

Avoiding Personnel Landmines

By
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I. HIRING

A. Use an Employment Application

1. Not Just Resumes
2. Ensure applicants fill out *every section*
 - a. Look for gaps
 - b. Demand a good explanation for any gaps
3. Don't ask about protected classifications
 - a. Ex. – Don't ask: "Are you over 40?"
4. Ask the hard questions
 - a. Have you ever been accused of physical abuse, sexual abuse, or sexual harassment?
 - b. Have you ever been accused of any serious misconduct toward a child?
5. Include a Reference Release
 - a. Not necessary but helpful. *See* C.R.S. § 8-2-114(3) -- Even without a release, Colorado law shields references from liability when offering truthful information about former employees
 - (i) *See also* below about required background checks

- b. Sample language:
 - (i) *For the school:* I hereby authorize the School to gather information about my prior employment history and references, and I release the School and its agents from any and all liability arising from their good faith efforts in this process.
 - (ii) *For prior employers:* I hereby authorize my prior employers to disclose information regarding my employment to the School and its agents. I release my prior employers and their agents from any and all liability arising from these disclosures.

B. Charter Schools Are *Required* To Perform Background Investigations, Colo. Rev. Stat. § 22-30.5-110.5(1)

1. Background “Investigations” include both reference and background checks
2. Required Investigations for All Finalists
 - a. Not required for all applicants
 - b. Only for applicants to whom an offer of employment is extended (“finalists”), Colo. Rev. Stat. § 22-30.5-110.5(1)
 - (i) All finalists, no matter the position at the school
3. Why are investigations required?
 - a. To determine whether the applicant is suitable to work with children, Colo. Rev. Stat. § 22-30.5-110.5(1)
4. **Bottom Line:** “An employee or an applicant for employment with a charter school is disqualified from employment if the results of a fingerprint-based criminal history record check . . . disclose a conviction for [the following offenses.]” Colo. Rev. Stat. § 22-30.5-110.7(6.5)
 - a. Employee or applicant
 - b. “Position of employment” means any paid job or position
 - (i) Employed for money, not volunteer
 - (ii) Full time or part time

- (iii) *All employees*, regardless whether the position has any contact with children
 - c. Disqualifying Offenses, Colo. Rev. Stat. § 22-32-109.8(6.5)
 - (i) Felony child abuse
 - (ii) Crime of violence
 - (iii) Felony involving unlawful sexual behavior
 - (iv) Felony domestic violence
 - Disqualified for 5 years only
 - School districts may hire after a “safety risk assessment”
 - (v) Felony drug offense
 - Disqualified for 5 years only
 - School districts may hire after a “safety risk assessment”
 - (vi) Felony indecent exposure
 - (vii) Offense in another state that would have qualified as any of the above, had it taken place in Colorado
- C. Colorado’s required investigations shall include, at minimum: (1) CDE inquiry, (2) criminal history check and (3) reference check
 - 1. Inquiry to CDE, Colo. Rev. Stat. § 22-30.5-110.5(2)(a)
 - a. Adverse action against educator license or certification
 - b. Separation of employment from a school district (?only?) because of unlawful sexual behavior
 - (i) Statutory list of types of separation
 - (a) Dismissal (involuntary)
 - (b) Resignation (voluntary)
 - (ii) Separation “as a result of any allegation” of unlawful sexual behavior that was “supported” and “confirmed,” Colo. Rev. Stat. § 22-30.5-110.5(2)(a)(II)

2. Criminal history record check, Colo. Rev. Stat. § 22-30.5-110.5(2)(b)
 - a. Fingerprint-based
 - b. As described under Colo. Rev. Stat. § 22-30.5-110.7
 - c. Check is designed to determine, at minimum, a criminal record of:
 - (i) Felony, or
 - (ii) Misdemeanor crime involving
 - (a) unlawful sexual behavior
 - (b) unlawful behavior involving children

3. Reference check, Colo. Rev. Stat. § 22-30.5-110.5(2)(c)
 - a. “Inquiries to the applicant’s previous employers to obtain information or recommendations that may be relevant to the applicant’s fitness for employment”
 - b. *(More) Immunity for former employer* – Colo. Rev. Stat. § 22-30.5-110.5(5)(a): Previous employers are immune from civil liability, unless (1) they give knowingly false information that (2) has prejudicial effect on applicant or school
 - c. *Immunity for charter school* – Colo. Rev. Stat. § 22-30.5-110.5(5)(b): Charter school that relies on information from previous employer shall be immune from civil liability, unless
 - (i) information is false, and
 - (ii) school knew it was false, or acted with reckless disregard for its truth
 - d. *Question: Does this create liability in previous employer for failure to disclose material information / comply with statute?*
 - (i) Can a school be held liable under § 22-30.5-110.5(5)(a) if it provides merely “name, dates of employment, and positions held”?

- D. Cost of investigations, Colo. Rev. Stat. § 22-30.5-110.5(4), -110.7(9)
 1. Charter school must pay CDE for all applicants *without* a teacher’s license

- a. State Board to establish amount of fee
 - b. Fee to approximate direct and indirect costs of inquiries
2. School may assess amount of fee to applicant

II. EMPLOYMENT AGREEMENTS

A. Contracts are promises that courts will enforce

- 1. Contracts by any other name are still binding
 - a. Offer letter
 - b. Employment Agreements: A contract to perform work in exchange for compensation
- 2. Contract Formation
 - a. **Offer:** Manifesting a willingness to have this promise enforced
 - b. **Acceptance:** Voluntarily agreeing to offer to have this promise enforced
 - c. **Consideration:** Each party receives something of value
- 3. Contracts do not need to be in writing
 - a. Oral
 - b. Implied, *e.g.*, handbooks *may* create contractual rights. *See Continental Air Lines, Inc. v. Keenan*, 731 P. 2d 708, 711-12 (Colo. 1987)
 - (i) Ordinary contract theory – Handbook constituted an “offer” which the employee “accepted.”
 - (ii) Promissory estoppel – Employee reasonably relied on handbook language
 - (iii) *Keenan* was applied in the public school context in *Adams County Sch. Dist. v. Dickey*, 791 P.2d 688 (Colo. 1990) (handbook may have created implied contract for warehouse foreman, an otherwise at-will employee)
- 4. Disclaimers: How to avoid implied promises and preserve at-will status

a. Applications --Suggested Language Above the Signature Block:

Nothing in this application is intended to imply or create an employment relationship or employment contract. If hired, employment is at-will and can be terminated without notice and at any time and for any or no reason. I understand that while personnel policies may change from time to time, my at-will status is not subject to change absent a written agreement signed by the (appropriate School officer).

b. Suggested Disclaimers for Staff Handbook (placed prominently in distinctive typeface).

The information contained in this staff handbook is for general information only. The language used is not intended to create or constitute an employment agreement with any employee. The policies, practices and programs described in this guide are subject to any applicable rules, regulations and provisions as approved by the School. The School has the right to make final decisions concerning the interpretation and application of its policies, practices and programs, and to change or discontinue them at any time.

- or -

Neither the School's policies, this staff handbook, any written materials, nor administration statements should be construed by any employee as an expressed or implied contract guaranteeing the rights, compensation, or benefits of any employee. The School reserves the right to unilaterally modify or cancel any provision of this guide or its policies. Unless the employee and the School have executed a written contract with contrary provisions, employment is terminable at will of either the employee or the School, at any time, without notice, cause, or prior discipline.

c. Staff Handbook Acknowledgment Forms.

I acknowledge receipt of the School's employee handbook. I understand that I should consult my immediate superior regarding any questions not answered in this handbook. I acknowledge that the benefits or rights described are not guaranteed, that the provisions are subject to the School's unilateral decision to modify or cancel them. I further acknowledge that my employment is terminable by me or the School at will, without notice, cause, or prior discipline and that no verbal statements of anyone in the School shall modify my at-will status.

Date

Signature

III. PERFORMANCE EVALUATIONS

- A. Not required, but best practice
- B. “Promise less, do more”
 - 1. Consider carefully before promising a certain number of evaluations
 - 2. Conduct them on a regular basis
 - a. At least once per year
- C. Formal and Informal
 - 1. Written
 - 2. Verbal
- D. Use a form to guide evaluations
 - 1. Consistent across employees and supervisors
 - 2. Tailored to specific virtues for your school
- E. Be honest – Include positive and negative

IV. GRIEVANCE PROCESS

- A. Written process in employee handbook
 - 1. Don’t bind school
 - 2. Consider whether to require employees to use it
- B. Guides everyone when grievances surface
- C. Suggested Process
 - 1. Start at lowest level – Unhappy employee must first talk to source of problem
 - 2. Progressive levels
 - a. teacher-teacher

- b. teacher-dean
 - c. teacher-principal
 - d. teacher-board (at board's discretion?)
 - 3. Require unhappy employee to write grievance down at levels 3 or 4
 - a. Problem
 - b. Any violation of policy
 - c. Desired solution
 - 4. Alternative route in case position is source of problem
- D. Process should move with "deliberate speed"

V. EMPLOYEE HANDBOOK

- A. Guidance, not binding promises
- B. Only policies you need
- C. Update annually
- D. Sexual harassment
- E. Grievance
- F. Right to search the school's electronic devices
- G. Child abuse reporting

VI. EMPLOYMENT DISCRIMINATION

- A. Adverse employment action must have been "because of" protected class or conduct
- B. Protected classes, C.R.S. § 24-34-402
 - 1. Disability
 - 2. Race
 - 3. Creed

4. Color
5. Sex
6. Sexual orientation
 - a. Includes transgender status
7. Religion
8. Age (over 40)
9. National origin
10. Ancestry

C. Must first file with EEOC or CCRD

VII. HARASSMENT IN THE WORKPLACE

A. Defining “harassment”

1. “Harassment” is a subset of illegal discrimination
 - a. That is, one only has a legal claim for illegal harassment if the harassing conduct is because of the victim’s status in a protected class
 - b. Ex. – Sexual, racial, religious harassment
2. Harassment/hostile work environment – must unreasonably interfere with an individual’s work performance
 - a. For instance, **sexual harassment** is defined as: “Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.” 29 C.F.R. § 1604.11
 - b. To constitute a **hostile work environment** a plaintiff’s workplace must be “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working

environment.” *Vajdl v. Mesabi Academy of KidsPeace*, 484 F.3d 546, 550 (8th Cir. 2007)

- B. Types of harassment
 - 1. Superior-subordinate
 - 2. Peer
- C. Liability generally follows responsibility: Generally, employers are liable only for their own wrongdoing, except when a supervisor misuses authority
 - 1. Direct liability
 - 2. Vicarious liability – derived from common law agency principles
 - a. “Master” is strictly liable for wrongdoing of “servant,” when servant acts within the course and scope of employment
 - (i) Most courts hold that harassing behavior is not within the “course and scope of employment”
- D. Statutory basis for harassment claims
 - 1. Title VII of the Civil Rights Act
 - 2. Americans with Disabilities Act (“ADA”) / Rehabilitation Act
 - 3. Age Discrimination in Employment Act (“ADEA”)
 - 4. Colorado Anti-Discrimination Act
- E. Basic elements of *prima facie* harassment case¹
 - 1. Employee belongs to a protected group
 - 2. Employee was subjected to harassment
 - 3. Harassment complained of was *because of* victim’s membership in a protected class

¹ The elements of harassment are widely recognized: “(1) . . . member of a protected group; (2) . . . subject to unwelcome harassment; (3) the harassment was based on [protected class]; and (4) due to the harassment’s severity or pervasiveness, the harassment altered a term, condition, or privilege of the plaintiff’s employment and created an abusive working environment.” *Harsco Corp. v. Renner*, 475 F.3d 1179, 1186 (10th Cir. 2007) (alteration and quotation omitted).

4. Harassment complained of affected a term condition or privilege of employment²
 - a. Hostile environment – Unwelcome, offensive conduct that is so severe and pervasive that it alters the “terms and conditions” of employment
 - b. *Quid pro quo* – Adverse action taken because subordinate rebuffed advances by supervisor
- F. More about supervisor-subordinate claims³
1. *Strict liability*: If a supervisor’s harassment culminates in an adverse employment action, then the employer is liable
 - a. Regardless of whether the employer exercised reasonable care to prevent and promptly correct harassment
 - b. Regardless of whether the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer
 2. *Affirmative defense*: If a supervisor’s harassment does not culminate in an adverse employment action, then the employer may escape liability if it can show:
 - a. Employer exercised reasonable care to prevent and promptly correct harassment; and
 - b. Employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by employer
- G. More about the *affirmative defense*:
1. Preventing harassment
 - a. Non-harassment policies
 - b. Grievance procedures

² The Supreme Court has expressly downplayed the terms “hostile work environment” and “*quid pro quo*,” although it has not dismissed them as irrelevant. *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751-53 (1998). They certainly retain vitality in court opinions and law review articles.

³See *Burlington Indus. v. Ellerth*, 524 U.S. at 765; *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08 (1998).

- (i) Published
 - (ii) Alternative routes to grieve
- 2. Prompt remedial action
 - a. Commence an investigation
 - b. Conduct thorough investigation
 - c. Complete the investigation
 - d. Take appropriate steps, given the investigation
- 3. Employee unreasonably fails to take advantage of employer policies to prevent and correct harassment
 - a. Does not notify anyone
 - b. Knows about policies

VIII. Termination of Employment

- A. Progressive discipline has come first
 - 1. Documented
 - 2. Employee should not be surprised
- B. Dignity and privacy
 - 1. Non-renew v. termination
 - 2. Graceful exit
 - 3. Share information only on a need-to-know basis
- C. Specific reasons for termination
 - 1. At-will = any reason or no reason
 - 2. Not an illegal reason
- D. Termination meeting itself
 - 1. Scripted

2. Direct supervisor and one other person
 3. Final paycheck ready, C.R.S. 8-4-109(1)(a)
- E. Separation Agreement
1. Employee releases legal claims against school
 2. School gives employee separation pay
 - Money beyond final paycheck
 3. Reachable under CORA, C.R.S. 24-72-204(3)(a)(II)(B)
- F. Post-Separation
1. Enter onto school property?
 2. Speak with school employees?
 3. Come to school events?
 4. Keep children enrolled in the school?
 5. Refer friends to the school?

IX. FREEDOM OF SPEECH AND RELIGION IN CHARTER SCHOOLS

- A. *of the First Amendment*: “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.” The First Three Freedoms of the First Amendment.
1. Establishment Clause
 2. Free Exercise Clause
 3. Free Speech Clause
- B. General Principles
1. *Who* is acting or speaking?
 - a. Government Speech v. Private Speech: “There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing

religion, which the Free Speech and Free Exercise Clauses protect.”⁴

2. Purposes of the constitutional “separation of church and state.”
 - a. Prevent religious wars and societal strife.
 - b. Protect religious liberty.
 - (i) Freedom to gather to worship: Government cannot prevent religious believers from gathering together to form churches.
 - (ii) Freedom of individual conscience: Government cannot pressure an individual to accept or reject religious beliefs.
 - c. Protect religious minorities.
3. Context Matters.
 - a. *Van Orden v. Perry*, 545 U.S. 677 (2005) (*upholding* the display of a monument of the Ten Commandments on the Texas State Capitol grounds).
 - b. *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (*striking down* the placing of a version of the Ten Commandments in two different county courthouses in Kentucky).

C. Establishment Clause

1. “Endorsement test” – Government conduct “establishes religion” if a reasonable, neutral, informed observer would believe that the government was “endorsing” religion or a particular religious belief.
2. Establishment Clause Bedrock: Government must remain *neutral* towards religion. It may neither favor nor disfavor religion or a particular religious belief.

D. Free Exercise Clause

1. The First Amendment does not require religious exemptions from neutral and generally applicable laws. *Employment Division of Oregon v. Smith*, 494 U.S. 872 (1990).

⁴ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000).

2. Non-neutral laws, *i.e.*, laws that target religion, are subject to “strict scrutiny.”
 - a. Does the law in question serve a “compelling governmental interest”?
 - b. Can the government advance its interest another way (least restrictive means)?”
- E. Free Speech Clause
1. General: No viewpoint discrimination
 - a. Government cannot pick a side on an issue
 - b. While disfavored, government can at times discriminate between speech based on content/subject matter
 2. Permissible speech restrictions:
 - a. Violence (incitement to immediate violence)
 - b. Threats of violence (fighting words, “true threats,” not figures of speech)
 - c. Disruptive behavior/speech
 - d. Harassment (more than just offensive expression)
 3. Four speech variables: Identify the speaker, the speech, the government actor, and the government restriction.⁵

Issues Related To Religion in Public Schools

- A. Student Prayers.
 1. “See You At The Pole” student prayer event.
 2. Student prayers over lunch or before tests.
 3. Student prayer or Bible-study groups.
- B. School Prayer, Moments of Silence
- C. Prayer at School Events, like graduation.

⁵ This analysis is taken from John Garvey’s book *What are Freedoms For?*

- D. Faculty, Staff, or Administration Prayers.
 - 1. Teachers praying with each other.
 - 2. Teachers praying with students or parents.
 - 3. Faculty prayer or Bible-study groups.
- E. Teaching.
 - 1. Teachers must teach the curriculum.
 - 2. Teaching about religion v. evangelizing.
 - a. Teaching creationism or intelligent design. *See above.*
 - b. *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam) (“The Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like.”).
- F. Student Assignments, Religion, and Speech.
- G. Distribution of Religious Literature.
- H. Religious Persuasion Versus Religious Harassment.
- I. Equal Access to School Facilities.⁶
- J. Religious Holidays.
- K. Holiday Music Concerts.
- L. Excusal From Religiously Objectionable Lessons.
- M. Student dress.
- N. Released Time.
- O. School Newspapers.⁷
- P. School Libraries.

⁶ Equal Access Act of 1998, 20 USC 4071, is a federal law that requires equal access to “limited open forums” in public secondary schools.

⁷ Rights of free expression for public school students. Colo. Rev. Stat. § 22-1-120.

- Q. Political Activities of Students, Faculty, or Staff.
 - 1. Teacher criticism of the school board, superintendent, or principal.
 - 2. Teacher by day; political/religious activist by night.
- R. And many, many more.

Sample Policies

Freedom of Speech

The School may ensure that the speech of its employees and students remains focused on accomplishing the School's educational objectives. Because teachers are public employees who represent the School, while students are not, teachers and students have different kinds of freedom of speech when school is in session.

Students attend the School to learn. Thus, students may be disciplined for disrupting the learning process by, for example, speaking out-of-turn or off-topic. For instance, a student may not offer his or her political views during an algebra lesson. However, the School may not limit student speech which is appropriate in context simply because the student's views are unusual or uncomfortable to others. For example, if when teaching history a teacher wants students to discuss America's best and worst moments, the teacher must permit students to express unpopular or controversial ideas, even if overtly religious or political, so long as they remain relevant and are expressed respectfully. The School need never tolerate lewd, vulgar, or profane speech under any circumstances. The School may also ensure that speech is age-appropriate. For example, it may prohibit certain topics in their entirety for certain age children, if it determines the children are not mature enough for such subject matter.

In contrast, teachers are both an extension of the School (which is a government enterprise) and authority figures with respect to their students. As a result, teachers do not have the same latitude as students in expressing their own personal and religious viewpoints within the classroom. While teachers should permit political and religious speech by students within the guidelines set forth above, teachers should refrain from volunteering and advancing their own personal religious and political viewpoints. Teachers may express their views on these subjects if students inquire, and may present various viewpoints in an effort to further learning, but should exercise mature self-restraint with respect to their own beliefs on these subjects. The classroom is not a forum for teachers to advance their political, religious, or personal viewpoints.

While generally student speech includes the content of what is written in assignments and "symbolic" speech associated with jewelry, armbands, flags, or art projects, the School may limit speech in order to accomplish its educational objectives. For instance, the School may enforce its uniform policy. It must, however, do so consistently. Thus, if the School permits students to wear certain sizes and types of jewelry with the uniform, then it must permit that sort of jewelry with religious or political messages.

The School expects its teachers to teach its curriculum. Indeed, the School expects all its employees – teachers, administrators, and other staff – to advance its educational mission every day by word and deed. It is impossible to predict the many ways in which issues regarding free speech may arise. Except in cases involving an imminent, substantial disruption, teachers should take time to reflect before acting. Teachers are also encouraged to seek further guidance in situations that are not clearly addressed by this guideline.

Religion in a Public School

The critical distinction in this area is that the First Amendment, on the one hand, prohibits government (which includes public schools) from establishing a religion, and, on the other hand, protects private individuals when initiating religious activity. The School may impose reasonable time, place, and manner restrictions on all speech, including religious speech, in order to advance the educational objectives of the School.

By way of example, a teacher (as a representative of the government) may not lead a class in prayer, but a student (who is a private citizen) may pray before a test or a meal, or at any other time, so long as it does not disrupt the learning process. Students may express their religious beliefs in homework, artwork, and other written and oral assignments so long as student submissions are responsive to the assignment. For instance, if a teacher asks students to write an essay about their hero, a student may write about a religious figure being his or her hero without any adverse effect due to the religious content of the answer. Of course, the teacher may, and should, grade that essay like any other, using it to assess whether the student has learned the grammatical, rhetorical, or other lessons the teacher has been trying to teach. Students are free to discuss religious topics among themselves during free time to the extent the participants wish to do so.

Teachers, in addition to other School staff and administrators, wear two hats: government representative and private individual. Almost always at school, teachers are representatives of the School, especially when interacting with students and parents. In that role, teachers may not impose or advance, or reasonably appear to impose or advance, any set of religious beliefs. In limited circumstances, however – for example, on their breaks and when not interacting with students – teachers may behave as private individuals. For instance, in such a circumstance, a teacher may pray over his or her meal or read devotional material.

Some situations are complicated, so contact the principal if you need further guidance.

Final Thoughts from Justice Sandra Day O'Connor

The First Amendment expresses our Nation's fundamental commitment to religious liberty by means of two provisions – one protecting the free exercise of religion, the other barring establishment of religion. They were written by the descendants of people who had

come to this land precisely so that they could practice their religion freely. Together with the other First Amendment guarantees – of free speech, a free press, and the rights to assemble and petition – the Religion Clauses were designed to safeguard the freedom of conscience and belief that those immigrants had sought. They embody an idea that was once considered radical: Free people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct.

Reasonable minds can disagree about how to apply the Religion Clauses in a given case. But the goal of the Clauses is clear: to carry out the Founders' plan of preserving religious liberty to the fullest extent possible in a pluralistic society. By enforcing the Clauses, we have kept religion a matter for the individual conscience, not for the prosecutor or bureaucrat. At a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish. The well-known statement that “[w]e are a religious people,” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), has proved true. Americans attend their places of worship more often than do citizens of other developed nations, R. Fowler, A. Hertzke, & L. Olson, *Religion and Politics in America* 28-29 (2d ed.1999), and describe religion as playing an especially important role in their lives, *Pew Global Attitudes Project, Among Wealthy Nations ... U.S. Stands Alone in its Embrace of Religion* (Dec. 19, 2002). Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: Why would we trade a system that has served us so well for one that has served others so poorly?

McCreary County, Ky. v. American Civil Liberties Union of Ky., 545 U.S. 844, 881-82 (2005) (O’Connor, J., concurring).