

Top Legal Concerns From Florida Public Librarians

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Marti A. Minor, J.D., M.L.I.S.



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Intellectual Freedom

Facing Challenges to Library Materials and Displays

Intellectual Freedom: An Enduring Tenet of the Profession

- ▶ ALA's Freedom to Read Statement charges librarians with the responsibility to “contest encroachments” on availability of the “widest diversity of views and expressions, including those that are unorthodox, unpopular, or considered dangerous by the majority.”
- ▶ Office of Intellectual Freedom (OIF) was established to implement ALA policies concerning the concept of intellectual freedom as embodied in the Library Bill of Rights. The goal of the office is to educate librarians and the general public about the nature and importance of intellectual freedom in libraries.

Intellectual Freedom: Legal Underpinnings

- ▶ First Amendment of the U.S. Constitution: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or **abridging the freedom of speech**, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”
- ▶ 1943 U.S. Supreme Court recognized that the First Amendment’s guarantee of free speech includes the freedom to **receive** speech. *Martin v. City of Struthers*, 319 U.S. 141.
- ▶ 1965 U.S. Supreme Court interpreted the First Amendment even more broadly to encompass the “right to read . . . and freedom of inquiry.” *Griswold v. Connecticut*, 381 U.S. 479.

Materials Challenges

- ▶ 2010-2020 ALA tracked 3,200+ formal challenges, nearly half made in public libraries.
- ▶ According to OIF, 2020 saw a **notable shift** in the type of materials challenged—away from LGBTQ subjects and toward topics involving racism and diversity in America.
- ▶ Controversial materials policy is a library's first line of defense. A strong policy will:
 - ▶ Specify the method by which complaints are made.
 - ▶ Contain specific designation of who will conduct the library's initial review of the material.
 - ▶ Denote the final decision maker.

Materials Challenges: Beyond Policy

- ▶ *Libraries: An American Value*: an ALA document directed at library users rather than librarians.
 - ▶ Explains the role libraries play in a democratic society.
 - ▶ OIF reports a high rate of success in stemming complaints with simple explanation that the library serves the entire community which requires diverse viewpoints.
 - ▶ Keep copies on hand to provide to complainants.
- ▶ Call the experts: OIF offers consulting services and confidential support related to library materials challenges. Contact:
 - ▶ OIF Director Deborah Caldwell-Stone at dstone@ala.org, 312.280.4224 or
 - ▶ Assistant Director Kristin Pekoll at kpekoll@ala.org, 800.545.2433, ext. 4221.

Displays & Bulletin Boards

- ▶ There is an important distinction between displays/bulletin boards designed and maintained by the library and those open to the public.
- ▶ Libraries are **not** required to open display or exhibit space to the public; if libraries choose to do so, space must be provided on an equitable basis to all who request it, regardless of the beliefs or affiliations. *Gay Guardian Newspaper v. Ochopee Reg'l Library Sys.*, 235 F. Supp. 2d 1362, 1364 (S.D. Ga. 2002), *aff'd sub nom. Gay Guardian Newspaper v. Ochopee Reg'l*, 90 F. App'x 386 (11th Cir. 2003).
- ▶ Limitations on time, place and manner are allowed, but be careful that any restrictions are “content neutral.”

First Amendment Right to Access: A Different Point ▶ of View

Trespassed Patrons

Those Suffering From Homelessness

Meeting Rooms Applicants

Protesters/Petitioners

What Courts Say About Public Libraries

- ▶ At least since 1943 (*City of Struthers*), the Supreme Court has recognized that the First Amendment includes a right to receive information.
- ▶ In 1992, a U.S. Circuit Court (Third Circuit) described public libraries as the “quintessential locus for the exercise of the right to receive information and ideas.” *Kreimer v. Bureau for Police for Town of Morristown*, 958 F.2d 1242.
- ▶ The right to receive information and the associated right to access public libraries are not absolute. Courts have long recognized that there are circumstances in which the government may limit First Amendment rights.

Forum Analysis

- ▶ Adopted by the Supreme Court in 1983. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n.*, 460 U.S. 37.
 - ▶ Public Forum, highest level of protection: streets, parks, public sidewalks.
 - ▶ Non-Public Forum, lowest level of protection: government property that has not traditionally or by designation been used as a place for public communication.

Somewhere in the Middle

- ▶ Limited Public Forum: property the government has opened for use by the public for the exercise of specific expressive activity. Courts have consistently placed public libraries in this category.
 - ▶ Obligated to permit the public to exercise only rights that are consistent with the nature of the library and with the government's intent in creating the library.
 - ▶ Restrictions that do not limit the First Amendment activities that have been specifically permitted need only be "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry*.
 - ▶ But rules that limit the First Amendment activities for which the library was created will receive more scrutiny.

To pass muster...

- ▶ Time, place, or manner restrictions that limit the permitted First Amendment activities within a limited public forum are valid only if they are “narrowly tailored to serve a significant governmental interest, and...leave open ample alternative channels for communication of information.” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).
- ▶ Significant governmental interest: courts readily recognize that library officials have a significant interest in ensuring that all patrons can use library facilities to the maximum extent possible during the time the library is open. *Kreimer*.
- ▶ Narrow tailoring is achieved “so long as the...regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.” *Ward*.

Patron Conduct

- ▶ Regardless of the First Amendment right of access to a public library, individuals have no right to behave in an unlawful manner when visiting.
- ▶ Also, public libraries are free to prohibit conduct that is otherwise lawful but disruptive in the library context when the purpose is “achieving maximum [l]ibrary use.” *Kreimer*.
- ▶ Courts have reasoned that because conduct rules allow for the removal of patrons who misuse library facilities, there is no direct impact on the First Amendment rights for which public libraries have been designated. Thus, such restrictions receive lenient scrutiny: they must be reasonable and viewpoint neutral.

Code of Conduct Enforcement

Notice: inform patrons of conduct rules.

Clear Objective: ensure library staff members can explain the reason for the rule.

Consistency: failure to apply rules uniformly to all patrons would be discriminatory.

Reasonable Penalties: usually a progressive discipline approach affords the most flexibility to impose punishment best suited to further the library's overall mission.

The Ultimate Punishment: Trespass

- ▶ Before the government may deprive an individual of a property or liberty interest, it must afford due process of law. Fourteenth Amendment.
- ▶ The right of access guaranteed under the First Amendment is a liberty interest.
- ▶ Due process = notice and right to be heard.
- ▶ 2012: Bitterroot Public Library (Hamilton, MT) banned a patron who was repeatedly belligerent and intimidating to library staff; upheld by federal court. It was important to the court that the patron was notified of the objectionable conduct, the consequences of the behavior, and given a right to appeal to the library board.
- ▶ 2011: A public law library in Massachusetts settled with a patron who was banned because he “made other patrons uncomfortable.” The banned patron was not informed of what conduct was at issue or what conduct to refrain from and he was not given the opportunity to be heard.

Policies Aimed at Those Suffering Homelessness Questioned or Struck Down

- ▶ Sleeping: A city criminal ordinance prohibiting sleeping in public buildings, including libraries, was found unconstitutional. *Pottinger v. City of Miami*, 810 F.Supp. 1551 (S.D. Fla. 1992). A more recent case found a criminal ordinance prohibiting sleeping or camping outside to be unconstitutional. *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).
- ▶ A library policy prohibiting “objectionable appearance or odor” was found unconstitutional because it was vague. What is objectionable? *Armstrong v. D.C. Public Library*, 154 F.Supp. 2d 67 (D. D.C. 2001).
- ▶ A library policy disallowing wheeled carts was questioned because it was not narrowly tailored to serve the governmental interest in keeping passageways and browsing areas clear. *Lu v. Hulme*, 133 F.Supp.3d 312 (D. Mass. 2015).

Policies Aimed at Those Suffering Homelessness Upheld by Courts

- ▶ Offensive hygiene: *Kreimer* (OK for library to have rule requiring any patron whose bodily hygiene is so offensive as to be a nuisance to other persons to leave the premises.) The use of term "nuisance" gives "so offensive" some objective and definitive measurement.
- ▶ Dress code: *Neinast v. Columbus Metro. Lib.*, 346 F.3d 585, 589 (6th Cir. 2003). The requirement was that patrons must wear shoes inside the library.

What about loitering?

Loitering Prowling F.S.A § 856.021

- ▶ The offense of loitering and prowling in Florida occurs when an individual maintains a suspicious presence in an unusual place, time, or manner; and under circumstances that point toward the possibility of a threat to the safety of property or persons.
- ▶ Usually used by law enforcement to arrest someone who is engaged in suspicious conduct.
- ▶ Does **not** criminalize idleness or vagrancy. *State v. Ecker*, 311 So. 2d 104, 107-10 (Fla. 1975).
- ▶ In 1972, Supreme Court held that vagrancy laws, which criminalize loafing, “nightwalking” and avoiding work, are unconstitutional. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).

Library Meeting Room

- ▶ Article VI of the Library Bill of Rights states that such facilities should be made available to the public served by the given library “on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.”
- ▶ In 2018, ALA amended its interpretation of this provision to state that libraries may not deny access to meeting rooms based upon the viewpoint of speakers or the content of their speech including “religious, political, and hate speech.” The interpretation went on to provide that “the library cannot exclude religious, social, civic, partisan political, or hate groups.” The use of the terms “hate speech” and “hate groups” stirred controversy.
- ▶ In January 2019, a new amendment was adopted which states: “libraries may not exclude any group based on the subject matter to be discussed or the ideas for which the group advocates. However, if a group's actions during a meeting disrupt or harass others in the library, library policies regarding acceptable behavior may apply. If libraries adopt policies that are perceived to restrict potentially controversial groups' access to meeting rooms, they may face legal and financial consequences. Allowing religious groups to use library meeting rooms and spaces does not constitute a breach of the First Amendment's Establishment Clause.

When to Tread Carefully

Politically Partisan

- ▶ A Wisconsin court approved of a library meeting room policy that prohibited meetings that are “politically partisan.” However, the court noted that the apparent intent was to exclude nothing more than political party meetings. *Pfeifer v. City of W. Allis*, 91 F. Supp. 2d 1253, 1262-63 (E.D. Wis. 2000).

Worship Services

- ▶ A California court held that that a public library may exclude worship **services**. *Faith Ctr. Church Evangelistic Ministries v. Glover*, 480 F.3d 891, 895 (9th Cir. 2007) abrogated (on other grounds) by *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 129 (2008).

Regulating Behavior Outside of the Library

- ▶ Sidewalks and parking lots surrounding government buildings are traditional public fora. *United States v. Grace*, 461 U.S. 171, 177 (1983).
- ▶ Therefore, any restriction on the exercise of expressive activity outside the library will be subject to strict scrutiny: it must further a compelling governmental interest and be narrowly tailored to meet the needs of that interest. *Perry*.
- ▶ Individuals have the right to distribute literature, hold signs and collect petition signatures while on sidewalks or in front of government buildings so long as they do not disrupt other people or traffic.
- ▶ Any restrictions must be viewpoint neutral and be aimed at preventing the disruption of library service.

No Requirement to Tolerate Unlawful Conduct

- ▶ **Mob Intimidation § 784.0495:** It is unlawful for a person, assembled with 2 or more others and acting with a common intent, to use force or threaten to use imminent force, to compel or induce, or attempt to compel or induce, another person to do or refrain from doing any act or to assume, abandon, or maintain a particular viewpoint against his or her will.
- ▶ **Affrays; Riots § 870.01:** (1) A person commits an affray if he or she engages, by mutual consent, in fighting with another person in a public place to the terror of the people; (2) A person commits a riot if he or she willfully participates in a violent public disturbance involving an assembly of 3 or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in: (a) injury to another; (b) damage to property; or (c) imminent danger of injury to another person or damage to property.
- ▶ **Unlawful Assemblies § 870.02:** it is unlawful for 3 or more persons to meet together to commit a breach of the peace, or to do any other unlawful act.
- ▶ **Breach of the Peace; Disorderly Conduct § 877.03:** it is unlawful to commit acts that are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engage in brawling or fighting.

▶ Accessibility

ADA Compliance

Gender-Specific Restrooms

Americans With Disabilities Act

Title II prohibits public providers of programs and services from (a) discriminating against “a qualified individual with a disability;” and (b) excluding such individual from participation in or denial of the benefits of services, programs or activities. 42 U.S.C. § 12131 *et seq.*

- ▶ Disability is defined as an impairment that substantially limits the ability to perform a major life function (caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, and reproducing). A temporary impairment is not disability.
- ▶ Qualified individual: **not** if condition poses a direct threat to the safe operation of the library or if the individual “poses a direct threat to the health or safety of others.”

Resources for Technical Compliance

- ▶ [ADA Title II Technical Assistance Manual](#)
- ▶ Access Advocates [12 Basic Requirements for ADA Compliance at the Library - \(accessadvocates.com\)](#)

Beyond the Basics: What Accommodations Are Required by Title II?

- ▶ “A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 C.F.R. § 35.130(b)(7).
- ▶ Does not require government entities “to employ any and all means to make services accessible to persons with disabilities... It requires only “reasonable modifications” that would not fundamentally alter the nature of the service provided . . . [or] impose an undue financial or administrative burden.” *Tennessee v. Lane*, 541 U.S. 509 (2004).

In the Digital World

- ▶ When the ADA became law (1990), Congress was chiefly focused on improving the lives of people with disabilities as they navigated **physical** spaces.
- ▶ Since then, services and offerings of public libraries (and other governmental entities) have broadly expanded into the digital world.
- ▶ Precisely what is required in this area is difficult to enumerate because technology continues to evolve faster than the law.
- ▶ Assistive Technology
 - ▶ ALA tip sheet: ala.org/asgcla/resources/tipsheets/assistive-technologies
 - ▶ Florida Alliance for Assistive Services and Technology: faast.org
 - ▶ Web Content Accessibility Guidelines (WCAG): the WCAG documents explain how to make web content more accessible to people with disabilities. [Web Content Accessibility Guidelines \(WCAG\) Overview | Web Accessibility Initiative \(WAI\) | W3C](#)

Gender-Specific Bathrooms

- ▶ In 2016, NC enacted a “bathroom bill” applicable to government buildings—required restroom use corresponding to gender on birth certificate regardless of gender identity. U.S. District Court struck down the law. Before appeal was complete, it was repealed by the legislature.
- ▶ Bills have been introduced in Florida, but none have passed.
- ▶ Public school policy of a Florida high school requiring use of restroom corresponding to gender on enrollment documents struck down by the 11th Circuit Court of Appeals. Set for rehearing by the entire court in 2022. *Adams v. School Bd. of St. Johns County*, 3 F.4th 1299 (2021).
- ▶ Some municipalities have enacted laws specifically allowing public restroom use in accordance with gender identity. municode.com/library/fl

Service Animals



ADA Accommodation

- ▶ Title II of the ADA requires public libraries to modify policies, practices, and procedures to allow a person with a disability to be accompanied by a service animal (28 C.F.R. § 35.136(g)).
- ▶ ADA defines “service animal as a dog individually trained to do work/perform tasks for the benefit of an individual with a disability.” 28 C.F.R. § 35.104 and § 36.104.
 - ▶ Guide Dog serves as a travel tool for persons who have severe visual impairments or are blind.
 - ▶ Hearing or Signal Dog alerts a person who has a significant hearing loss or is deaf when a sound occurs, such as a knock on the door.
 - ▶ Psychiatric Service Dog assists individuals with disabilities to detect the onset of psychiatric episodes and lessen their effects. Tasks performed by psychiatric service dogs may include reminding the handler to take medicine, providing safety checks or room searches, or turning on lights for persons with Post Traumatic Stress Disorder, interrupting self-mutilation by persons with dissociative identity disorders, and keeping disoriented individuals from danger.
 - ▶ SSigDOG (sensory signal dogs or social signal dog) assists a person with autism. The dog alerts the handler to distracting repetitive movements common among those with autism, allowing the person to stop the movement.
 - ▶ Seizure Response Dog assists a person with a seizure disorder.

Emotional Support Animals are NOT Service Animals



- ▶ Emotional support animals, comfort animals, and therapy dogs are **not** service animals under the ADA. Other species of animals, whether wild or domestic, trained or untrained, are **not** considered service animals either. Exception: miniature horse.
- ▶ ADA Summary publication with definition and exclusion of emotional support animals ada.gov/service_animals_2010.htm

Questions Allowed by Law

OK to ask:

- Whether an animal is a service animal.
- What tasks the animal has been trained to perform.

Do NOT ask:

- Nature of the individual's disability.
- For documentation that the service animal is trained.

Florida Law

§ 413.08

Similarities to ADA

- ▶ Defines service animal as a dog or miniature horse trained to perform tasks for an individual with a disability.
- ▶ Possible tasks: guiding, alerting, pulling a wheelchair, assisting with mobility or balance, retrieving objects, helping an individual with a psychiatric or neurological disability by preventing or interrupting impulsive or destructive behaviors, reminding an individual with mental illness to take prescribed medications, calming an individual with PTSD during an anxiety attack.
- ▶ Tasks excluded: crime deterrent, emotional support, well-being, comfort or companionship.

Additions to ADA

- ▶ “Any trainer of a service animal, while engaged in the training of such an animal, has the same rights and privileges with respect to access to public facilities” as an individual with a disability.
- ▶ Fraudulently misrepresenting an animal as a service animal is a misdemeanor.

Misbehaving Animal

- ▶ If an animal is out of control and the handler does not take effective action to control it, the animal may be excluded.
- ▶ In general, a service animal must be on a harness, leash, or other tether, unless the person's disability prevents it. In those instances, the person must be able to control the animal with voice, signals, or other means.

Employment



Federal Anti-Discrimination Laws

- ▶ Title VII of the Civil Rights Act of 1965: prohibits discrimination on the basis of race, color, religion, national origin, or sex.
 - ▶ Note *Bostock v. Clayton Co.*, 590 U.S. ____ (2020) holding that gender identity is a protected class.
- ▶ Age Discrimination in Employment Act (ADEA): protects workers age 40+.
- ▶ Equal Pay Act of 1963: makes it illegal to pay different wages to men and women if they perform equal work in the same workplace.
- ▶ Americans With Disabilities Act (ADA): prohibits adverse employment actions on the basis of an employee's disability. Also requires employers to provide reasonable accommodations.
- ▶ Genetic Information Nondiscrimination Act of 2008 (GINA): prohibits employers from requesting genetic info from applicants/employees.

Other Federal Employment Laws

- ▶ Family & Medical Leave Act (FMLA): Covered employers must provide eligible employees with up to 12 weeks of unpaid leave during any 12-month period for certain events.
- ▶ Fair Labor Standards Act (FLSA): Requires overtime (OT) compensation for hours worked over 40/week by eligible employees. Note that employees of public agencies may be rewarded for OT through compensatory time off (rate of 1.5 hour per hour of OT worked).
- ▶ Occupational Safety and Health Act (OSHA): The federal law does not apply to state/local governmental employees. But there are proposed bills currently before the Florida Legislature to create a state plan that would apply to state and local government workplaces.

Application & Interview Questions

- ▶ Purpose: Obtain information from job candidates in order to allow the employer to select the applicant who is the best fit for the organization.
- ▶ Avoid questions designed to elicit information that cannot be legally used in hiring decisions.
- ▶ No prohibition on what a job candidate reveals voluntarily.

Do NOT Ask

- ▶ Maiden name
- ▶ Marital status
- ▶ Plans to have children
- ▶ Arrangements for child care
- ▶ Age—but can confirm minimum age
- ▶ Citizenship—can confirm legally eligible to work
- ▶ Membership in social/political groups
- ▶ Religious affiliation
- ▶ Race
- ▶ Sex or sexual preference
- ▶ Disability
- ▶ Criminal history
- ▶ Military history

OK to Ask

- ▶ Educational history
- ▶ Prior job experience
- ▶ References
- ▶ Drug test (but alcohol test is allowed **only** if reasonable suspicion that employee is under the influence at work)
- ▶ Needs for accommodations (can't use as a basis not to hire)
- ▶ Membership in trade/professional organizations
- ▶ **After hire:** family insurance coverage
- ▶ **After hire:** ability to work on religious holidays

▶ Odds & Ends

Unattended Children in the Library

- ▶ *In loco parentis*: Latin for “in the place of the parent.” Legal responsibility of a person or organization to take on some of the functions and responsibilities of a parent.
- ▶ Teaching personnel stand *in loco parentis* with respect to students in their classrooms who they must supervise and control. *State v. Lanier*, 979 So. 2d 365, 369 (Fla. 4th DCA 2008). As a result, teachers may risk liability should they fail to diligently supervise students.
- ▶ No law establishing library personnel as *in loco parentis*. Thus, no legal liability to supervise or chaperone.
- ▶ Consider a library policy: [Unattended Children in Libraries - Professional tips \(ala.org\)](#).

Friends of the Library

- ▶ The Solicitation of Contributions Act requires anyone who solicits donations from people in the state of Florida to register with the Florida Department of Agriculture and Consumer Services (FDACS) and renew annually. This applies to charitable organizations, sponsors, professional solicitors and professional fundraising consultants, i.e., Friends of the Library.
- ▶ But this law does not apply to governmental entities, i.e., the public library itself.
- ▶ No prohibition for public library to accept donations or to encourage membership in a Friends group.

Open Carry

- ▶ Open carry is not legal in Florida except for a person engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition. F.S.A. §§ 790.053, 790.25.
- ▶ Holders of a concealed carry permit cannot be prohibited from bringing guns inside public libraries except when a library is being used as public polling place. F.S.A. § 790.33 (State of Florida has preempted the field of firearm regulation); F.S.A. § 790.06 (enumerating places where a license holder cannot bring a firearm).

Federal Register

- ▶ The *Federal Register* is the official newspaper of the federal government and is published every workday. [federalregister.gov](https://www.federalregister.gov).
- ▶ Contains four sections:
 - ▶ Presidential Documents
 - ▶ Rules and Regulations
 - ▶ Proposed Rules
 - ▶ Notices
- ▶ Annually, the regulations contained in the *Federal Register* are compiled into the bound volumes of the *Code of Federal Regulations* (CFR).
- ▶ Searchable at [Govinfo.gov](https://www.govinfo.gov).
- ▶ For assistance on understanding rules and regulations related to grant applications, begin with the grant administering agency.

Patron Privacy

- ▶ 1938 ALA Code of Ethics: “It is the librarian’s obligation to treat as confidential any private information obtained through contact with library patrons.”
- ▶ Current ALA Code of Ethics, Article III: “We protect each library user’s right to privacy and confidentiality with respect to information sought or received, and resources consulted, borrowed, acquired or transmitted.”
- ▶ Today’s challenge: Third-party vendors.

Third-party vendors such as digital content providers, program facilitators, and even other libraries, may provide software, hardware, or services. Many will collect and use library user data for a variety of reasons, including consumer analytics and segmentation, personalization, digital rights management, and digital collection development. It is important for libraries to ensure that the contracts and licenses governing the collection, processing, disclosure, and retention of library user data reflect library ethics, policies, and legal obligations concerning user privacy and confidentiality.

About the Presenter

Marti A. Minor, J.D., M.L.I.S.

Marti has combined a long-time love of libraries with her legal education and more than 25 years of experience working in state and federal courts to offer educational programming for librarians.

Her presentations delve into legal issues that commonly occur in libraries, alerting librarians to potential legal pitfalls and listing vetted resources for in-depth research on topics including personnel policies, open records requests, patron confidentiality, employee privacy concerns and external litigation threats.

Marti is the author of the 2018 *Library Law: A Handbook for Public Librarians in Georgia*.

