who co-owned the property and was an employee of the company to which the property was to be sold); Schweichler v. Village of Caledonia, 845 N.Y.S.2d 901, 904, 45 A.D.3d 1281, 1283–84 (4th Dept. 2007) (despite the lack of a violation of Article 18, annulling a planning board site plan approval because of the appearance of bias and actual bias of planning board members).
23. *Carrigan*, 236 P.3d at 620 n.4. *See also Carrigan*, 131 S. Ct. at 2351. The Supreme Court of Nevada likewise did not consider Carrigan's prior restraint argument. *Carrigan*, 236 P.3d at 620 n.4.
24. *Carrigan*, 236 P.3d at 631 n.7 (Pickering, J., dissenting) (citations omitted).
25. *See*, *e.g.*, N.Y.C. Charter § 2604(b)(2) (2011) (providing that "[n]o public servant shall engage in any business, transaction or private employment, or have any financial or other private interest, direct or indirect, which is in conflict with the proper discharge of his or her official duties"); § 2606(d) (providing that "no penalties shall be imposed for a violation of paragraph two of subdivision b of section twenty-six hundred four unless such violation involved conduct identified by rule of the board as prohibited by such paragraph"); 53 Rules of the City of New York § 1-13 (identifying conduct prohibited by N.Y.C. Charter § 2604(b)(2)).

**Mark Davies is the Executive Director of the New York City Conflicts of Interest Board, the ethics board for the City of New York. The views expressed in this article do not necessarily represent the views of the Board.**

# Awarding Attorney's Fees Under FOIL: Recent Decisions

By Robert J. Freeman



For nearly twenty-five years, the Freedom of Information Law,[1] commonly known as ("FOIL"), stated that a court could award attorney's fees when it was found that (1) the person denied access "substantially prevailed"; (2) the agency had no reasonable basis for withholding the records; and (3) the records were of "clearly significant interest to the general public."[2] The purpose of that provision, according to the sponsor of the bill, was to overcome "the 'sue us' attitude" of some agencies, a stance found to be contrary to FOIL's legislative intent.[3]

It became clear, however, that a court's authority to award attorney's fees was limited and weak. If an agency stonewalled and denied access without justification, and if the records were important only to the person requesting them, attorney's fees could not be awarded because the records would not have been significant to the public. That conclusion was confirmed by the Court of Appeals in *Beechwood Restorative Care Center v. Signor*,[4] which involved a matter of great significance to a community, but because the records at issue were found to be routine and mundane, the Court rejected a request for an award of attorney's fees.

That requirement was eliminated in 2006, and the courts were given expanded authority to award attorney's fees when (1) the person denied access substantially prevailed and (2) the court finds either that (a) the agency had no reasonable basis for denying access or (b) the agency failed to respond to a request in a timely manner as specified in FOIL.

Those more recent standards were recently considered in depth for the first time in two decisions rendered in July by the Appellate Division, Third Department.

*New York Civil Liberties Union v. City of Saratoga Springs*[5] involved a request made in April, 2009, for records relating to the use of tasers. The request was denied, and NYCLU initiated an Article 78 proceeding in October. Soon after the commencement of the lawsuit, the parties attempted to negotiate a settlement. Those efforts were unsuccessful, which led NYCLU to request a conference with Supreme Court. Following the conference, the City disclosed portions of the records. That led to a determination by the Court that the records must be disclosed in their entirety. Although the Court found that each condition necessary to award attorney's fees was met, the request for an award was rejected.

The Appellate Division agreed with NYCLU's contention that the lower court's denial of a request for an award of attorney's fees represented an abuse of discretion. While the Appellate Division confirmed that an award is discretionary, it referred to the legislative intent regarding the 2006 amendment, which was to "create a clear deterrent to unreasonable delays and denials of access [and thereby] encourage every unit of government to make a good faith effort to comply with the requirements of FOIL."[6]

In reversing the initial holding, it was found that the lower court's characterization of the resolution of the controversy as "essentially informal and voluntary" was contrary to the facts. The Court pointed to "tactics to delay disclosure," missing deadlines, failures to return telephone calls, and most importantly, to the reality that "complete disclosure was made—more than a year after the initial request—only after further intervention by the court and an order directing [the City] to provide an unredacted copy of the records." It was emphasized that "all of the prerequisites for such an award were met and [the City] neglected to offer *any* excuse for their failure to timely respond to [NYCLU's] request." The Court added that "in view of the fact that it was only through the use of the judicial process that [NYCLU] was able to obtain the required disclosure and [the City] evinced a clear disregard of the public's right to open government—we find that the denial of [NYCLU's] request for an award of counsel fees was an abuse of discretion."

The other decision, *New York State Defenders Association v. New York State Police*,[7] involved a request for "policies relating to electronic recording of custodial interviews, interrogations, confessions and statements." The State Police rejected the request in its entirety, but after a judicial proceeding was initiated, all of the records that were requested were attached to its response to the petition. Based on that disclosure, it was contended that the matter was moot, and the Supreme Court dismissed the petition and the request for attorney's fees.

The Appellate Division, however, rejected the claim by the State Police that the Defenders Association did not substantially prevail, stating that "to allow [an agency] to automatically forestall an award of counsel fees simply by releasing the requested documents before asserting a defense would contravene the very purpose of FOIL's fee-shifting provision." On the contrary, because the State Police disclosed the records sought, the applicant "may be said to have substantially prevailed."

It was also found that the State Police had no reasonable basis for issuing a "blanket denial" of the request. To argue that there was a reasonable basis for denying access was "belied by the virtually immediate release of the requested information upon commencement of this proceeding." Because the lower court based its denial of an award of attorney's fees "on its erroneous conclusion that the statutory prerequisites were not satisfied," the Appellate Division referred the matter back to the lower court to determine whether such an award would be proper.

In short, the handwriting appears to be on the wall: agencies cannot delay disclosure of records or deny access to records unless there is a good reason to do so. If they engage in delay or withhold records without justification, it is possible and perhaps likely that the person requesting the records may be awarded attorney's fees payable by the agency.

### Endnotes

1. Public Officers Law, Article 6, sections 84-90.
2. Public Officers Law, section 89(4)(c).
3. Assembly Memorandum in Support, Bill Jacket, Ch. 73, L.1982.
4. 5 N.Y.3d (2005).
5. 926 N.Y.S.2d 732 (3d Dept. 2011).
6. Senate sponsor's Memorandum in Support, Bill Jacket, Ch. 492, L. 2006.
7. 927 N.Y.S.2d 423 (3d Dept. 2011).

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# Municipal Planning and Engineering Consultants Held Not Liable Under RLUIPA

By Patricia W. Gurahian

The United States District Court, Eastern District, decided an issue of first impression in the Second Circuit in *Roman Catholic Diocese of Rockville Centre, New York v. Incorporated Village of Old Westbury.*[1] The District Court found that the standard to hold persons or entities providing planning and land use consulting services liable under the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") is the "state actor" standard applied in Federal civil rights litigations.[2] Thus, as is the case with Section 1983 claims for deprivation of constitutional rights pursuant to 42 U.S.C. Section 1983, a private party acting as a consultant to a municipality may be liable under RLUIPA only where the private party is "acting under color of State law."[3]

Here, Senior District Judge Denis R. Hurley concluded that the rendering of professional advice and consulting services is not state action taken under color of law because the consultant defendants were not the ultimate decision makers vis-à-vis the pertinent zoning and planning application(s).[4]

## A. Decision-Making Required to Trigger RLUIPA Liability

Section 1983 provides a civil claim for damages against any person who, acting under color of state law, deprives another of a right, privilege or immunity secured by the Constitution or the laws of the United States.[5] In order to maintain a Section 1983 claim, a plaintiff must establish a deprivation of constitutional rights "under color of law." Accordingly private parties are not liable under Section 1983 unless the conduct allegedly causing the deprivation of a federal right can be fairly attributable to the state. Section 1983's language—referencing individuals who have acted "under color of law" to deprive others of their rights—has been understood to mean that only wrongdoers "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it" may be subject to Section 1983 liability.[6] It follows that a private party may not be held liable under Section 1983, unless "the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State."[7] Furthermore, it is the plaintiff who bears the burden of proving that "the acts of [the] private [person or entity constitutes] state action under Section 1983."[8] It provides "a procedure for redress for the deprivation of rights established elsewhere."[9]

Meanwhile, RLUIPA, a U.S. federal law, protects religious institutions from governments who impose burdensome zoning law restrictions on them. RLUIPA provides in relevant part:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—is in furtherance of a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest.[10]

The term "government" is defined by the statute to include:

> (i) a State, county, municipality, or other governmental entity created under the authority of a State;
>
> (ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
>
> (iii) any other person acting under color of State law.…[11]

In *Roman Catholic Diocese*, the Roman Catholic Diocese of Rockville Centre, New York (the "Diocese") brought, among other claims, both a Section 1983 claim as well as an RLUIPA claim, alleging that the Village's denial of its application for a special permit to develop a cemetery constituted an improper interference with a religious exercise, the Roman Catholic burial.[12]

However, the Diocese did not just name the Village Board as a defendant; the Diocese also sought to hold liable the professional consultants who provided the Village with their planning and land use expertise, as well as the Village's engineering and ground water consultants (the "Consultant Defendants"). The Consultant Defendants included in this action were: Frederick P. Clark Associates, Inc. ("FPCA"), the planning and land use consultant to the Village of Old Westbury, David J. Portman ("Portman"), who advised the Village through FPCA between 1995 and 2008, and Tara M. Nesi, the FPCA Senior Associate who acquired Portman's position in 2008, as well as environmental engineering consultants Leggette Brashears & Graham, Inc. ("LBG") and Thomas P. Cusak ("Cusak").

FPCA, Portman and Nesi were not Village employees; instead FPCA had a contractual relationship with the Village of Old Westbury, wherein FPCA provided community planning, development, environmental, and transportation consulting services to the Village and, in exchange, the Village paid FPCA for these services. It was alleged that FPCA, and Portman, in particular, had a strong presence in the Village and were interchangeably referred to as the "Village Planner."

The planning consultant defendants were represented by this author's law firm, McCullough Goldberger & Staudt LLP, and they, and the engineering consultants, separately filed motions to dismiss all claims including the constitutional law violations, the Section 1983, and RLUIPA claims, as well as a conspiracy claim under 42 U.S.C. § 1985, which the district court granted. The claims against the Consultant Defendants were dismissed under both Section 1983 and RLUIPA because the District Court found that both statutes require that the violation be committed by *a government official acting under color of law*: a fact which could not be proven with regards to these consultants.[13]

Here, the Diocese argued that the planning consultants in particular played a key role in the Village's ultimate decision-making process regarding the Diocese's application to develop a cemetery and that their involvement in the process rendered them State actors. In *Roman Catholic Diocese*, the Diocese tried to establish the Consultant Defendant's status as State actors by arguing that their assistance was critical to the Village Board's alleged delay in issuing a Statement of Findings pursuant to the State Environmental Quality Review Act ("SEQRA") and by arguing that it was through lengthy delays in the environmental review process that the Board had effectively denied the Diocese's application for a special exception permit. Basically, with little factual support, the Diocese claimed that FCPA was involved in a conspiracy to deny the construction of the cemetery which dated back over 15 years.[14]

In essence, the Diocese sought to show that the Consultant Defendants deprived the Diocese of its constitutional rights under color of law, by advising the Village and its Board as to the adequacy of the Diocese's environmental reports and testing performed pursuant to SEQRA, as well as the Board's acceptance of the Final Environmental Impact Statement, and by not providing the necessary deference to the religious use. However, despite any advice the Consultant Defendants may have provided to the Village, they were *not* the ultimate decision makers, and so they could not be found to be State actors.[15]

As the Consultant Defendants argued, and the district court agreed, merely providing opinions and advice to assist a municipality in making its decisions does *not* constitute engaging in state action for purposes of Section 1983 liability.[16] The facts of the case clearly established that the FPCA defendants served as land use and planning consultants to the Village of Old Westbury, and, as such, provided the Village with advice, technical assistance, and recommendations *only*. These consultants were not the ultimate decision makers and they could not and did not enact the local laws or make the final determinations regarding land use planning, SEQR environmental review, or the processing of the special use permit application which were the subject of the Diocese's claims.

Judge Hurley noted that the Second Circuit had not previously addressed the contours of RLUIPA's "under color of State law" requirement for the imposition of liability on non-governmental entities such as consultants.[17] By examining the act's legislative history and noting that RLUIPA's definition of "government" was intended to track the language found in an earlier statute, the Religious Freedom Restoration Act ("RFRA"), the Court found a starting point for its analysis.[18] Also, since courts had previously interpreted RFRA's "acting under color of law" phrase in the same way that phrase is interpreted in Section 1983 litigation, the Court had a basis for extending that interpretation to RLUIPA.[19] Thus, the District Court found that RLUIPA's definition of government included "persons acting under color of State law" and should be interpreted in the same manner as the phrase "color of law" has been interpreted in RFRA and Section 1983 litigation.[20] Quite simply, Senior District Judge Denis R. Hurley concluded that rendering professional advice and consulting services by providing opinions and advice to assist municipalities in making their decisions is not engaging in state action for purposes of RLUIPA liability.[21]

## B. Additional Matters of Civil Procedure

Another issue of importance which factored into the court's decision making process in granting the Consultant Defendants' motion is the fact that the U.S. Supreme Court has recently revised the standard for evaluating a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The implication of this on the *Roman Catholic Diocese* case was that the district court was obligated to evaluate the Consultant Defendants' motion to dismiss under a relatively new standard.

In *Ashcroft v. Iqbal*,[22] the Court modified the standard set forth in *Bell Atlantic Corporation v. Twombly*, which stated that, in order to survive a motion to dismiss, a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face."[23] The Court's decision in *Iqbal* provided further guidance to this standard by setting forth a two-pronged approach for courts to use in deciding a motion to dismiss: first, a court should "begin by identifying allegations that, because they are mere conclusions, are not entitled to the

assumption of truth"—meaning the "legal conclusions" contained in the plaintiff's complaint "must be supported by factual allegations"—and second, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief."[24]

In light of this revised standard, as the district court was evaluating the Consultant Defendants' motion to dismiss in *Roman Catholic Diocese*, it did not have to accept or assume the truth of the Diocese's legal conclusion that the FPCA defendants acted under color of state law. Rather, it had to accept the factual conclusions allegedly supporting this legal conclusion, and determine whether these facts plausibly gave rise to entitlement to relief. The plaintiff's Complaint, however, did not meet these requirements set forth by *Iqbal*: the factual allegations included in the complaint did *not* support the legal conclusion that the alleged actions taken by the FCPA defendants were actions taken under color of state law.[25]

The Complaint did not allege that the FPCA defendants rendered any decisions that were binding upon the Village or its Board, or that they engaged in any overt acts or conduct other than making recommendations and rendering advice to the Board. Rather, the FPCA defendants served as mere consultants to the Village and its Board, and, therefore, were not responsible for enacting the zoning ordinance forbidding the burial of human remains in the Village or for making the final decision to deny the Diocese's application for a zoning change, nor were they responsible for the alleged delay in the SEQRA review or the special permit review. Accordingly, all of the Diocese's claims, including its Section 1983 and RLUIPA claims, against the Consultant Defendants were dismissed.[26]

### C. A Cemetery's Qualification as Religious Use and Conduct

RLUIPA's applicability to land use consultants is the second issue of first impression attributed to the long and interesting zoning and litigation history which dates back to shortly after the Diocese acquired the property in 1995.

The initial decision of interest, made over 15 years ago, was from the Supreme Court, Nassau County, as affirmed by the Appellate Division, Second Department, which held that in this instance the cemetery use constitutes conduct for a religious purpose.[27] In 1995, the Diocese acquired 97 open and undeveloped acres for cemetery purposes after it determined that it had insufficient real property to accommodate Catholic burials within Nassau County.[28] The Diocese intended to develop this property into a cemetery (the Queen of Peace Cemetery); however, there existed a Village land use ordinance that did not allow land within the Village to be used for the burial of human remains, and so the Diocese submitted an application to the Village Board requesting a zoning change and a special use permit.[29]

The Village's consultants FPCA and Portman provided the Village with a lengthy report opining that the Diocese's proposed development of Queen of Peace constituted a commercial enterprise or business use of property that was inconsistent with the Village's comprehensive plan. After a public hearing, the Village Board voted to deny the Diocese's application for a zoning change.[30] The Board had come to the conclusion that if the Diocese were to develop its Queen of Peace Cemetery on this property, it would constitute a "huge commercial operation"—as opposed to a religious use of real property—and would thus be incompatible with the Village's comprehensive plan.[31]

The Diocese, a nonprofit religious corporation formed pursuant to an act of the New York State Legislature, filed suit in 1996, in State court, challenging the portion of the Village's zoning ordinance which did not permit the burial of human remains on the property, as well as the Board's denial of the Diocese's application for a zoning change to develop its Queen of Peace Cemetery.[32] The Diocese argued, in pertinent part, that the cemetery purpose was a religious use entitling the Diocese to additional considerations and accommodations under the Village Zoning Code.[33] The New York State Supreme Court found that the Roman Catholic burial, including the prayerful commemoration of the lives of decedents, the sacred and perpetual care of their earthly remains and the corresponding development of the Kingdom of God on Earth and in Heaven constituted the exercise of fundamental civil rights connected with the Roman Catholic faith protected by the Constitution and the laws of the United States and State of New York.

A cemetery's status as a religious use had not previously been established. The State Supreme Court, Nassau County issued an Order in 2000, after finding that the Diocese's plan to develop a cemetery on this property did in fact "constitute conduct for a religious purpose," voiding the Board's denial of the Diocese's application.[34]

In 2002, the Appellate Division affirmed the cemetery was a religious use but also found that the Queen of Peace use qualified as a type 1 action under SEQRA, which carries a presumption that such development would result in a significant adverse environmental impact and thus necessitating an environmental review.[35] The Appellate Division remanded the matter to the Village Board to determine the environmental impact consistent with the preferential treatment afforded the religious use of the property.[36]

The actions post remand were, in general, the focus of the Eastern District litigation.

## D. The Ongoing Legal Issues

As is evident, this recent Eastern District decision is but one chapter in an ongoing saga.

While the motions to dismiss were pending, the Village in fact issued both a SEQRA Statement of Findings and granted the Diocese's special permit with conditions. The Diocese claims that the conditions are onerous and the equivalent of a denial, but, interestingly, the Diocese did not choose to file an Article 78 challenge in State Court but instead seeks to continue to pursue its claims against the Village in federal court. At the time the Consultant Defendants made their motions, the Village defendants also moved to dismiss the Diocese's claims on multiple grounds, and in part, on ripeness grounds because a decision had not been rendered at the time the litigation was filed. Judge Hurley provided the Diocese with an opportunity to re-plead against the Village defendants. As a result, the Diocese has recently made a motion to amend and supplement its complaint, which motion is pending. It will be interesting to see if this new motion practice sets any new legal standards with regard to ripeness and exhaustion of remedies. It is noted that Judge Hurley also provided the plaintiffs with a small window of opportunity to re-plead and amend more specific acts against the Consultant Defendants but the Diocese has elected to pursue its claims only against the Village defendants, further recognition that a plaintiff must meet a high burden and plead specific supportable facts in order to establish acts constituting state action by planning and land use consultants.

## Endnotes

1. Roman Catholic Diocese of Rockville Centre, New York v. Village of Old Westbury, No. 09 CV 5195(DRH)(ETB), 2011 WL 666252 (E.D.N.Y. Feb. 14, 2011).
2. *Roman Catholic Diocese*, 2011 WL 666252, at *11.
3. *Roman Catholic Diocese*, 2011 WL 666252, at *11.
4. *Roman Catholic Diocese,* 2011 WL 666252, at *9–10.
5. 42 U.S.C. § 1983 (2011).
6. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (1988) (citation omitted).
7. Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
8. Omnipoint Commc'ns Inc. v. Comi, 233 F.Supp.2d 388, 394 (N.D.N.Y. 2002).
9. *Roman Catholic Diocese*, 2011 WL 666252, at *6 (quoting Sykes v. James, 13 F.3d 515, 519 (2d Cir. 1993)).
10. 42 U.S.C. § 2000cc(a)(1).
11. 42 U.S.C. § 2000cc-5(4).
12. *Roman Catholic Diocese*, 2011 WL 666252, at *4.
13. *Roman Catholic Diocese*, 2011 WL 666252, at *6–7.
14. For the reader interested in issues dealing with the accrual of limitations periods under Section 1983 and RLUIPA or the issue of ripeness to bring claims against municipalities where no final planning or zoning determination has been made, the reader is respectfully referred to the full decision in *Roman Catholic Diocese* which also addresses these legal concepts.
15. *Roman Catholic Diocese*, 2011 WL 666252, at *7.
16. *Roman Catholic Diocese*, 2011 WL 666252, at *7.
17. *Roman Catholic Diocese*, 2011 WL 666252, at *10.
18. *Roman Catholic Diocese*, 2011 WL 666252, at *10.
19. *Roman Catholic Diocese*, 2011 WL 666252, at *10.
20. *Roman Catholic Diocese*, 2011 WL 666252, at *11.
21. *Roman Catholic Diocese*, 2011 WL 666252, at *11.
22. Ashcroft v. Iqbal, __ U.S. __, 129 S.Ct. 1937 (2009).
23. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 547 (2007).
24. *Iqbal*, 129 S.Ct. at 1950.
25. *Roman Catholic Diocese*, 2011 WL 666252, at *10.
26. *Roman Catholic Diocese*, 2011 WL 666252, at *11, 22.
27. *Roman Catholic Diocese*, 2011 WL 666252, at *2.
28. *Roman Catholic Diocese*, 2011 WL 666252, at *2.
29. *Roman Catholic Diocese*, 2011 WL 666252, at *2.
30. *Roman Catholic Diocese*, 2011 WL 666252, at *2.
31. *Roman Catholic Diocese*, 2011 WL 666252, at *2.
32. *Roman Catholic Diocese*, 2011 WL 666252, at *2.
33. *Roman Catholic Diocese*, 2011 WL 666252, at *2.
34. *Roman Catholic Diocese*, 2011 WL 666252, at *2.
35. *Roman Catholic Diocese*, 2011 WL 666252, at *3.
36. *Roman Catholic Diocese*, 2011 WL 666252, at *3.

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