

MEMORANDUM

To: South Dakota Library Association
From: Tom Harmon, Harmon Law Office
Re: Lawyers for Libraries – Rocky Mountain Training Institute
Date: December 18, 2007

Let me begin by thanking the Association for underwriting my expenses to attend the Lawyers for Libraries training program in Denver on November 8, 2007. I found the sessions quite interesting, and I am certain the materials will be useful to be, both in addressing questions that may arise from public libraries in South Dakota and assisting me in addressing many of the same issues that arise in our public schools and their libraries.

The materials provided at the seminar were also included on a CD. I have spoken with the sponsoring organization, the American Library Association, Office for Intellectual Freedom, and they have indicated that I may copy this disk and provide a copy to the South Dakota Association that members may access at will. If you would like such a copy, please let me know, and it will be provided.

The first and principal presenter at the seminar was Teresa Chmara, who spoke on “Directing Library Policies and Minimizing Library Liability.” Ms. Chmara began with some basic concepts that the library has been recognized by the courts as a public forum and that there is a Constitutional right to receive information which is a corollary to the right to speak. She identified cases such as *Board of Education v. Pico*, 457 US 853 (1982) and *Reno v. American Civil Liberties Union*, 521 US 844 (1997) as standing for the principle of the right to receive information. The *Pico* case considered whether a local school board violated the Constitution by removing certain books from the school library, while the *Reno* case dealt with a challenge to the Communications Decency Act enacted by the United States Congress. In both cases the notion of the right to receive information was the base principle upon which the decision turned.

The first type of policies discussed were policies governing patron behavior. Libraries may regulate “non-expressive activity” so long as the regulations are designed to promote safety or efficient access to materials. This requires that patrons must be engaged in library-associated activities. We may prohibit harassment and, as in the case of *Kreimer v. Bureau of Police*, the Morristown, New Jersey, library could remove a homeless person patron with offensive bodily hygiene that constituted a nuisance to others. It should be remembered that to the extent the library is a public governmental organization, the library card can be seen as a property right and thus certain minimal due process can be required before having the right to enter the library removed. It is critical that terms such as harassment, intimidation, offensive, and the like be clearly defined in any policy of this sort.

Some libraries have bans against playing cards or board games in the library, and the courts have upheld the right of the library to have such persons removed and have even

confirmed a conviction of trespass in this setting. Courts have upheld evictions based upon people coming into the library barefoot because the shoe requirement was seen as a valid content neutral regulation promoting communication of the written word in a safe and sanitary environment. The principal purpose of not allowing barefoot patrons is to protect those patrons from injury that may come from materials found on the library floor and result in suits against the library.

All cases addressing issues presented at the Seminar may be found in full on the CD mentioned above.

The next issue regarding library policies is far more difficult and technical. These are policies governing book removal or censorship issues. Again the *Pico* case was addressed. The Supreme Court held that if it was the intention of the school board in removing the books to deny students access to ideas which the school board disagrees, and if that intent was a decisive factor in the decision, then the school board had exercised its discretion in violation of the Constitution. Other cases were cited where library boards, particularly school boards, did not follow their own policy in considering a book for removal. That is almost certain to result in a judgment against the board, whether it be a school board or a library board.

General policy guidelines for materials challenges were identified. They include:

- A policy should be in place for book, video, or other challenges to materials in the library.
- Create a form for challenges to materials that allows for uniform gathering of information when a challenge is made and require it to be used.
- The policy should outline who reviews the challenge in the first instance and what is the appeal mechanism.
- The policy should outline the criteria used for review of challenges.

Clearly, it is best to have these policies in place before a full-scale demonstration is taking place on the library steps because some group or another has found themselves offended because of something to be found in the library. Attempting to create an enforceable policy in such a setting is dangerous and almost doomed to failure.

Next we looked at policies governing internet access. The springboard for discussion was the issue of whether library patrons have a Constitutional right to unfiltered access to the internet at the public library. The Children's Internet Protection Act provides that schools and libraries applying for certain funds for internet access, such as E-rate discounts or LSTA grants, may not receive such funds unless they certify that they have in place a policy of internet safety including the use of technology protection measures such as filtering or blocking software that protects access to certain visual depictions. These filters must block access for minors to visual depictions that are obscene, child pornography, or harmful to minors, and adults must also be blocked from visual depictions that are obscene or child pornography. The protection measure must be in place on all computers including those used by staff. The library administrator may

disable the software temporarily to enable access for bona fide research or other lawful purposes.

The Neighborhood Children's Internet Protection Act applies to libraries and schools that receive universal service discounts and provides that they must adopt and implement internet safety policies addressing access by minors to inappropriate matter, safety and security of minors when using electronic mail, chatrooms and the like, unauthorized access including hacking and other unlawful activities by minors online, unauthorized disclosure use or dissemination of personal identification information, and measures to restrict minors access to materials harmful to minors. The library must hold at least one public hearing or meeting to address the proposed policy. The determination of what material is inappropriate is left to the library board or other governing authority. Thus it appears that so long as the school board or library board holds at least one public hearing prior to adopting and implementing a policy that addresses the five criteria, determination of what that policy might be is left to the discretion of the local governing body. In *United States v. American Library Association*, 539 US 194 (2003) the Supreme Court addressed a challenge to the Children's Internet Protection Act on behalf of public libraries. The district court panel had found that the filters both underblocked and overblocked and that the CIPA was invalid because it would require libraries to violate First Amendment rights of their patrons. The Supreme Court reversed the lower court but without enough justices to create a majority opinion. Some of the justices felt that the notion that the library has broad discretion to choose what they bring into the libraries should prevail and that overblocking problems were cured by disabling provisions. Other justices felt that even that was a burden on the exercise of Constitutional rights by the adults and thus subject to future challenge. (While in Denver I had occasion to go to one of the Denver Public Libraries in order to check my email. When I am on the road, in order to check email, I must log into the AOL website, which was blocked on the library computers. According to the policy that was handed to me, all I needed to do was ask that the filters be unblocked, which I did, and thereafter there appeared to be no restriction on what material I could access. While this was a branch library, it had nearly fifty online computers available for patrons.)

The problem of what actually constitutes obscene speech has caused problems for the courts in the United States for many years. In 1957 the Supreme Court held that obscenity is not protected speech. The Court defined obscenity as speech that appeals to prurient interest and is without redeeming social value. In 1966 the Court further clarified that in order to be obscene speech must depict specified sexual contact in a patently offensive manner and that it must be "utterly" without redeeming social value. In 1973 in the case of *Miller v. California* the Court replaced the "utterly without redeeming social value" standard with "lacking in serious literary, artistic, political, or scientific value." The Court also established a three-part test to determine 1) whether the average person applying contemporary community standards would find the work as a whole appeals to prurient interest, 2) whether the work depicts or describes in a patently offensive way sexual conduct specifically defined by applicable state law, and 3) whether the work taken as a whole lacks serious artistic, political, or scientific value.

The discussion has now expanded to include what speech might be “harmful to minors” speech. Confusingly enough, courts have held that a determination of whether material is harmful to minors must be in the context of whether the material would be harmful to the oldest of minors. That means material cannot be deemed harmful to minors if it would be Constitutionally protected for a seventeen year old even if it was reasonable to conclude that it would be harmful for a five year old.

Child pornography has been fairly clearly identified as portrayals of actual children engaged in sexual activity. In 2002 in *Ashcroft v. Free Speech Coalition*, 535 US 234, the Court held that the third category of unprotected speech identified above did not extend to virtual child pornography whether generated by a computer or by using young-looking adults as actors.

The issue of whether a library can be sued by a patron for alleged harm as a result of viewing obscene material that is harmful to minors or child pornography was addressed. Section 230 of the Federal Communication Decency Act immunized interactive service providers against state law liability for third party postings. The principal result of that is that Facebook and other similar type services cannot be held liable for allowing people to post material on their sites which may be obscene, harmful, or slander.

No doubt you have acceptable internet use policies (IUP) in place. At the seminar they identified general guidelines for such policies as follows:

- Develop clear, specific and objective use policies for all terminals. ALA resources for formulating such policies can be found on the ALA.org website.
- The IUP should be posted in a clear, conspicuous manner.
- The IUP should state the library prohibits the use of the equipment to access material that is obscene, child pornography, or in the case of minors, harmful to minors.
- The IUP should be consistently and objectively applied.
- The IUP should provide an appeal mechanism even if the mechanism is informal.
- The IUP should alert patrons to guidelines relating to minor patrons and should make it clear that it is the parents, not the library employees, who are responsible for the monitoring their children’s internet activity.
- Where feasible the library should provide tutorials on internet use and might consider directing minors to sites developed for children.
- Where filters are used, the IUP must include a procedure for disabling filters for adults when the adult asks for such disabling.
- Optional steps such as use of privacy screens, recessed monitors, and segregation of terminals might also be considered.

Next to be discussed were policies governing meeting rooms and display cases. The issue here is whether the facility has created a designated public forum. In *Lehman v. City of Shaker Heights*, 418 US 298 (1974) the Court held that the library did not intend to open the forum, in that case space on rapid transit vehicles, and noted that if it held to the contrary display cases in public hospitals, libraries, office buildings, military

compounds, and the like would immediately become open to every would be pamphleteer and politician, and that the Constitution did not require such a result. The Supreme Court has held that the government does not create a public forum by an action or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse. That would apply to the situation where it was being whether a meeting room or display case within a public library was considered a public forum. The existence of a written policy which applies consistently is essential in these situations. The court will also look to see whether the policy is subjective or overly general and the selectivity of the criteria used to determine access.

A library treads on dangerous ground when it becomes selective in the use of its public areas and rooms based upon the content of what is occurring. For example, if you allow rooms to be used for general purposes but exclude access based upon religious content of the speech, the policy must be very carefully and narrowly drawn to serve a compelling state interest. The notion that the use of a public facility by a religious group would violate the establishment clause has been rejected by our Supreme Court so long as the governmental action had a secular purpose and did not have a principal or primary effect of advancing or inhibiting religion nor fostering an excessive entanglement with religion. The general subject here is viewpoint discrimination, and it is a very difficult area. Before you undertake such a procedure, you may well wish to visit with your city or library attorney about these issues. The issue of whether the library facility can be used for commercial purposes has also been addressed, and the Courts have held that governmental restrictions upon commercial speech may be no more broad than is necessary to serve the substantial interest of the governmental entity. Courts have noted that refusing use of a public forum on the basis that the subject would produce controversy is not a valid ground for such action. In a case entitled *Gay Guardian Newspaper v Ohoopie Regional Library* rising in Georgia in 2002 the Ohoopie Regional Library had permitted groups to distribute free publications on the front lobby table provided by the library. Various patrons objected that the Gay Guardian was being distributed in the lobby. At the point the library changed its policy to permit distribution of only library-generated or government materials. All agreed that the library would be acting in an unconstitutional manner if it kept the lobby table accessible to other groups but banned the gay publication. The Court noted that the library could choose to close down the forum completely even if motivated by a desire to avoid potential controversy surrounding the free publications that might be left on the table.

The last general area addressed by Ms. Chmara dealt with policies governing harassment and hostile work environment. The general legal standard was identified. The plaintiff must show that he or she is a member of a protected group, was subjected to pervasive or severe harassment because of membership in the protected group, the employee and a reasonable person would view the behavior as harassment, and it is reasonable that the employer be held responsible for the environment in which the alleged harassment occurred.

Courts have noted that the “pervasive or severe harassment” standard is not a code of civility, but the harassment must be sufficiently severe or pervasive to alter the condition

of the plaintiff's employment and create an abusive working environment. Simple teasing, offhand comments, and isolated incidents that would not amount to a hostile work environment do not reach this level. The conduct must be extreme to amount to a change in the terms or conditions of employment.

The library policy needs to specifically address sexual harassment in particular and must be enforced in order to protect the employer from sexual harassment by one employee of another in the workplace. Courts look to see if the employer had exercised reasonable care to avoid harassment and to eliminate it whenever it might occur. The courts will also examine the complaining employee to see if he or she failed to act with reasonable care to take advantage of the employer's safeguards.

The issue of whether the library can be held liable for acts of the patrons was also discussed. Generally speaking if the employer does not take reasonable steps to remedy a hostile working environment of which the employer is aware or in the exercise of reasonable care should have been aware, the employer may be held liable for such actions.

General guidelines for sexual harassment policies were identified:

- The library should adopt a harassment policy – with advice of counsel – that makes it clear the library does not condone, encourage, or tolerate harassment.
- The library should publicize its policy by posting it prominently in the library so every employee and patron is aware of its existence.
- The library should establish confidential procedures for addressing complaints of a hostile work environment by employees.
- The library should make complaint procedures easily accessible and well known to employees. Make sure that every current employee received a copy of that policy and that all new employees receive the policy when they start.
- If a complaint comes in, the library should immediately direct that complaint to an employment counselor or legal counsel for investigation regardless of whether or not it appears to be meritorious. Following the investigation the person or committee making the investigation should make a determination of whether the complaint has merit.

The second presenter was John K. Horany from Dallas Texas, who was an attorney in the case of *Sund v. City of Wichita Falls*. Mr. Hornay addressed a case he handled involving the censorship of two books, Heather Has Two Mommies by Leslea Newman and Daddy's Roommate by Michael Willhoite. Both are children's picture books written for very young children about the subject of children who have gay and lesbian parents. The attempts to censor these books included an action by Rev. Robert Jeffress, pastor of the First Baptist Church in Wichita Falls, who checked out both copies of the two books and refused to return them. In fact, the good reverend destroyed the books, but later reimbursed the library \$54.00 for their cost along with the demand that the library administrator not purchase any replacement copies. The library advisory board recommended that the books be repurchased and placed in the non-fiction youth book

area. The reverend and his church then pursued the Wichita Falls city council seeking a resolution to ban the books in question. The city council eventually adopted a resolution that allowed a petition process in order to remove certain books from the children's area of the library. Shortly thereafter petitions were received, and the librarian removed all the copies of the two books from the youth section and placed them in the adult section. The court noted that the effect of the resolution was to allow 300 people to essentially control what goes on in the public library. The court noted that the 300 people were a tiny proportion of the 100,000 people living in Wichita Falls. The full opinion may be found on the CD. The court struck down the resolution as unconstitutional. The plaintiff's cost of the lawsuit was assessed against the city of Wichita Falls.

Following lunch Deborah Caldwell-Stone discussed privacy and confidentiality issues in the library setting. The issue addresses whether library patrons' records related to circulation or internet use are private and whether library patrons have an expectation of privacy. A subsidiary issue putting the First Amendment into play arises when law enforcement seeks records that may reveal a person's reading habits or a subpoena or search warrant is served upon the library requiring it to turn over records containing information about internet sites accessed by particular patrons. These are issues that should be addressed in developing privacy policies for the library. A good many state laws protect library users' privacy rights including certain provisions of South Dakota law. The ALA Code of Ethics indicates that library users' rights to privacy shall be upheld.

The subpoena issues have been before courts at all levels. The majority view is that first the information must be relevant to the investigation; second, whether the information can be obtained by alternative means; and finally whether there is a compelling need for the information. It is important that the library be clear about its own privacy policy and that it make this policy clear to the patrons.

Different considerations are involved when there is a warrantless search. Generally speaking if the facts known to the officer at the time would cause a reasonable person to believe the search is necessary to prevent physical harm to a person or the destruction or concealment of evidence, the court may authorize or affirm the warrantless search after it has occurred. Once law enforcement is legally within the library or any other place, any material that is in plain view and the officer has probable cause to believe is evidence of a crime may in fact be seized.

The USA Patriot Act has a number of provisions relating to all types of records including library records as well as stored electronic data and electronic communication. Under the Foreign Intelligence Surveillance Act, Access to Business Records Section, an order will be issued if the federal agents present reasonable grounds that the records are relevant to an investigation and they are presumptively relevant if the FBI states that they pertain to a foreign agent or foreign power. The order may also include a gag order which prohibits the recipient from disclosing the existence of the warrants or the fact that the records were turned over to the FBI. These gag orders can only be challenged after one year has

passed and if the government asserts that disclosure may damage national security the government's assertion will be treated as conclusive.

National security letters can be issued under the authority of the FBI without judicial approval or judicial oversight relating to particular records such as electronic communication, credit card records, consumer credit records, as well as libraries and library consortia that provide internet services. Again the gag order can be issued. Many of these provisions are presently under judicial review in federal court in New York.

Guidelines for developing library privacy policies include:

- Avoid creating unnecessary records.
- Avoid retaining records that are not needed.
- Limit the degree to which personally identifiable information is monitored, collected, disclosed, and distributed. Do not allow library practices and procedures that place personally identifiable information in public view. Have documentary evidence of library practice and intent available.
- Well defined privacy statements communicate the library's commitment to protecting personally identifiable information.
- Conduct a thorough privacy audit of your operation determining
 - How and where data is stored;
 - How privacy matters are handled;
 - What training and education is provided to workers, trustees and volunteers;
 - Evaluate the library's existing privacy policies.

Special privacy concerns should be considered with regard to surveillance cameras as well as minors and what access parents and others have to minors' material.

An outline for how to conduct a privacy audit was presented and is contained on the CD identified above.

The final session was a case scenario examining actual responses to requests for patron information. This session principally dealt with documents including subpoenas and court orders, copies of which are contained in the materials.

Generally speaking neither the library nor a librarian can afford to be found guilty of obstruction of justice in refusing to respond to a subpoena. There is a substantial difference between subpoenas and search warrants. If you are served with a subpoena, contact your city or library attorney, unless the city attorney is serving the subpoena. If necessary avail yourself of a court challenge to the response to the subpoena if you and your legal counsel agree that the subpoena is not proper.

On the other hand, search warrants are executed by police officers who are almost always armed and have the presumptive right to search whatever is identified in the search

warrant itself. You have a right to examine the search warrant itself, but you are under an obligation to comply with its terms if it is within your power to do so.

Conclusion: The seminar was quite interesting; however, some of the presenters essentially read the material, which is not a very effective method of presentation. In addition, the seminar occurred in a room which could easily accommodate several hundred people. There were fewer than twenty attendees, and thus the physical surroundings and acoustics were not the best. Nevertheless, I found the topics interesting, and the material should be useful as noted above.

Respectfully submitted,

Thomas Harmon

Thomas H. Harmon