Legal Issues in Leisure Services

- Contracts & agency
- Eminent domain
- 1st Amendment issues
- Non-discrimination in programs & facilities (including ADA)
- Illinois Open Meetings Act
- Illinois Freedom of Information Act
- Intellectual property rights (copyrights & trademarks)

Legal issues to be covered in RPTA 323

- Liability & negligence
- Security
- Event management
- Employment law
Legal issues covered in RPTA 322

- Contracts and agency
- Eminent domain
- 1st Amendment issues (freedom of expression, freedom of religion)
- Non-discrimination in programming and facilities (including ADA)
- Open meetings requirements for public bodies
- Freedom of information requirements for public entities
- Intellectual property rights (e.g., copyright, trademark)

Contracts

- A contract is a binding, legally enforceable agreement between two parties (who may be individuals or organizations)
- Contracts — written or oral?
  - Most contracts that can be completed within one year may be either written or oral, with some major exceptions including: (a) contracts dealing with ownership of real estate and (b) commercial contracts for goods worth $500 or more
  - Even if oral contracts are permitted, written contracts are more easily enforced
- Not everyone in an organization is authorized to create contracts — be sure employees understand the limits of their authority
- To avoid misunderstandings:
  - Know what is required to create a binding contract
What is required to create a binding contract

- Two parties: You cannot make a contract with yourself
- Intent: The parties must intend to make a contract
- Capacity: All parties must have the legal capacity to make contracts (e.g., be at least 18 years old, be of sound mind)
- Offer: A promise made by one party to do something (or to refrain from doing something) in exchange for a second party doing (or refraining from doing) something else
- Consideration: What is to be exchanged as part of the contract. Consideration can be almost anything so long as (a) it has some genuine value to the parties making the contract, even if that value is very low; and (b) it is not against established public policy (e.g., it is not illegal or grossly immoral)
- Acceptance (also called agreement): The offer must be accepted, usually in a manner and within a timeframe specified in the offer itself

Agency

- Agency is a legal relationship between two parties in which:
  - One person (the principal) grants another person (the agent) legal authority to act on the principal's behalf and to promote her/his interests
  - The agent agrees to be under the principal's direction and control while performing her/his assigned duties
- The grant of authority usually includes:
  - the specific scope and duration of the agent's authority
  - the purposes for which the grant is made, possibly including specific goals or outcomes
- The principal is legally responsible for the agent's acts (provided the agent does not unreasonably exceed the authority granted to her/him)
- The acts of the agent are legally binding on the principal
Eminent domain — quick definition

- The power of state and federal governments to take private property and convert it to public use
  - The power may only be exercised if just compensation is provided to owners of the property taken

Eminent domain — somewhat longer definition

- The power of eminent domain is established by the 5th Amendment to the United States Constitution, which allows federal and state governments to take private property for public purposes, even over the objections of the property owner
  - Sometimes also called governmental condemnation, taking, or expropriation
- The property owner is entitled to:
  - “Just compensation” (usually understood as the property’s fair market value) for the property taken
  - Due process, including the right to contest the government’s action in whole or in part, and the amount of compensation offered
- Public use is virtually anything sanctioned by a federal or state legislative body: Roads, parks, reservoirs, schools, hospitals, or other public buildings
  - Definition of “public use” expanded in controversial U.S. Supreme Court decision Kelo v. New London [545 U.S. 469 (2005)] to include “economic development”
Civil rights & liberties in leisure services management

• A very large and complex topic
• Covered here under two broad headings:
  ‣ Freedom of expression and religion in public parks and facilities
  ‣ Non-discrimination in programming and facilities
    ✦ Some aspects covered in this course under operations management
    ✦ Other aspects covered in Programming and in Facilities Management

Freedom of religion

• Freedom of religion is guaranteed by two clauses in the 1st Amendment:
  ‣ “Establishment clause”: No government action that tends to
    ✦ Establish an official religion
    ✦ Favor one religion over another
    ✦ Favor religion over non-religion
    ✦ Favor non-religion over religion
  ‣ “Free exercise clause”: No government action interfering with a person’s
    practice of her/his religion, except for very specific circumstances
  ‣ The 14th Amendment expands 1st Amendment protections to include state
    government as well as the federal government
Freedom of expression

- Freedom of expression: A cluster of civil rights and liberties protected by the 1st Amendment to the U.S. Constitution
  - Expressly protected: free speech, free press, freedom of assembly, and freedom to petition the government
  - Implicitly protected under the freedom of assembly: freedom of belief and freedom of association
- Freedom of expression originally protected only against interference by the Federal government
  - The 14th Amendment expands 1st Amendment protections to include state government as well as the federal government

Free expression:
The special role of public streets & public parks

“... they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.”

Justice Roberts, Hague v. CIO, 307 U.S. 496 (1939)
Freedom of expression strictly protected

- “Pure” 1st Amendment expression includes ideas and information about politics, public issues, community well-being, faith, and in general all topics that may educate or empower citizens
  ‣ Ideas and information are distinguished from conduct
- “Pure” 1st Amendment expression is strictly protected from government regulation based on viewpoint or content
  ‣ Claims to regulate “pure” 1st Amendment subject to “strict scrutiny” and require clear evidence of a “compelling governmental interest” (usually public safety or security)
  ‣ Content-neutral regulation (see slide 16) may be permissible
- Examples of “low speech” given less protection (e.g., regulation not subject to strict scrutiny):
  ‣ Commercial speech
  ‣ “Fighting words” aimed at specific individuals & likely to provoke immediate physical response
  ‣ Illegal action or advocacy of illegal action (see slide 14)
  ‣ Obscenity & profanity in public places

Expression & illegal action or advocacy of illegal action

- Major distinction between expression of an idea and conduct based on that idea
- Expression is protected from government regulation based on viewpoint or content, including:
  ‣ Expressing a favorable idea or opinion about an illegal activity and providing general information about what that activity involves
  ‣ Endorsing an illegal activity and expressing support for those who engage in it
    ✦ Note that expression generally remains protected even if it includes offensive, highly charged language
- Conduct is not protected, including
  ‣ Engaging in an illegal activity
  ‣ Advocating illegal activity in a way likely to encourage such illegal activity by
There's a difference . . .

- **Protected expression**: “You look around and you’ll see a few rich people, most of them likely racketeers, and because they’re rich, they can buy cops and politicians to run this town any way they want. And whenever anyone speaks up about it, the pigs hammer them down and the judges get paid off to look the other way. Well, I’m f*****g tired of it and it’s damn well time to fight back. And I think that’s what any self-respecting man or woman should do — fight those b******s and take our town away from them.”

- **Unprotected advocacy**: “You’ve heard what I think about this. Now here’s what we should do, you and me. We should go down to City Hall when we’re done here. And when we get there, we find the mayor and toss him out on the street. If any police get in the way or try to stop us, then we’ll show them we’re not scared to fight them. That’s what you should do whenever you get hassled — show them you know how to fight. Because I’m not scared and I don’t think you’re scared, either.”

- **Unprotected activity**: Actually engaging in illegal activity.

Content-neutral regulation

- Peaceful, lawful “pure” 1st Amendment purposes protected absolutely (note that purely social purposes / activities are not included here)

- “Content-neutral” regulation of expression is permissible *provided*
  - Regulation does *not* have the effect of controlling expression on the basis of *viewpoint or content*, with a very limited number of exceptions (see slide 13)
  - Regulation addresses compelling governmental interests, e.g., coordinating multiple uses of limited space, preserving public parks for future use, preventing dangerous or illegal activities; & guaranteeing financial responsibility for damage
  - Regulation provides *specific decision-making guidance* sufficient to reduce discretionary action by public officials to a bare minimum (existence of discretionary authority will likely defeat any claim of content-neutrality)
Consider the following . . . .

- A law prohibiting speakers in a public park from expressing ideas about same-sex marriage because this may be offensive to other people using the park.
- A law prohibiting speakers in a public park from using profanity.
- A law prohibiting casual users of a public park from using profanity.
- A law prohibiting casual users of a public park from using profanity in a manner audible to other park users a specified distance away.
- A law prohibiting people from using profanity while participating in a program conducted in the park by the local park district.
- A law prohibiting speakers in a public park from using loudspeakers, amplifiers, and similar devices to attract an audience.

Forums for free speech

- Degree of protection for free speech may depend on the forum in which the speech occurs.
- Three categories: traditional public forums, designated public forums, and nonpublic forums.
Traditional public forums

- Traditional public forums include public parks, sidewalks, and other areas historically open to public speech and debate (see slide 12)
  - It bears emphasis: Public parks and the sidewalks around them are regarded as traditional public forums for 1st Amendment purposes
- “Pure” 1st Amendment expression receives almost total protection in traditional public forums
  - They are open to all classes of speakers on almost all topics
  - They permit no content or viewpoint regulation of “pure” 1st Amendment expression absent the showing under strict scrutiny of a compelling governmental interest (see slide 13)
  - Content-neutral regulation of “pure” 1st Amendment expression is permitted within narrow bounds (see slides 15 & 20)
  - “Low” speech receives less protection (see slide 13)

Content-neutral regulation in traditional public forums

“... the government’s ability” to restrict expression in traditional public forums “is very limited...”

“... the government may enforce reasonable time, place, and manner restrictions” only if “the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication...”

The government may totally prohibit “a particular type of expression” only if the prohibition is “narrowly drawn to accomplish a compelling governmental interest.”

Designated public forums

- Designated public forums include municipal meeting rooms, municipal theaters or recreation centers, public university facilities.
- Government may choose to open or not to open such forums, and is not obligated to keep them open
  - When open, same level of free speech protections as traditional public forums (see slide 16)
- Government may restrict designated public forum access to
  - Specific classes of speakers (e.g., residents of a city, students at a university)
  - Specific topics (e.g., comments on a proposed city ordinance, comments on university-related business)
- With regard to designated classes of speakers or topics, government regulation must be content-neutral
  - Government may not engage in viewpoint or content discrimination

Non-public forums

- Public areas that are neither traditionally associated with free speech activities nor designated as such
  - Examples: Airport terminals and other transportation facilities, public agency internal communication systems (e.g., interdepartmental mail, computer networks)
- Government may impose reasonable regulation of speech (e.g., to avoid overloading internal communications, to prevent harassment of travelers, etc.).
- Reasonable regulation must be content-neutral
  - Viewpoint or content regulation is not reasonable
Non-discrimination in programming & facilities

- The U.S. Constitution and Federal law ban discrimination based on a wide range of factors, including race, sex, ethnicity, religion, age, national origin, physical or mental condition, and military service.
  - No one may be denied access to programming or entry to facilities based solely on any of these factors.
  - Equal access and inclusion are the guiding principles
- There are very, very few exceptions to this general rule
  - Private, membership-based organizations with social, fraternal, or religious purposes

The Americans with Disabilities Act (ADA)

- Major civil rights legislation intended to prevent discrimination on the basis of disability
- Three major titles affect the leisure services field:
  - Title I — Employment (covered in RPTA 323)
  - Title II — Access to facilities and programs operated by public entities
  - Title III — Access to facilities and programs operated by commercial entities
General definition of disability (28 CFR §35.104)

• “... a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.”

• “Physical or mental impairment” means:
  ‣ “... any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine”
  ‣ “Any mental or psychological disorder such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.”

• “Major life activities” means
  ‣ “functions such as caring for one’s self, performing manual tasks, walking, 25

The “Program Access Test”

• “Can an individual with a physical or mental impairment have the same program experience as people without physical or mental impairment?”
  ‣ The “program access test” is less about physical accessibility and more about program content and the intended program experience.

• The “program access test” is used by the Department of Justice when enforcing the ADA
  ‣ It gives meaning to the abstract legal standards spelled out in the ADA.
ADA and public entities

• “No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.” (28 CFR §35.130)

• “This part does not require a public entity to permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others.” (28 CFR §35.139)
  ‣ Assessment of threat must be individualized and based on “current medical knowledge or the best available objective evidence . . . .”

• “Except as otherwise provided in §35.150, no qualified individual with a disability shall, because a public entity’s facilities are inaccessible to or unusable by individuals with disabilities, be excluded from participation in, or be denied the benefits of the services, programs, or activities of a public entity, or be

ADA and public entities (continued)

• For existing facilities: “A public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities.” (28 CFR §35.150)

• For new construction and alterations: “Each facility or part of a facility constructed by, on behalf of, or for the use of a public entity shall be designed and constructed in such manner that the facility or part of the facility is readily accessible to and usable by individuals with disabilities, if the construction was commenced after January 26, 1992.” (28 CFR §35.15)
ADA and public accommodations

- "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site . . . ." (28 CFR §36.201)

- "Both the landlord who owns the building that houses a place of public accommodation and the tenant who owns or operates the place of public accommodation are public accommodations subject to the requirements of this part. As between the parties, allocation of responsibility for complying with the obligations of this part may be determined by lease or other contract." (28 CFR §36.201)

ADA and public accommodations (continued)

- "A public accommodation shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered." (28 CFR §36.301)

- "A public accommodation may impose legitimate safety requirements that are necessary for safe operation. Safety requirements must be based on actual risks and not on mere speculation, stereotypes, or generalizations about individuals with disabilities." (28 CFR §36.301)
Open meetings

- Public bodies exist to conduct the people’s business. The people therefore have a right to be informed about how public bodies go about doing so.

- Among the requirements of the Illinois Open Meeting Act (OMA):
  - All meetings of public bodies must be announced and agendas posted in advance.
  - Meetings of public bodies are broadly defined to ensure as much sunshine as possible.
  - Requirements are set for the minimum number of votes required to pass ordinances, resolutions, and so on.
  - Members of the public must be able to address public bodies in some fashion.
  - Meetings must be documented by minutes and recordings.

Freedom of information

- The Illinois Freedom of Information Act (FOIA or “foy-ah”) ensures members of the public have access to information about public bodies and their decision-making processes.

- The FOIA states that it is “the public policy of the State of Illinois that all persons are entitled to full and complete information regarding the affairs of government and the official acts and policies of those who represent them as public officials and public employees consistent with the terms of this Act. Such access is necessary to enable the people to fulfill their duties of discussing public issues fully and freely, making informed political judgments and monitoring government to ensure that it is being conducted in the public interest.”