

APWA, Chicago Metro Chapter  
Municipal Law Seminar,  
St. Charles Public Works,  
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# The Landscape of Lawsuits Against Local Governments – why are Public Officials easy targets?

**Presented by:**

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# PUBLIC OFFICIALS ARE A FREQUENTLY SUED GROUP – WHY?

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- Civil Rights Act of 1871
  - Codified at 42 U.S.C. § 1983
  - “Every person who, under color of any [law] . . . subjects, or causes to be subjected, any . . . person . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .”
  - Post Civil War Reconstruction statute passed to implement 13<sup>th</sup>, 14<sup>th</sup> and 15<sup>th</sup> Amendments.

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- *Monroe v. Pape*, 365 U.S. 167 (1961)
  - The conduct of the local police constitute State action “under color of law” even when not authorized by statute or law
  - However, a local government is not a person under § 1983.
- *Monell v. Dep’t Soc. Services*, 436 U.S. 658 (1978)
  - A local government is a person under § 1983.
  - Local government liability pursuant to custom, practice or policy.

# PUBLIC OFFICIALS ARE A FREQUENTLY SUED GROUP – WHY?

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County or City =  
deep pocket =  
indemnification

# PUBLIC OFFICIALS ARE A FREQUENTLY SUED GROUP – WHY?

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- 42 U.S.C. § 1988
  - Civil Rights Attorney's Fees Award Act of 1976
    - Private Attorney General Theory
  - *Riverside v. Rivera*, 477 U.S.561 (1986)
    - Plaintiff awarded attorney's fees if successful - the plaintiff's lawyer will get "paid."
- Prevailing Plaintiffs, not prevailing Defendants, recoup fees
- Cost of litigation = settlement

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- Societal Attitudes and Perceptions
  - The Rodney King saga and jury perceptions
  - Continuing public mistrust of law enforcements in the 1990' s
  - September 11, 2001 – did the pendulum swing back?
  - Illinois Areas of Concern
    - Wrongful convictions – death row emptied
    - Torture suits
    - High profile police misconduct

# THE PUBLIC OFFICIAL PUNITIVE DAMAGES CRISIS

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- Scope of punitive damages problem
  - Damages available in civil rights cases
    - Compensatory damages – make plaintiff whole
    - Punitive damages – punish and deter future misconduct

# THE PUBLIC OFFICIAL PUNITIVE DAMAGES CRISIS

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- Punitive damages sought in most every civil rights case- usually within jury's discretion
  - Intentional misconduct is not necessary for punitive damages award. *Smith v. Wade*, 461 U.S. 30 (1983)
- Large punitive damages awards occurring with greater frequency
- Illinois local governments cannot pay punitive damages on behalf of public officials.
  - 745 ILCS 10/2-302



# THE PUBLIC OFFICIAL PUNITIVE DAMAGES CRISIS

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- How to protect yourself – Action Plan
  - Consult an estate planning lawyer *before* being sued
    - Residence (in Illinois) can be held in tenancy by the entirety
    - Consider transfer of property to spouse or other family member (certain downsides – not for everyone)

# Short Biographical Summary

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Mr. Hervas concentrates his law practice in defending units of local government and public officials in the federal and state courts. He is licensed in the State of Illinois and is admitted to practice before the United States Supreme Court, the Seventh Circuit Court of Appeals, and numerous Federal District Courts. He is a 1983 graduate of DePaul University College of Law. For 32 years Mr. Hervas has litigated hundreds of cases, many valued at more than \$1 million dollars. His practice currently concentrates in municipal law, police and fire discipline matters, and specialized litigation. On a personal level, Mr. Hervas is active in local government as he currently serves as the Itasca Village Attorney. Previously, he served for 8 years on the Itasca District 10 School Board, and for 3½ years as an Alderman for the City of Des Plaines. He is a resident of Itasca. His wife, Reba, is the President of Overshadowed Theatrical Productions in Itasca. They have 3 grown children. Mr. Hervas also loves to golf and race sprint triathlons.