



Maryland Municipal Attorneys' Association

Quarterly Newsletter – Spring 2016

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Newsletter Suggestions

This quarterly newsletter is sent to all MMAA members, giving updates and highlighting key legal issues. Let editor Frank Johnson know of any article suggestions, and please share this with anyone who may want to join MMAA. Most town and city attorneys in Maryland are members, and it's a good way to share information. Annual dues are \$50, a great bargain since members can attend the quarterly lunches without cost. So if you're not currently a member, send Frank an email if you're interested. fjohnson@gaitthersburgmd.gov

Winter MMAA Meeting: March 3 in Annapolis

The Winter MMAA Lunch Meeting will be on Thursday, March 3 at Harry Browne's, 66 State Circle in Annapolis, starting at noon. We're pleased to welcome Zenita Hurley, Chief Counsel, Civil Rights and Legislative Affairs, for the Maryland Attorney General, as well as Deputy Counsel Tiffany Harvey. They will speak on legislative issues of particular importance to the Attorney General, and will also focus on recent issues affecting local police departments. This includes a November 2015 survey and the Attorney General's memo on racial profiling. Following that presentation we'll discuss key legislative issues with MML representatives and our own MML Legislative Committee liaison, Lynn Board. We look forward to seeing you there!

MMAA's page on MML Website

Check it out! The [MMAA](#) has a webpage (under "Departments" on MML's website, www.mdmunicipal.org). It lists members, information from our meetings and meeting announcements. We try to keep the website current, but please let us know of any changes, including municipal attorney representation or address changes; just send Frank an email.

First Amendment May Protect Whistleblower Testimony

The Supreme Court in *Lane v. Franks*, 573 U.S. ___, 134 S.Ct. 2369, 2014 Lexis 4302 (June 19, 2014), held that a community college employee's testimony in a whistleblower proceeding may have First Amendment protection as "citizen speech," even if the employee otherwise testifies as part of his or her employment. The Court, in reaching that conclusion, reversed the 11th Circuit's decision that such testimony was not protected as citizen speech. The issue had been raised after an employee was fired in retaliation for testifying against another employee in a whistleblower case. The Supreme Court in *Lane* analyzed *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006) to find that such testimony was protected by the First Amendment for two key reasons. First, the Court found it was outside the scope of an employee's normal duties. Second, the Court decided the speech was on a matter of public concern. As such, the Court concluded that the employee, in testifying, was protected by the First Amendment because the testimony was a "quintessential" example of citizen speech under the First Amendment.

But despite finding the First Amendment applied to prevent an alleged retaliatory firing, qualified immunity still applied to protect the community college (which was the employer in this case). That was because precedent didn't give sufficient guidance on what constituted retaliation in such whistleblower cases, at least prior to *Lane*. Thus the Supreme Court found that past precedent did not put the community college on adequate notice that such a firing would constitute retaliation. Of course, with *Lane's* ruling, qualified immunity would not likely protect employers from liability for such retaliatory firings in the future.



Changes to Police Forfeiture Procedures with Veto Override

Civil forfeitures have long been part of the enforcement of our criminal laws. But until recently, they have received little notice; unlike criminal prosecutions, they don't merit TV coverage. But recent news articles identified examples of apparently overreaching federal agencies. According to some articles, entirely innocent persons, charged with no crimes, lost thousands of dollars from bank accounts or other substantial property holdings. Partly as a result, some think forfeitures are inherently wrong and have sought changes in the law to discourage such filings.

But Maryland law, like many other states, generally does not allow seizures of property without charges being filed. Md. Criminal Procedure Code §12-101 *et seq.* and 13-101 *et seq.* authorize forfeitures when there is a warrant and/or an arrest against the owner for the offenses related to the property being forfeited. In addition, the law mandates, in most cases, an active District or Circuit Court proceeding.

Thus, forfeitures in Maryland are not pursued unless there is an allegation that a crime has been committed, and most timelines revolve around the arrest and final disposition of the criminal prosecution. Where no prosecutions are brought, or charges are dismissed or denied because a person is found not guilty, property often has to be and indeed is returned.

Forfeiture proceedings under State law can be brought by the State's Attorney, but the State's Attorney can (and in many cases does) designate counsel for municipalities and counties.

As a result, increasingly municipal attorneys are handling civil forfeiture proceedings directly.

The General Assembly last year passed Senate Bill 528, which changed several provisions, including the burden of proof, removal of presumptions and specifying elements that must be proven to show forfeiture can be ordered. Additionally, the Bill imposed for currency forfeitures a minimum amount of \$300 before a forfeiture proceeding could be

filed, and put the burden on the police to show the owner violated the relevant criminal laws, acquired the property as part of the violation or within a reasonable time afterwards, and that there was no other likely source for the property.

Additionally, the police must show the presumed property owner had actual knowledge of the violations regarding controlled dangerous substances, under Md. Criminal Procedure Code §12-103, for vehicles, real estate and property such as bank accounts, securities or the like provided in exchange for controlled dangerous substances.

The Governor vetoed Senate Bill 528, but in the 2016 session, the General Assembly overrode the Governor's veto. The bill thus became effective thirty days afterwards, as of February 22, 2016.

Forfeitures have never been favored by the legal system, and the impact of the change does not eliminate forfeitures. The change will make some forfeiture cases more difficult to prove, but the reality has always been that a criminal prosecution was usually required. The shift in the burden and standard of proof will certainly make it more difficult for police in these cases. The impact may be that only those with clear proof of each element, along with an actual conviction (rather than prosecution based on criminal charges) will be pursued in the future. It should also be noted that several additional bills to limit forfeitures have been filed in the current state legislative session.

Tentative Date for Spring MMAA Lunch Meeting: May 12

The tentative date for the Spring MMAA Lunch Meeting is Thursday, May 12, subject to finalizing the arrangements (and we will send out an announcement asking for RSVPs). We are planning to have it again at Fisherman's Inn in Kent Island and will welcome retired Court of Appeals Judge Glenn T. Harrell with a current review of Maryland's high court decisions, including zoning and land use matters. We will have legislative updates and vote on officers for 2016/2017. A formal announcement will be forthcoming, and we hope to see you there!