

WINTER 2011 VOL. 16 NO. 3

# TPIJ

## *Texas Paralegal Journal*



## Trademark Infringement and Counterfeit Imports

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# PRESIDENT'S *Message*

by Debbie Oaks Guerra, President, Paralegal Division

**T**his is the time when many of us may focus on how we can further our careers during the coming year.

In making your career resolutions, experts suggest that you concentrate on resolutions that make use of your strengths rather than on those that seek to correct your weaknesses. Did you know that after weight loss, *learning something new*, tops Americans' list of New Year's resolutions this year? Learning new skills may be the single best thing anyone can do for their career. Here are some suggestions for New Year's resolutions that may help move your career forward:

**Attend at least one large industry event.** Expanding your knowledge and contacts beyond your immediate field (or practice area) can not only make you more valuable in your current job but also can open up new job possibilities in related fields. The 2011 Texas Advanced Paralegal Seminar is scheduled for October 5th–7th at the D/FW Marriott at Championship Circle in Fort Worth. If you have never attended TAPS, resolve to join us this year as we celebrate the Paralegal Division's 30th anniversary!

**Volunteer for a professional organization.** The benefits of participating in professional organizations include keep-



ing abreast of industry-specific developments and regulations; networking with other professionals which can help in one's job search and in discovering alternate career paths within the profession; and giving back to your profession to help improve it and the livelihoods of those people within it. Visit the PD website at [www.txpd.org](http://www.txpd.org) and select the MEMBERS ONLY tab then VOLUNTEER tab to review the current opportunities and register to volunteer!

**Network more.** Networking is one of the keys to business success and we all should resolve to do more of it. By networking, however, I mean not just meeting new people but actually trying to help them. The best networking resolution you could make would be not only to network more but to give more generously to your network without regard to how the people you are helping might be able to help you. Networking in that way will yield benefits to your own career in ways you cannot imagine. If you haven't already, join the Paralegal Division Groups on LinkedIn and Facebook and start building your professional network today!

**Give something back to the community this year.** While it has been a difficult year for many people, for those of us in

a position to, resolve to get involved in a community service project. Whether it be as a volunteer, through the gift of your time, or as a contributor, through the donation of money or goods – *resolve* to give back. The PD Board of Directors has been challenged with the goal of organizing one community service project in their geographical district this year. Watch the PD Blog for information on upcoming events and how you can get involved.

Finally, I would like to take a moment to remember a wonderful friend and paralegal superstar, Glenda K. Barber, RP, who passed away on October 8, 2010. Not only was Glenda a friend of mine, she was one of my biggest supporters. Glenda encouraged me to strive for greatness and I have her to thank for my continued passion and commitment to my career. I will miss her contagious enthusiasm but know that the paralegal profession is better today, because of her.

Whatever resolutions you choose to make, stay focused on causing them to become a reality. Wishing you a happy, healthy and prosperous career in the coming year!



Debbie Oaks Guerra  
President Paralegal Division

## UPCOMING EVENTS—PARALEGAL DIVISION

[www.txpd.org](http://www.txpd.org)

District 10 CLE Seminar\*, Montgomery, TX—February 4, 2011

District 7 CLE Seminar\*, Amarillo, TX—February 5, 2011

Board of Directors Meeting, Dallas, TX—February 25 & 26, 2011

Annual Meeting, Paralegal Division, San Antonio, TX—June 24, 2011

Texas Advanced Paralegal Seminar, Fort Worth, TX—October 5–7, 2011

District 3 CLE Seminar\*, Fort Worth, TX—January 26, 2011

District 3 CLE Seminar\*, Fort Worth, TX—January 31, 2011

District 10 CLE Seminar\*, Montgomery, TX—February 4, 2011

District 16 CLE Seminar\*, El Paso, TX—February 4, 2011

District 7 CLE Seminar\*, Amarillo, TX—February 5, 2011

District 2 CLE Seminar\*, Dallas, TX—February 23, 2011

Board of Directors Meeting, Dallas, TX—February 25 & 26, 2011

District 2 CLE Seminar\*, Dallas, TX—March 30, 2011

Annual Meeting, Paralegal Division, San Antonio, TX—June 24, 2011

Texas Advanced Paralegal Seminar, Fort Worth, TX—October 5–7, 2011

\*Details located on PD's website CLE Calendar





## EXCEPTIONAL PRO BONO SERVICE AWARD

The Paralegal Division of the State Bar of Texas is proud to sponsor an Exceptional Pro Bono Service Award. Its purpose is to promote the awareness of pro bono activities and to encourage Division members to volunteer their time and specialty skills to pro bono projects within their community by recognizing a PD member who demonstrates exceptional dedication to pro bono service. Paralegals are invited to foster the development of pro bono projects, to provide assistance to established pro bono programs, and to work closely with attorneys to provide unmet legal services to people with low incomes. This award will go to a Division member who has volunteered his or her time and special skills in providing uncompensated services in pro bono assistance to their community. The winner of the award will be announced at the Annual meeting, his/her expenses to attend the Annual Meeting will be incurred by the Division, and a profile of the individual will be published in the *Texas Paralegal Journal*.

Please complete the following nomination form, and return it **NO LATER THAN MARCH 31, 2011** to the following:

Allen Mihecoby, CLAS, RP  
Chair, Professional Development Committee  
BNSF Railway Company  
2500 Lou Menk Drive, AOB-3  
Fort Worth, Texas 76131-2828  
817-352.2371 (direct dial)  
817-352.7635 (fax)  
[PDC@txpd.org](mailto:PDC@txpd.org)

Individual's Name: \_\_\_\_\_

Firm: \_\_\_\_\_ Job Title: \_\_\_\_\_

Address: \_\_\_\_\_

Phone: \_\_\_\_\_ Fax: \_\_\_\_\_ Yrs. in Practice: \_\_\_\_\_

Work Experience: \_\_\_\_\_

Give a statement (on a separate sheet using "Nominee" rather than the individual's name) using the following guidelines as to how the above-named individual qualifies as rendering Exceptional Pro Bono Service by a Paralegal Division Member.

1. Renders service without expectation of compensation.
2. Renders service that simplifies the legal process for (or increases the availability) and quality of, legal services to those in need of such services but who are without the means to afford such service.
3. Renders to charitable or public interest organizations with respect to matters or projects designed predominantly to address the needs of poor or elderly person(s).
4. Renders legislative, administrative, political or systems advocacy services on behalf of those in need of such services but who do not have the means to afford such service.
5. Assist an attorney in his/her representation of indigents in criminal and civil matters.



# We're On Track

**The destination for NALA's 36th Annual Convention & Summer Institutes, July 27-30, 2011 will be**

# Dallas

The site for the 2011 convention will be the

## **Dallas/Plano Marriott at Legacy Town Center**

This is NALA's first "All Institute" convention and will feature seven institutes:

- Corporate
- Essential Skills
- Estate Planning/ Administration
- Social Security
- Personal Injury
- Real Estate
- Litigation/Technology

The special NALA rate of \$119/day is available three days before and three days after the meeting dates.

**Please make this change in your NALA convention itinerary for 2011 and we'll head on up the road for Omaha in 2012.**

Check the NALA website for details – [www.nala.org](http://www.nala.org)



## Land Use APC Course

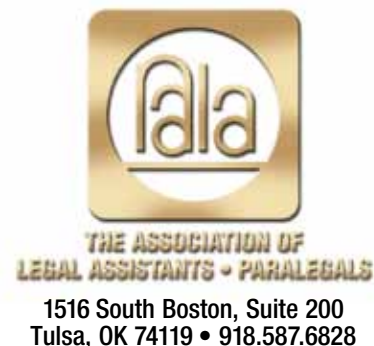
The latest APC course released by NALA is *Land Use*, an overview of zoning and land-use regulation. Paralegals working in real estate and zoning will find this course particularly useful.

Course Modules include:

- Introduction to Land Use Regulation
- Zoning Authority
- Zoning for Land Uses
- Subdivisions
- Growth Management
- Litigation Remedies
- Constitutional Framework
- Comprehensive Planning
- Administrative and Agency Rule & Decision Making
- Environmental Regulations & Protection
- Aesthetics and Preservation of Property
- Processes for Law Owners and Developers
- Land-Use Regulation: Past, Present & Future

**Visit [www.nala.org](http://www.nala.org) and click on "Advanced Certification" for details on NALA's other APC programs**

- Alternative Dispute Resolution
- Discovery
- Trademarks
- Business Organizations: Incorporated Entities
- Contracts Administration
- Social Security Disability
- Trial Practice
- Personal Injury (Eight Practice Areas)



# TPIJ

## Texas Paralegal Journal

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Computer Skills for the Well-Trained Paralegal

# EDITOR'S *Note*

by Heidi Beginski, Board Certified Paralegal, Personal Injury Trial Law, Texas Board of Legal Specialization

**A**s 2010 came to a close, the Division lost the man responsible for the idea of its creation, with the death of Bob Towery, who was a long-time proponent of the paralegal profession. The Division marks its 30th Anniversary this year, a milestone that would have been impossible without the dedication and support of Mr. Towery.

In addition to our regular features and news about the Division and its members, this month's issue is jam-packed with articles on trademark infringement, witness preparation, courtroom presentation, and lifestyle statutes, among other topics. It might take you a while to read this entire issue, but I believe you will find all the articles to be very interesting and informative.

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## PARALEGAL DIVISION VOTE 2011

### District Director Elections

#### District Director Elections:

The PD's ONLINE ELECTION will take place April 4 through April 18, 2011. The election of district directors to the Board of Directors will be held in odd-numbered districts (Districts 1, 3, 5, 7, 11, 13, and 15).

All Active members of the PD in good standing are eligible to vote. All voting must be completed on or before 11:59 p.m., April 18, 2011.

Please take a few minutes to logon to the PD's website and cast your vote for your district's director (only odd-numbered districts vote in 2011). The process is fast, easy, anonymous, and secure.

- Between April 4th and April 18th, go to [www.txpd.org](http://www.txpd.org)
- In the Member-Only section, click on "Vote"
- Follow the instructions to login and vote (you will need your bar card number in order to vote).

If you do not have access to the Internet at home or the office, you can access the TX-PD website at your local library. No ballots will be mailed to members as **all voting will be online**. An email notice will be sent to Active voting member in April giving notification of the voting period. If you need any further information, contact the Elections Chair, Gloria Porter, at [Elections@txpd.org](mailto:Elections@txpd.org).

**TAKE THE TIME, MAKE YOUR VOICE HEARD!**

#### PUBLICATIONS:

Heidi Beginski, TBLS, Editor  
Debbie Guerra, President  
Norma Hackler, CMP, Coordinator  
Nan Gibson, Board Advisor

#### ART DIRECTION

David Timmons Design. 4703 Placid Place, Austin, Texas 78731 . Phone 512-451-4845, Fax 512-451-1087. E-mail: [dtimmonso@gmail.com](mailto:dtimmonso@gmail.com)

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#### DEADLINE FOR SUBMISSION OF ARTICLES FOR THE SUMMER ISSUE IS JUNE 1, 2011.

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# Trademark Infringement and Counterfeit Imports in the United States

## *Possible Solutions for a Global Dilemma*

By Heather Maxwell



Every day, millions of Americans support an illegal, worldwide industry, one that relies on child labor and often fuels terrorism and drug cartels. Purchasing counterfeit goods in the United States impairs our economy and has adverse effects on some citizens of other countries whose cheap labor produces counterfeit goods to be imported into the United States. In today's society, the average person now enjoys luxury items never seen before.<sup>1</sup> Large sectors of society have access to many choices of foods to eat and clothes to buy. It also appears that the more we Americans have, the more we are aware of what we don't have.<sup>2</sup> Americans knowingly purchase counterfeit goods that imitate designer handbags, jewelry, accessories, pharmaceuticals, and countless other products, all in an attempt to get a better deal and bridge the gap between those who can afford the genuine items and those who cannot.<sup>3</sup> Some illegal counterfeits pose unknown but extreme safety hazards for Americans; toothpaste, cheese, airplane parts, children's toys, and fragrances are but a few examples.<sup>4</sup>

Some counterfeit goods are often readily available on the streets of America's major cities and often found in markets and boutiques across the country. Many Americans believe that finding well-made replicas gives them the upper hand, as they may pay as little as one-fourth of the price of an original. Though cost is the main contributor to this illegal operation, many Americans do not realize that by purchasing illegal replicas, they may be contributing to the exploitation of children, trademark and copyright infringement, organized crime, terrorism, and job loss in the American workforce. With our economy and job market already under pressure, our citizens should become aware that small individual acts have an enormous cumulative impact. Every year, 750,000 American jobs are lost to counterfeit goods.<sup>5</sup> Every dollar consumers spend on counterfeit products equals one less dollar that contributes to a legitimate business. Though seizures of counterfeit goods are increasing, there is currently no law against knowingly purchasing a counterfeit item. And because many sales of replicas for cash happen out of plain sight, the sales are difficult crimes to punish. Unfortunately, solving the issues behind this illicit trade with so many negative repercussions is not at the top of very many lawmakers' to-do lists. The contributors to this global trade are powerful, and they are weakening nations around the world.<sup>6</sup> The counterfeit business should not be taken lightly, as there are many ways these enterprises can affect us in our day-to-day lives.

This paper will discuss the current state of trademark laws in the United States, how trademarks are acquired in the U.S., the definition of trademark infringement, what constitutes a "counterfeit good," and the dangers that illegal trademark infringements or counterfeits pose to Americans. It will also propose several ideas that may prevent consumers from purchasing counterfeit goods and prevent counterfeit goods from being so easily attainable.



## I. TRADEMARKS

### A. Definition

A trademark is a distinctive sign or indicator used by an individual, business organization, or other entity to identify that the products or services with which the trademark appears originate from a unique source.<sup>7</sup> Trademarks also exist to distinguish the owner's products or services from those of other entities. A trademark may appear as a word, symbol, or phrase.<sup>8</sup>

In some cases, trademark protection may be granted beyond words, symbols, and phrases to things such as a product color or packaging, also known as the trade dress.<sup>9</sup> The latter features are not protected if they confer any sort of functional or competitive advantage.<sup>10</sup> For example, a manufacturer cannot own a particular unique bottle shape if that shape confers some sort of functional advantage (e.g., is easier to stack or easier to grip).<sup>11</sup> Because trademarks aid consumers in identifying the sources of certain goods, manufacturers are given incentives to invest in the quality of their goods.

### B. United States Trademark Laws

The sources of law that govern trademarks in the United States include both federal and state laws. Trademarks were historically protected in the United States only under state common law, growing out of torts pertaining to unfair competition. As early as 1791, Thomas Jefferson proposed that the marks of sailcloth makers be protected under the Commerce Clause<sup>12</sup>, but it was not until 1870 that Congress first attempted to establish a federal regime for protection of trademarks.<sup>13</sup> This first statute, purportedly an exercise of the Copyright Clause powers, was struck down in several early trademark cases, leading Congress to craft a subsequent act under its Commerce Clause power in 1881.<sup>14</sup> This law acted as a spark that led to the vast expansion of federal trademark law, regulating the areas that had previously been governed exclusively by common law.<sup>15</sup>

The most important federal statute that protects trademarks is the Lanham Act of 1948, which was amended in

1996.<sup>16</sup> The Lanham Act defines the scope of a trademark and the process by which federal registration for a trademark can be obtained from the Patent and Trademark Office. It also prescribes penalties for trademark infringement. The Lanham Act confers broad jurisdictional powers upon United States courts. The statute's express intent is

To regulate commerce within the control of Congress by making actionable the deceptive and misleading use of marks in such commerce; to protect registered marks used in such commerce from interference by State or territorial legislation; to protect persons engaged in such commerce against unfair competition; to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks; and to provide rights and remedies stipulated by treaties and conventions respecting trademarks, trade-names, and unfair competition entered into between the United States and foreign nations.<sup>17</sup>

Trademark infringement laws have been of great benefit to society, when used appropriately.<sup>18</sup> These laws exist to protect the ingenuity of those who have worked to create, and also to inspire liberal thought.<sup>19</sup> The systems of intellectual property laws that have been created are to ensure that inventors, designers, musicians, and others have personal motivation to invent and create new products. Each time they create something new, they have the right to market their products and in turn make a profit from their work.<sup>20</sup>

### C. Trademark Acquisition

Owners can acquire trademark rights by being the first to use the mark in commerce or by registering the mark with the U.S. Patent and Trademark Office (USPTO).<sup>21</sup> Any marks that may be perceived as being descriptive may only receive protective rights after they have attained valid secondary meaning.<sup>22</sup>

Using a mark is construed as the actual sale of a product to the public with the mark attached to the product in some way.<sup>23</sup> When one has an absolute intent to use a mark in commerce, acquiring priority is very important, so the mark should be registered with the USPTO.<sup>24</sup> Once a mark is registered with the USPTO, a party has the right to use the mark nationwide.<sup>25</sup>

Registration with the USPTO is not absolutely required for a trademark to be protected; however, registration does grant a number of important benefits to the registering party.<sup>26</sup> As described above, registering a mark gives a party the right to use that mark nationwide.<sup>27</sup> Registration of a mark also allows the registering party to give notice to consumers and competitors that the trademark is currently owned and registered. If a mark currently owned and registered becomes victim to trademark infringement, having the mark registered enables the owning party to bring an infringement suit in federal court.<sup>28</sup> If a trademark infringement case is brought to court, the registration potentially allows a party to recover treble damages, attorney's fees, and other remedies. Finally, registered trademarks, after five years, can become "incontestable," at which point the exclusive right to use the mark is conclusively established.<sup>29</sup>

Applications for registration are subject to approval by the USPTO, which may reject a registration on any number of grounds.<sup>30</sup> For example, the USPTO will not allow the registration of marks considered to be generic or descriptive, unless the descriptive marks have a secondary meaning. Other material that may be rejected is anything "immoral or scandalous," certain geographic marks, marks that are surnames, and marks that may cause confusion among consumers. When a mark is rejected, that rejection does not necessarily mean it is not entitled to a trademark protection; rejection simply does not grant the mark any special benefits.<sup>31</sup> Also, some states, such as Texas, have developed their own registration systems under state trademark law that provide for protection within the owning party's state.



#### D. Losing Trademark Rights

Trademark rights in the United States can be lost through abandonment, improper licensing or assignment, or by becoming so commonly used that the trademarks themselves become generic.<sup>32</sup> A trademark is abandoned when the owner of the trademark no longer maintains the proper paperwork to keep the trademark up-to-date and no longer desires the trademark to be in use.

#### E. Trademark Infringement

If a party owns the rights to a particular trademark, that party can sue subsequent users for trademark infringement.<sup>33</sup> The standard used to identify trademark infringement is "likelihood of confusion."<sup>34</sup> Specifically, the use of a trademark in connection with the sale of a good constitutes infringement if it is likely to cause consumer confusion as to the source of those goods or as to the sponsorship or approval of such goods.<sup>35</sup> In deciding whether consumers are likely to be confused, courts will typically look to a number of factors, including: (1) the strength of the mark; (2) the proximity of the goods; (3) the similarity of the marks; (4) evidence of actual confusion; (5) the similarity of marketing channels used; (6) the degree of caution exercised by the typical purchaser; and (7) the defendant's intent.<sup>36</sup>

The use of an identical mark on the same product clearly constitutes infringement. If cell phones are being manufactured and sold using the mark "Blueberry," the use of that mark will likely cause confusion among consumers,<sup>37</sup> who may think they are purchasing a cellular telephone that was made by Research in Motion (RIM), best known for creating the BlackBerry® smart phone and providing solutions that allow seamless, mobile access to time-sensitive information through email, phone, text messages, the Internet, and other applications.<sup>38</sup> Using a very similar mark on the same type of product may also give rise to a claim of infringement; if the marks are close enough in sound, appearance, or meaning so as to cause confusion, they will most likely give rise to an infringe-

ment claim, or not be granted protection by the USPTO. For example, "Blueberry" telephones would most likely not be permitted. If, however, the same name were used on a completely different product, it might not cause confusion and lead to an infringement claim. Apple® Computers and Apple® Records can peacefully co-exist, for example, without fear of marketing confusion or trademark infringement;<sup>39</sup> the products they manufacture and distribute to the public are not likely to be confused by consumers.<sup>40</sup>

Between the two ends of the infringement spectrum lie many close cases, to which the courts will apply the factors listed previously.<sup>41</sup> Where the marks are similar and the products are also similar, it is and will continue to be difficult to determine whether consumer confusion is likely.<sup>42</sup> For example, in the case of *Sleek craft Boats*, "Slick craft" used a mark in connection with the sale of recreational boats.<sup>43</sup> An infringement action was filed against the makers of "Sleek craft" who sold high-speed, high-performance boats. Because the two different types of boats served two very different markets, the court concluded that the products were not identical; however, the use of "Sleek craft" would most likely cause confusion among consumers overall.<sup>44</sup> In this case, the court held that the "Slick craft" mark had been infringed upon, and issued a limited mandatory injunction against using the "Sleek craft" name.<sup>45</sup>

#### F. Trademark Dilution

In addition to bringing an action for infringement, owners of trademarks can bring an action for federal trademark dilution under either federal or state law. Under federal law, a dilution claim can only be brought if the mark is "famous"<sup>46</sup>. In deciding whether a mark is famous, the courts look to the following factors: (1) the degree of inherent or acquired distinctiveness; (2) the duration and extent of use; (3) the amount of advertising and publicity; (4) the geographic extent of the market; (5) the channels of trade; (6) the degree of recognition in trading areas; (7) any use of similar marks by third parties; and (8)

whether the mark is registered.<sup>47</sup> Kodak, Exxon, and Xerox are all examples of famous marks.<sup>48</sup>

Under some state laws, a mark need not be famous in order to give rise to a dilution claim.<sup>49</sup> Instead, dilution is available if: (1) the mark has selling power; and (2) the two marks are substantially similar.<sup>50</sup> Once the prerequisites for a dilution claim are satisfied, the owner of a mark can bring an action against any use of that mark that dilutes the distinctive quality of the mark, either through "blurring" or "tarnishment" of that mark; unlike an infringement claim, likelihood of confusion is not necessary.<sup>51</sup> Blurring occurs when the power of a mark is weakened through its identification with dissimilar goods. For example, Kodak brand blue jeans, Exxon brand refrigerators, or Xerox brand televisions could all weaken well-known trademarks through blurring. Although these product names would not likely confuse consumers, each one would dilute the distinctive quality of the original marks.

Tarnishment occurs when the mark is "cast in an unflattering light."<sup>52</sup> In other words, tarnishment occurs when a particular mark becomes poorly represented or negatively viewed through the eyes of consumers, typically through its association with inferior or unseemly products or services. For example, Toys "R" Us successfully brought a tarnishment claim against adultsrus.com, a pornographic web site, for tarnishing the Toys "R" Us reputation as a supplier of children's toys.<sup>53</sup>

## II. COUNTERFEIT GOODS

A counterfeit is an imitation, usually one made with the intent of fraudulently passing it off as genuine. Counterfeit products are often produced with the intent to take advantage of the established worth of the imitated product. More often than not, the genuine product has established a substantial net worth through intensive advertising and trademark protection.

Counterfeiting frequently describes the forgeries of currency and documents and imitations of clothing, software, pharmaceuticals, watches, electronics, logos, and





brands. In the United States, footwear was the top commodity seized, in fiscal year 2009, with a domestic value of \$99.7 million, which accounted for 38% of the entire value of infringed goods.<sup>54</sup> Three of the top ten categories of commodities seized included products posing possible safety or security risks to innocent civilians.<sup>55</sup>

#### A. Why Not Purchase the Genuine Items?

There are several reasons why Americans might choose to purchase counterfeit items. They might be more easily affordable and appear to be exactly like the original. As previously stated, counterfeit goods bridge the gap between those who can afford to pay the steep prices for designer brands and those who cannot. Cost is the largest motivation for consumers to purchase counterfeits goods. For many name-brand handbags and accessories, the cost of a counterfeit is much more within the average consumer's reach than purchasing the real thing. The prices of real designer handbags, for example, can range anywhere from \$250 to \$6,000, and the range can be more exaggerated for jewelry and watches with designer names. Compare those prices with the average cost of a knockoff, \$45 to \$150 for the imposters.

For other items, such as DVDs and music, pirated versions are readily available through the Internet at little to no cost, compared to \$20 to \$40 for the latest DVDs and CDs in stores.

In today's world, many Americans are not deceived entirely by the counterfeit business, though that does happen. Most consumers who purchase counterfeit goods are purchasing them willingly. The January 2005 Gallup Organization polled 1,304 U.S. adult citizens, and more than 13% said they had purchased counterfeit goods knowingly.<sup>56</sup> To many Americans, it is a great accomplishment to have been able to reduce the price of a "Rolex" or "Prada" handbag.<sup>57</sup> Consumers might know that what they are purchasing is not the real thing, but they do so in attempts to deceive those around them. Unfortunately, we live in a very materialistic society, and name brands and top

designers can elevate our status and boost our own self-worth.<sup>58</sup>

#### *The "Real" Harm in "Fake" Goods*

"When a counterfeit label lies to us, it often puts us and the people we care about in danger."<sup>59</sup> Sadly, not all counterfeit products enter our households with our consent. Many of them infiltrate our daily lives and pose serious health threats to our loved ones and us. In 2004, Kyocera recalled batteries for several of its cellular telephones after dangerous counterfeit mobile phone batteries were found in some models.<sup>60</sup> How dangerous can a mobile phone battery be? According to the United States Office of Information and Public Affairs, counterfeited mobile phones and batteries are susceptible to overcharging, can overheat, and can pose a fire hazard and burn hazard to the ears of consumers.<sup>61</sup>

In 2002, a sixteen-year-old boy from New York was receiving injections of Epogen to boost his red blood cell count after a recent liver transplant. Every week, the child reportedly suffered from extreme adverse side effects to the injections. Fearing that his body was not responding to the treatment, doctors quickly ran tests, only to find that his body was responding the only way it knew how to the counterfeited Epogen that he had been receiving. The Epogen had not been purchased on the streets, or from a shady vendor. Instead, it had been purchased at the local CVS pharmacy in his neighborhood. CVS, like the victim, had no idea that the medication was a counterfeit. Even today, no one knows how the counterfeit medication ended up in the dispensary.<sup>62</sup>

#### *The U.S. Government and Counterfeit Goods*

New laws could make things tougher for those selling fakes. On October 13, 2008, President Bush signed the PRO-IP Act, which establishes increased penalties for counterfeiters and strengthens those for sellers of fake goods that cause physical harm or death (such as bogus medicines and auto parts, or cell phone batteries that explode). It also grants up to \$25 mil-

lion annually until 2013 to state and local law enforcement to help develop anti-counterfeiting programs. An intellectual property coordinator will be appointed to oversee efforts from the White House.<sup>63</sup>

A federal crackdown on counterfeit imports is driving an increase in domestic output of fake merchandise. Raids recently carried out in major cities, such as New York, have resulted in the seizures of an estimated \$200 million in counterfeit apparel bearing the logos of brands such as North Face, Polo, Lacoste, Rocawear, Seven for all Mankind, and Fubu.<sup>64</sup> One of the largest seizures was a joint operation in Arizona, Texas, and California that seized seventy-seven containers of fake Nike Air Jordan shoes, and a container of Abercrombie & Fitch clothing, all valued at \$69.5 million.<sup>65</sup>

Aside from seizure and sting operations, another method for government agencies to attack counterfeits is at the retail level. Fendi sued the Sam's Club division of Wal-Mart stores, Inc., for selling fake Fendi bags and leather goods in five states. Sam's Club agreed to pay Fendi a confidential amount to settle the dispute and dismiss the action.<sup>66</sup> Tiffany & Co. sued eBay, the world's largest online auction site, for allowing the sale of counterfeits, and Gucci has filed suit against over one hundred other websites in the United States for selling counterfeited Gucci merchandise.<sup>67</sup>

#### *Global Contribution to Counterfeits*

The spread of counterfeit goods has become a global enterprise in recent years, and the range of goods subject to infringement has increased significantly. Today there is no product safe from the parasitism of counterfeit production. Apparel and accessories accounted for over 50% of the counterfeit goods seized by U.S. Customs and Border Patrol.<sup>68</sup> It is estimated that U.S. companies annually lose \$8.1 billion in overseas business owing to violations of intellectual property laws.

According to the studies of the Counterfeit Intelligence Bureau of the International Chamber of Commerce, counterfeit goods make up 5% to 7% of world trade. In fiscal year 2009, there



were 14,841 intellectual property rights seizures with a domestic value of \$260.7 million. China was the top source country for intellectual property rights (IPR) seizures in 2009, with a domestic value of \$204.7 million, which accounted for 79% of the total value seized.<sup>69</sup> Imports from China were the leaders in seizures of IPR that posed a safety risk for consumers. India was the second-highest source country for safety-related IPR seizures such as electronics, computer software, and hardware, media, pharmaceuticals, toys, and electronic games.<sup>70</sup>

According to the International Anti-Counterfeiting Coalition, if the knockoff economy were a business, it would be the world's biggest, twice the size of Wal-Mart. A recent report by the Organization for Economic Cooperation and Development indicates that up to \$600 billion of international trade could have been in counterfeit and illegally copied goods in 2005 (2% of world trade in 2005).<sup>71</sup> The WCO (World Customs Organization), estimates that the trade in fakes is currently worth about \$512 billion, or 7% of the world's trade.<sup>72</sup>

Most counterfeit goods are produced in China, making it the counterfeit capital of the world. Joining China near the top of the list are Korea, Taiwan, and India. Some counterfeits are produced in the same factory that produces the original, authentic product, using the same materials. In such cases, the factory owner, unbeknownst to the trademark owner, orders an intentional "overrun" of the factory's production. Without the employment of anti-counterfeiting measures, identical manufacturing methods and materials make this type of counterfeit (and it is still a counterfeit, as its production and sale are unauthorized by the trademark owner) impossible to distinguish from the authentic article.<sup>73</sup>

### *The American Contribution*

In some cases, our interaction with counterfeit goods is inevitable, unavoidable, and out of our control. However, if Americans knew what exactly they contributed to every time they willingly made purchases of fraudulent goods, they

might think twice about their actions. In countries such as Thailand and China, where the surplus of counterfeit goods is imported to the U.S., consumers are contributing to extreme cases of abusive child labor. As Dana Thomas recounts:

I remember walking into an assembly plant in Thailand a couple of years ago and seeing six or seven little children, all under ten years old, sitting on the floor assembling counterfeit leather bags...the owners had broken the children's legs and tied the lower leg to the thigh so the bones wouldn't mend. [They] did it because the children said they wanted to go outside and play.<sup>74</sup>

The desire of the masses to purchase fake goods is the driving force behind counterfeit production. These operations affect our nation and innocent people around the world every day. They hurt our economy and workforce by the thousands. Some see the rise in counterfeit production as an inevitable product of globalization. As more and more companies, in an effort to increase profits, move manufacturing to the cheaper labor markets of the third world, areas with weaker labor laws or environmental regulations, they give the means of production to foreign workers. Factory owners often do not care about the effects the emissions from the factories will have on the environment, the age or health of their factory workers, and least of all, the rights of trademark owners. These new managers of production have little or no loyalty to anyone but themselves. They see that profits are being made by a global brand for doing little (other than advertising) and see the possibilities of removing the middleman (i.e., the parent corporation) and marketing directly to the consumer.<sup>75</sup>

### III. REMEDIES

Because this entire operation is nothing short of a revolving door, it is a tricky situation to sort out. Attempting to enforce the laws of trademark infringement on those of another country would probably be impossible. As many of the owners

and foremen of these factories are "fly-by-night," who is left to be responsible?

In attempts to try to avoid infringement, some copyright owners have begun taking matters into their own hands by producing various parts of an item manufactured in independent factories, and then limiting the supply of certain distinguishing parts to the factory that performs the final assembly to the exact number required for the number of items to be assembled (or as near that number as practical). They also have begun requiring the factories to account for every part used and to return any unused, faulty, or damaged parts.<sup>76</sup> To distinguish the originals from the counterfeits, the copyright holders for designer clothing, jewelry, and handbags have employed the use of serial numbers and/or holograms, which may be attached to products in different factories.<sup>77</sup>

Increasing the enforcement of trademark and copyright law to discourage counterfeiting has been a focus of U.S. trade negotiations in recent years. This type of enforcement has been the focus with both individual countries and on the global stage.<sup>78</sup>

Though international and individual government efforts have been a driving force behind the fight against illegal counterfeiting and trafficking, governments cannot fight the battle alone.<sup>79</sup> Governments are naturally limited. Most of all, if governments, including the United States, cannot gain control over this dilemma within their own borders, how can they begin to control the problem in other nations? If the war against counterfeiting and illicit trade is to be won, it will not be up to any one country or government to do alone. "Unilateral action can produce occasional and spectacular short-term results, but it has yet to score a long-term victory in the fight against illicit trade."<sup>80</sup>

From the perspective of customs control in the U.S., there has been a dramatic increase in the numbers of seized counterfeit materials that potentially would have made it into the states and been distributed had the materials not been seized.



A more effective way of ensuring the authenticity of certain goods, such as medications, automotive/airplane parts, and designer productions, is a small device called a radio frequency identification device (RFID).<sup>81</sup> Very similar to the current barcode on many products we purchase today, the RFID is more advanced in that it can identify an item, confirm its authenticity, register its origin and date of manufacture, and also record its price. Requiring RFIDs on imports can aid in identifying authentic goods when entering the United States, as well as ensuring customers that the products they are purchasing are real.<sup>82</sup> RFIDs are similar to holographic tags that have become more popular among merchants outsourcing production, only these are much more technologically advanced and can provide a plethora of information about the product to which it is attached.<sup>83</sup> So long as American companies and trademark owners outsource their manufacturing to other nations, RFIDs are the best way to ensure that products being sold with their name and copyright are genuine. The manufacturing and distribution of fake luxury items, such as handbags and clothing, will not cease to exist entirely, but RFIDs will ensure that more important products such as medicines, and mechanical parts are real and safe for companies to distribute to consumers.

Even though fake handbags and clothing are causing a dilemma in the United States, counterfeit medications require the more urgent action. Within the current drug distribution system, there are thousands of wholesalers. Reportedly as many as 6,000 to 7,000<sup>84</sup> wholesale distributors of prescription drugs are in the United States.

The language of U.S. Code, chapter 113, 62320 for the current trafficking in counterfeit goods, which applies only to sellers of counterfeit goods, provides:

In general—whoever intentionally sells, purchases or attempts to sell goods or services that employ a known counterfeit mark on or in connection with such goods or services, or intentionally sells or purchases medications, products,

labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied to a corresponding product, the use of which is likely to cause confusion, or possible bodily harm or injury, or to deceive, shall if an individual be fined not more than \$2,000,000.”<sup>85</sup>

As for regulations and legal repercussions for purchasing counterfeit goods, hefty fines are already given to those caught selling fake goods, but what about the consumers? It would be difficult and time consuming to monitor and patrol areas where counterfeit goods are sold; however, knowingly purchasing these products should have consequences.

*Heather Maxwell is a recent graduate of the Paralegal Master's degree program at Texas State University.*

<sup>1</sup> MOISES NAIM, ILLICIT: HOW SMUGGLERS, TRAFFICKERS AND COPYCATS ARE HIJACKING THE GLOBAL ECONOMY 101 (2005).

<sup>2</sup> TIM PHILLIPS, KNOCKOFF: THE DEADLY TRADE IN COUNTERFEIT GOODS 25 (2007).

<sup>3</sup> *Id.* at 15.

<sup>4</sup> Dana Thomas, *Fight Against Fake Designer Goods Isn't Frivolous*, MSNBC, Jan. 9, 2009, <http://today.msnbc.msn.com/id/28571321/>.

<sup>5</sup> *Id.*

<sup>6</sup> NAIM, *supra* note 1, at 125.

<sup>7</sup> Overview of Trademark Law, available at <http://cyber.law.harvard.edu/metaschool/fisher/domain/tm.htm>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Qualitex Co. v. Jacobson Prod. Co. Inc., 115 U.S. 1300 (1995).

<sup>12</sup> *The Founders' Constitution*, available at [http://press-pubs.uchicago.edu/founders/documents/a1\\_8\\_3\\_commerce.html](http://press-pubs.uchicago.edu/founders/documents/a1_8_3_commerce.html).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> 15 U.S.C. 6 1051.

<sup>17</sup> *Id.* 61127.

<sup>18</sup> PHILLIPS, *supra* note 2, at 47.

<sup>19</sup> Overview of Trademark Law, *supra* note 7.

<sup>20</sup> *Id.* at 19.

<sup>21</sup> Overview of Trademark Law, *supra* note 7.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> 15 U.S.C. 6 1051.

<sup>27</sup> *Id.* 6 1072.

<sup>28</sup> *Id.* 6 1121.

<sup>29</sup> *Id.* 6 1065.

<sup>30</sup> *Id.* 6 1052.

<sup>31</sup> *Id.* 6 1125.

<sup>32</sup> Overview of Trademark Law, *supra* note 7.

<sup>33</sup> 15 U.S.C. 61114, 1125.

<sup>34</sup> Overview of Trademark Law, *supra* note 7.

<sup>35</sup> *Id.*

<sup>36</sup> Polaroid Corp. v. Polarad Elect. Corp., 287 F.2d 492 (2d Cir.).

<sup>37</sup> Overview of Trademark Law, *supra* note 7.

<sup>38</sup> Blackberry, [http://na.blackberry.com/eng/devices/?CPID=KNC-kw115614&HBX\\_PK=rml5ood4cd1-6of7-dao8-333c-00001cf9c63](http://na.blackberry.com/eng/devices/?CPID=KNC-kw115614&HBX_PK=rml5ood4cd1-6of7-dao8-333c-00001cf9c63) (last visited May 5, 2010).

<sup>39</sup> Overview of Trademark Law, *supra* note 7.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> AMF Inc. v. Sleek craft Boats, 599 F. 2d 341 (9<sup>th</sup> Cir. 1979).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Overview of Trademark Law, *supra* note 7.

<sup>47</sup> 15 U.S.C.6 1125(c).

<sup>48</sup> Overview of Trademark Law, *supra* note 7.

<sup>49</sup> *Id.*

<sup>50</sup> Mead Data Central, Inc. v. Toyota Motor Sales, Inc., 875 F. 2d 1026 (2d Cir. 1989).

<sup>51</sup> Overview of Trademark Law, *supra* note 7.

<sup>52</sup> *Id.*

<sup>53</sup> Toys “R” Us v. Akkaoui, 40 USPQ 2d (BNA) 1836 (N.D. Cal. 1996).

<sup>54</sup> U.S. Import Stats., available at <http://www.census.gov/econ/overview/mt0100.html>.

<sup>55</sup> *Id.*

<sup>56</sup> TIM PHILLIPS, *supra* note 2 at 88.

<sup>57</sup> *Id.* at 83.

<sup>58</sup> *Id.* at 67.

<sup>59</sup> *Id.* at 63.

<sup>60</sup> Tom Krazit, *Kyocera Recalls Explosive Batteries*, N.Y. TIMES, July 4, 2002, at A1.

<sup>61</sup> PHILLIPS, *supra* note 2, at 18.

<sup>62</sup> *Id.* at 54.

<sup>63</sup> Trademark Counterfeiting in the U.S., available at <http://www.iacc.org/>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> David Glovin, *Wal-Mart, Fendi Settle Lawsuit Over Knockoff Bags*, BLOOMBERG, (June 6, 2007), <http://www.bloomberg.com/apps/news?pid=20601087&sid=aduzwLXn6q8A>.

<sup>67</sup> U.S. Customs and Border Protection, available at <http://www.cbp.gov/>.

<sup>68</sup> *Id.*

<sup>69</sup> *The Economic Impact of Counterfeiting*, available at <http://www.oecd.org/dataoecd/11/11/2090589.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Dana Thomas, *Fight Against Fake Designer Goods Isn't Frivolous*, MSNBC, Jan. 9, 2009, <http://today.msnbc.msn.com/id/28571321/>.

<sup>74</sup> *Id.*

<sup>75</sup> *The Economic Impact of Counterfeiting*, *supra* note 69.

<sup>76</sup> *The Economic Impact of Counterfeiting*, *supra* note 69.

<sup>77</sup> Tait Swanson, *Combating Grey Market Goods in a Global Market*, 22 HOUS. J.

INT'L L. 327, 366-68 (2000) (discussing possible solutions to illegal imports).

<sup>78</sup> Pub.L. No. 1203-465, 108 stat 4809 (1994)

<sup>79</sup> NAIM, *supra* note 1, at 33.

<sup>80</sup> *Id.* at 22.

<sup>81</sup> *Id.* at 114.

<sup>82</sup> *Id.* at 115.

<sup>83</sup> *Id.* at 123.

<sup>84</sup> SWANSON, *supra* note 77, at 366-68.

<sup>85</sup> 113 U.S.C. 6 2320.





# Witness Preparation for the In-house Team

By Wayne Lindsey Robbgins, Jr.

It is important that company witnesses are adequately prepared for deposition and trial testimony. Paralegals—both in-house and from outside law firms—can assist in this process in a number of ways.

## Deposition Witness Preparation

Depositions are part of the discovery process. In theory, both sides to litigation “discover” all relevant facts about the opponent’s case. Since the parties are presumed to be reasonable, the goal is that discovery will promote settlement; since both sides will know all of the important facts about the case, they ought to be able to reach an amicable compromise. In fact, of course, discovery becomes a game in which both sides try to collect as much information as possible and give up as little while still playing by the rules.

Discovery depositions eliminate surprise in civil trials. We have all heard the axiom that a good lawyer never asks a question at trial to which he does not know the answer; this is how he knows the answer—he has asked the question earlier in deposition. In addition to eliminating surprise, depositions help to prepare for cross-examination by setting up impeachment opportunities and allowing us to “test drive” theories to determine what our best strategies for cross-examination will be.

Another reason that depositions are important is that they serve as educational tools for counsel who has more than one lawsuit against a given party. Plaintiffs’ law firms use depositions to build up libraries as arsenals of information against corporate defendants.

In preparing witnesses, keep in mind that a client has three basic needs from those witnesses: expertise, consistency, and preparation. Expertise is critical because, if the wrong person is in the chair, the client’s best story will not be told. Consistency is critical, especially in a world of corporate representative depositions, because lawyers talk to one another, and inconsistent answers—even if given in different cases with different counsel on the other side—will come back to bite a party. Since the party-opponent rule means that corporate witness depositions can be used at trial, preparation becomes absolutely critical. A witness cannot blow off a deposition with a promise of “being ready” for trial. The bad deposition will be used at trial, and the witness may not get a chance to redeem himself.

## The “Five Rules” for a Witness

When I am preparing witnesses for deposition, I teach five rules:

1. Tell the truth.
2. Don’t volunteer.
3. Don’t guess.
4. Make sure you understand the question.
5. Don’t get angry.



Witnesses who get stymied by questions or questioning styles can rely on these rules as a basis for grounding.

Telling the truth is important not only because penalties of perjury apply but because it is the right thing to do. It is also important in today's litigation world, of course, because few lies will survive the rigors of discovery. The party whose witness does not tell the truth will get hanged for the lie.

The obligation to tell the truth does not mean that a witness should tell everything he knows about the case. Volunteering is the biggest problem in depositions or at trial. Because we are nice people, we tend to want to explain to help questioners out. I tell witnesses that they should not use the word "because" in an answer unless the word "why" was in the question. At trial, I may want to build some explanation into my witness's direct testimony, but I will have prepared them for that. I do not want them ad-libbing explanations.

I tell witnesses that if they do not know or do not remember the answer to a question, the proper deposition or trial answer is "I don't know" or "I don't remember." Witnesses tend to think that they are supposed to answer any question that is asked of them; in fact, nothing could be further from the truth.

If witnesses answer questions they do not understand, there are only two options; they are either volunteering, or they are guessing. There is no other option.

Finally, angry witnesses tend to forget the first four rules. Especially in depositions, many lawyers will intentionally make witnesses angry, not because the lawyer is a mean person, but rather because it gets the witness off his guard.

### Helpful Hints for Deposition

Some basics that I teach a witness are: not to give opinions unless an opinion is specifically requested; to appear professional in appearance and manner; and

not to memorize anything particularly for the purpose of a deposition or trial testimony. Of course a witness should not conveniently "forget" things that he already knew before the deposition, but memorizing solely for the purpose of the deposition is counterproductive. Instead, the witness can bring notes or paperwork into the deposition.

I have a number of tips that I give witnesses preparing for a deposition or trial. If the paralegal is aware of these and can reassure the witness of these ideas, it would be enormously helpful.

1. It is ok that you meet with your lawyer and that you are paid your expenses for attending the deposition.
2. If a lawyer is attempting to put words in your mouth by seeking your agreement, providing analogies, or saying "wouldn't you agree with me that...", you should be wary.
3. Pause before answering questions.
4. When you get repeated questions, you should ask yourself, "Was my answer right the first time?" If you were right the first time, you will be right with the same answer every time.
5. Watch out for a questioner's use of surprise, contempt, or superiority in an attempt to shame you into answering a question or agreeing to a statement.
6. Watch out for attempts to get you to attach authority to any source other than yourself.
7. Respond to the general with the specific.
8. Do not stray outside your field.
9. Keep answers simple—not every question gets a "yes" or a "no," but many do.
10. Stop immediately if your attorney objects, and listen to the objection to see if you can learn something from it.
11. Do not exaggerate.
12. Do not try to win the lawsuit during your deposition. You cannot do that, but you can lose it.

13. Good witnesses are truthful, confident, polite, natural, serious, prepared, cool under pressure, relaxed, focused, and attentive. Poor witnesses are untruthful, chatty, evasive, overbearing, adversarial, cocky, sarcastic, angry, joking, making assumptions, guessing, emotional, anxious, and/or tired. Whatever the paralegal can do to help a witness fall into the first category will be appreciated.

Video depositions are a fact of life, but witnesses must be given notice. I suggest witnesses dress for a video deposition as though they were going to court and, if the witness is one who tends to drink water during a deposition, that the water be kept on the floor, out of the view of the camera. A witness during a video deposition should look at the camera.

Most lawyers—me included—were trained to ask some preliminary questions as kind of a "warm up" for depositions. These questions include things like the witness's home address, family situation, Social Security number, and personal background. In this day and age of identify theft, some witnesses may not want to provide this information. The attorneys for whom you work may not object, since they were probably trained in the same way—they know these questions are not used for identify theft but instead are simply preliminary questions. As the paralegal, you might want to talk to the witness and warn him that such questions may be coming. If the witness is uncomfortable giving out information of a personal nature, please make your attorney aware of that so that the proper objection can be lodged. I believe that personal information like Social Security numbers, home address, and family information can properly be kept out of a deposition.

I suggest that witnesses typically exercise their right to read and sign a deposition. Reading and signing can be waived, of course, but the default position should be to read and sign.



### **Trial Prep for Witnesses**

The same “five rules” I listed for depositions apply at trial. Witnesses have to be ready to tell the truth without volunteering everything they know.

It is important that a witness be familiarized with a courtroom prior to trial. A paralegal who knows the courtroom well can greatly assist an attorney with this part of the job. Similarly, the paralegal should be able to walk a witness through the process of how a trial works, where the witness will sit, the fact that a witness may be sequestered until time for him to testify, and the like. Witnesses need to be instructed to look at the jury when they testify, and a paralegal can help do this. In short, while your attorney is working on last minute substantive changes to examinations and objections, the paralegal can help witnesses be prepared for how a trial will go.

It is also important that a paralegal has looked at the attorney’s outlines for direct examination. If the paralegal knows in what direction the exam will go, the paralegal can know what exhibits will be used. The paralegal can also be able to answer questions that the witness may not want to ask the attorney.

### **How the Paralegal Helps Prior to a Deposition**

First and foremost, the file must be in order. As an attorney, I rely on my paralegals to have everything in the file within reach. I do not need to know the organization so long as I know my paralegal knows the organization—if I can’t find something, I know my paralegal can find it.

There are what I call “extra-file” materials—materials that are not in the regular case file—that may be needed for preparation for a deposition. If the paralegal stays a step ahead of me on this, I am eternally grateful. Such extra-file materials include other depositions this witness has given. If I am representing a corporate defendant, that defendant may have collections of depositions given by

that witness. If not, my paralegal should be able to call other attorneys who have represented this corporation to find out if this witness has been deposed in the past. Similarly, other depositions taken by the lawyer who will be deposing my witness are very helpful to me I can learn some styles, favorite questions, and the like.

As a final matter, exhibits absolutely must be ready prior to a deposition. First, the exhibit must be in hand. If I am going to use the exhibit in a deposition, I have to have it. Secondly, most exhibits need to be copied for all parties at the deposition. In some jurisdictions, moreover, deposition exhibits may need to be marked ahead of time. All of these are tasks for the paralegal.

### **How the Paralegal Helps for Trial**

First, I believe it is the paralegal’s job to take primary responsibility for anticipating the needs of the witness. Travel and hotel plans are second nature to most of us in the legal business, but witnesses may or may not be comfortable with them. You need to make sure that the witness knows where the airport is, has allowed enough time to get to the trial venue to allow for adequate preparation, and knows how to get to and from the hotel to the courthouse. Technology can be an issue with some witnesses—if the witness is going to use a PowerPoint, for example, the paralegal should make sure that a computer, a projector, a screen, and the permission of the court are all in place prior to the witness’s testimony.

The best paralegals anticipate the needs of the lawyers for whom they work. Obviously, this takes time in developing the relationship between the paralegal and the lawyer. The file must be in order for trial, and as the paralegal works with the lawyer, he finds out what the lawyer wants. Should the file be on the table or behind the lawyer? How much should be on paper and how much should be electronic? How much should be in the courtroom and what can be left in the hotel or in the

office? What does the lawyer want for each examination of a witness?

As far as direct examination is concerned, I believe the lawyer should have his outlines for direct examination prepared ahead of time. If the lawyer does so, the paralegal should review these outlines and be the “extra set of eyes” that the lawyer needs. Is there something important that is being left out? Is something being asked for which this witness is not the best source of information? Of course, the paralegal has to know the case well enough to be able to make some judgments on these questions.

It should go without saying that, at trial, the paralegal should have every exhibit ready, copied, marked, and in order. By “in order,” I mean in the order that the attorney needs the exhibits. Yes, paralegals can anticipate this order if the attorney prepared his direct examination outlines ahead of time. Those outlines should indicate where exhibits will be used. Obviously, you cannot anticipate with any degree of precision the order in which opponents will use exhibits at trial, so you need to have copies of all exhibits in numerical order available in case opposing counsel uses them.

I also believe a paralegal can help an attorney prepare for cross. This is not “witness preparation” in the strict sense of this presentation, but if the attorney has prepared his outline of cross-examination ahead of time, the paralegal can review that, have exhibits ready for it, and have impeachment materials ready as well.

Lawyers should know what they are doing as they prepare witnesses for deposition, as they prepare direct examination for trial, and as they prepare cross-examinations. The better the relationship between the lawyer and the paralegal, the more the paralegal can participate in and help with these preparations.

*Wayne Lindsey Robbins, Jr. is Senior General Attorney, BNSF Railway Company, Fort Worth*



# LEGISLATIVE AND CASE LAW UPDATES

**T**he Professional Development Committee is charged with reporting legislative and case law updates that may impact the various substantive areas in which PD members are employed. In this edition of the TPJ, the Committee is reporting updates in the areas of Corporate and Federal Litigation. The summaries contained in this article are not meant to substitute for the legal advice of a duly authorized attorney. If you are aware of any updates or case law that may impact your area of practice, please send that lead to the Professional Development Committee at [pdc@txpd.org](mailto:pdc@txpd.org) or feel free to contact your local Professional Development Committee Subchair.

## Corporate Law Updates

The following is a summary of the article, "Amendments to Delaware's Limited Liability Company, Limited Partnership and General Partnership Legislation Enacted," by Richards, Layton & Finger, P.A., which was published in the *Business Law Today* in July 29, 2010 [Reprinted with permission. A copy of the complete article may be found at: <http://www.abanet.org/buslaw/blt/content/2010/10/0004c.pdf>]

The Delaware General Assembly has recently enacted legislation amending the Delaware Limited Liability Company Act (DLLCA), the Delaware Revised Uniform Limited Partnership Act (DRUPA) (collectively, the Acts). The following is a brief summary of some of the amendments that affect Delaware limited liability companies (Delaware LLCs), Delaware limited partnerships (Delaware LPs) and Delaware general partnerships (Delaware GPs).

- Statute of Frauds—In *Olson v. Halvorsen*, C.A. No. 1884 (Del. Supr.



Dec. 15, 2009), the Delaware Supreme Court affirmed that a limited liability company agreement is subject to the statute of frauds. The statute of frauds requires agreements that cannot be performed within one year to be in writing. The Acts, however, permit oral agreements and provide that a member or partner may be bound by a limited liability company agreement, limited partnership agreement or general partnership agreement regardless of whether such member or partner executes such an agreement. In light of the decision in *Olson*, the Acts have been amended to provide that limited liability company agreements, limited partnership agreements and general partnership agreements are not subject to any statutes of frauds.

- Short Form Merger—A new section 267 was added to the Delaware General Corporation Law providing a mechanism for a short form merger of a subsidiary corporation or corporations and a parent non-corporate entity. Accordingly, the Acts have been amended to provide a mechanism to implement such short form mergers under new Section 267 of the DGCL where a Delaware LLC, Delaware LP or Delaware GP is the parent entity.
- Amendments to Agreements Involving

Information Rights—The amendments to the Acts clarify and confirm that all amendments to a limited liability company agreement, limited partnership agreement or general partnership agreement, including amendments that restrict the rights of members and partners to obtain information, are valid if adopted in the manner provided for in the limited liability company agreement, limited partnership agreement or general partnership agreement.

The recent amendments to DLLCA are contained in House Bill No. 372 (effective August 2, 2010). The recent amendments to DRULPA are contained in House Bill No. 373 (effective August 2, 2010). The recent amendments to DRUPA are contained in House bill No. 374 (effective August 2, 2010)

## Federal Rules of Civil Procedure Updates

The Committee thanks Kelly K. Cobb, paralegal at Brown, Dean, Wiseman, Proctor, Hart & Howell LLP in Fort Worth for her assistance in summarizing the following amendments.

Civil Rule 8. General Rules of Pleading.  
(c) Affirmative Defenses.

- Deleted "discharge in bankruptcy" as an affirmative defense. According to Pepper Hamilton's Client Alert "Amendments to the Federal Rules of Civil Procedure", December 1, 2010, "This amendment was made to conform Rule 8 to a self-executing statutory provision found in 11 U.S.C. 6 524(a), which recognizes that a discharge in bankruptcy voids a judgment to the extent the debtor's personal liability is a discharged debt."

Civil Rule 26. Duty to Disclose; General

Provisions Governing Discovery. —

- Extends the Work Product Privilege to drafts reports by testifying expert witnesses
- Extends the Attorney-Client Privilege to communications among the attorney and testifying expert witness, subject to these exceptions
  - Compensation for the expert's study or testimony;
  - Facts or data provided by the lawyer that the expert considered in forming the opinions; and
  - Assumptions provided to the expert by the lawyer that the expert relied on in forming an opinion.
- Provide clarification that experts not specifically retained to testify at trial are not obligated to submit Rule 26 expert reports
- Experts not required to submit reports will be required to disclose, the subject matter on which they will testify and a summary of the facts and opinions to

which the witness is expected to testify.

Under Rule 26, parties are still free to do diligent research sufficient to learn about and attempt to assault an opposing expert's opinions under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). This includes expert's qualifications and adoption, rejection or failure to consider matter in formulating opinions to be expressed at trial.

Civil Rule 56. Summary Judgment.—  
Amendments were adopted which:

- Require that a party asserting a fact that cannot be genuinely disputed must provide a "pinpoint citation" to the record.
- Recognize that a party may submit an unsworn written declaration under penalty or perjury as a substitute for an affidavit in support of or in opposition to a summary judgment motion.
- Set a time period, subject to local rules or court order, for filing of summary

judgment motions.

- Recognize that courts have the option, when a fact has not been properly supported by a party or responded to by an opposing party, of (a) considering the fact undisputed, (b) granting summary judgment, or (c) affording a party leave to amend; and
- Recognize that partial summary judgment may be entered.

These are substantial changes and those who practice within the federal court should review these amendments in detail to become personally familiar with the substance.

The full text of the amendments may be found at: <http://www.supremecourt.gov/orders/courtorders/frcv10.pdf>. A copy of the amendments to Rule 26, marked to show changes, may be found at the ABA's website at: [http://www.abanet.org/litigation/committees/expertwitnesses/docs/1008\\_rule26.pdf](http://www.abanet.org/litigation/committees/expertwitnesses/docs/1008_rule26.pdf)

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# Eleven Ways to Help Yourself Stay Sane in a Crazy Market

Craig Hackler, Financial Advisor, Raymond James Financial Services, Inc., Member FINRA/SIPC

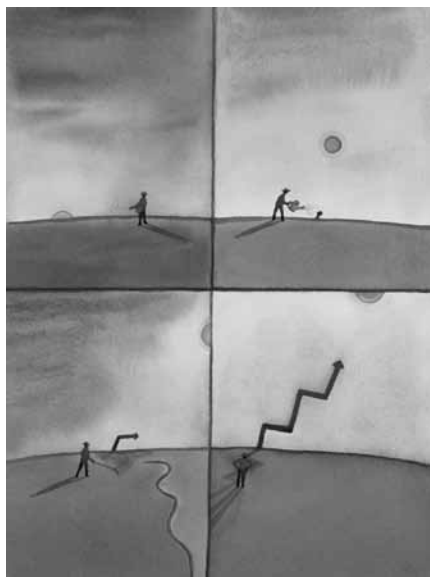
**K**eeping your cool can be hard to do when the market goes on one of its periodic roller-coaster rides. It's useful to have strategies in place that prepare you both financially and psychologically to handle market volatility. Here are 11 ways to help keep yourself from making hasty decisions that could have a long-term impact on your ability to achieve your financial goals.

## 1. Have a game plan

Having predetermined guidelines that recognize the potential for turbulent times can help prevent emotion from dictating your decisions. For example, you might take a core-and-satellite approach, combining the use of buy-and-hold principles for the bulk of your portfolio with tactical investing based on a shorter-term market outlook. You also can use diversification to try to offset the risks of certain holdings with those of others. Diversification may not ensure a profit or guarantee against a loss, but it can help you understand and balance your risk in advance. And if you're an active investor, a trading discipline can help you stick to a long-term strategy. For example, you might determine in advance that you will take profits when a security or index rises by a certain percentage, and buy when it has fallen by a set percentage.

## 2. Know what you own and why you own it

When the market goes off the tracks, knowing why you originally made a specific investment can help you evaluate whether your reasons still hold, regardless of what the overall market is doing. Understanding how a specific holding fits



in your portfolio also can help you consider whether a lower price might actually represent a buying opportunity.

And if you don't understand why a security is in your portfolio, find out. That knowledge can be important, especially if you're considering replacing your current holding with another investment.

## 3. Remember that everything's relative

Most of the variance in the returns of different portfolios can generally be attributed to their asset allocations. If you've got a well-diversified portfolio that includes multiple asset classes, it could be useful to compare its overall performance to relevant benchmarks. If you find that your investments are performing in line with those benchmarks, that realization might help you feel better about your overall strategy.

Even a diversified portfolio is no guarantee that you won't suffer losses, of course. But diversification means that just

because the S&P 500 might have dropped 10% or 20% doesn't necessarily mean your overall portfolio is down by the same amount.

## 4. Tell yourself that this too shall pass

The financial markets are historically cyclical. Even if you wish you had sold at what turned out to be a market peak, or regret having sat out a buying opportunity, you may well get another chance at some point. Even if you're considering changes, a volatile market can be an inopportune time to turn your portfolio inside out. A well-thought-out asset allocation is still the basis of good investment planning.

## 5. Be willing to learn from your mistakes

Anyone can look good during bull markets; smart investors are produced by the inevitable rough patches. Even the best aren't right all the time. If an earlier choice now seems rash, sometimes the best strategy is to take a tax loss, learn from the experience, and apply the lesson to future decisions. Expert help can prepare you and your portfolio to both weather and take advantage of the market's ups and downs.

## 6. Consider playing defense

During volatile periods in the stock market, many investors reexamine their allocation to such defensive sectors as consumer staples or utilities (though like all stocks, those sectors involve their own risks, and are not necessarily immune from overall market movements). Dividends also can help cushion the impact of price swings. According to Standard and Poor's, dividend income has represented roughly one-third of the monthly total return on the S&P 500 since 1926, ranging from a high of 53% during the 1940s to a low of 14% in the 1990s, when investors focused on growth.

## 7. Stay on course by continuing to save

Even if the value of your holdings fluctuates, regularly adding to an account designed for a long-term goal may cushion the emotional impact of market swings. If losses are offset even in part by new savings, your bottom-line number

might not be quite so discouraging.

If you're using dollar-cost averaging--investing a specific amount regularly regardless of fluctuating price levels—you may be getting a bargain by buying when prices are down. However, dollar cost averaging can't guarantee a profit or protect against a loss. Also, consider your ability to continue purchases through market slumps; systematic investing doesn't work if you stop when prices are down.

#### 8. Use cash to help manage your mindset

Cash can be the financial equivalent of taking deep breaths to relax. It can enhance your ability to make thoughtful decisions instead of impulsive ones. If you've established an appropriate asset allocation, you should have resources on hand to prevent having to sell stocks to meet ordinary expenses or, if you've used leverage, a margin call. Having a cash cushion coupled with a disciplined investing strategy can change your perspective on market volatility. Knowing that you're positioned to take advantage of a downturn by picking up bargains may increase your ability to be patient.

#### 9. Remember your road map

Solid asset allocation is the basis of sound investing. One of the reasons a diversified portfolio is so important is that strong performance of some investments may help offset poor performance by others. Even with an appropriate asset allocation, some parts of a portfolio may struggle at any given time. Timing the market can be challenging under the best of circumstances; wildly volatile markets can magnify the impact of making a wrong decision just as the market is about to move in an unexpected direction, either up or down. Make sure your asset allocation is appropriate before making drastic changes.

#### 10. Look in the rear-view mirror

If you're investing long-term, sometimes it helps to take a look back and see how far you've come. If your portfolio is down this year, it can be easy to forget any progress you may already have made over

the years. Though past performance is no guarantee of future returns, of course, the stock market's long-term direction has historically been up. With stocks, it's important to remember that having an investing strategy is only half the battle; the other half is being able to stick to it. Even if you're able to avoid losses by being out of the market, will you know when to get back in? If patience has helped you build a nest egg, it just might be useful now, too.

#### 11. Take it easy

If you feel you need to make changes in your portfolio, there are ways to do so short of a total makeover. You could test the waters by redirecting a small percentage of one asset class into another. You could put any new money into investments you feel are well positioned for the future but leave the rest as is. You could set a stop-loss order to prevent an investment from falling below a certain level, or have an informal threshold below which you will not allow an investment to fall before selling. Even if you need or want to

adjust your portfolio during a period of turmoil, those changes can--and probably should--happen in gradual steps. Taking gradual steps is one way to spread your risk over time as well as over a variety of asset classes.

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# Texas Lifestyle Discrimination Statute: A Smoking Necessity

By Lina Maraqa

Lifestyle discrimination is practiced against smokers by employers refusing to employ smokers or charging employees who smoke higher insurance premiums. For example, Turner Broadcasting System adopted a policy of hiring only non-smokers.<sup>1</sup> In a 2003 Gallup Poll, smoking and obesity were main factors behind an employer being less likely to hire someone: twenty percent said they would be less likely to hire someone if they were overweight, while twenty-five percent said they would be less likely to hire someone if that person were a smoker.<sup>2</sup> Employers discriminate against smokers due to their smoking habit even when it is an off-duty behavior that occurs off the employers' premises. Employees' lack of privacy is demonstrated by the access employers have to employees' medical records, with the employees' consent, which is often required for the acceptance of a job offer. Consequently, employers are able to detect employees who smoke, and then discriminate against them by charging them higher insurance premiums. Additionally, employers are able to choose not to employ smokers and thereby practice lifestyle discrimination against them at will.

Smokers are only the initial potential scapegoats for such lifestyle discrimination. In the future, such lifestyle discrimination by employers could expand to include employees who practice different forms of unhealthy behavior and are classified as health risks by insurance companies, such as diabetics, those with high cholesterol levels and/or high blood pressure, and those with a family history of terminal diseases. Although healthcare reform will prohibit insurance companies from denying coverage to those with pre-existing conditions, employers will still be able to charge those individuals higher insurance premiums. Legislative interven-

tion in Texas should deter such lifestyle discrimination by employers against "unhealthy" individuals by enacting a bill that makes it unlawful to discriminate against any individual based on his/her medical history, unhealthy practices and/or future medical condition. The statute should focus on preventing discrimination based on an individual's lifestyle choices that are apparent and discoverable in an individual's health condition and medical records.

Most people prefer for their medical records to remain confidential, and only to be exchanged between relevant institutions when necessary. A person's health information should be strongly protected. In many states, laws and the doctor-patient privilege have been the cornerstones of privacy protection for an individual's health information for decades.<sup>3</sup> However, these privacy laws vary by situation. "Confidentiality is likely to be lost in return for insurance coverage, an employment opportunity, an application for a government benefit, or an investigation of health and safety at an employer's work site"<sup>4</sup> The extent of privacy protection extended to an individual's medical record often depends on the location of these records and the purpose for which the information was compiled. Most importantly, a person may have a false sense of security about the actual privacy of his/her medical information.

When an individual receives treatment from a health professional, the individual's medical records are created. Records may include the individual's medical history, details about his/her lifestyle (such as smoking or involvement in high-risk sports) and family medical history. Additionally, medical records contain laboratory test results, medications prescribed, and reports that indicate the results of operations and other medical procedures. Medical records could also

include the results of genetic testing used to predict one's future health. An individual's medical records might include information about one's participation in research projects. Information provided on applications for disability, life insurance with private insurers, or government programs can also become part of one's medical file.<sup>5</sup>

The federal Health Insurance Portability and Accountability Act (HIPAA)<sup>6</sup> set a national standard for privacy of health information.<sup>7</sup> Implemented in 2003, HIPAA only applies to the electronic maintenance and transmission of medical records by health care providers, health plans, and health clearinghouses.<sup>8</sup> A vast amount of health-related information is recorded and maintained outside of such health care facilities, and thus is beyond the protection of HIPAA. Since HIPAA was enacted, a strong criticism has been that the rules have not been effectively enforced.<sup>9</sup> In February 2009, as part of the American Recovery and Reinvestment Act of 2009 (Public Law 111-5), also known as the Stimulus Law, major revisions were adopted which called for enhanced enforcement and stiffer penalties for violations.<sup>10</sup> A federal district court in Texas upheld the validity of HIPAA and the Privacy Rule against several constitutional challenges in *Association of American Physicians & Surgeons, Inc. v. U.S. Dept. of Health and Human Services*.<sup>11</sup> However, an individual's medical information is still not completely covered by this federal privacy rule. Information found in an individual's financial records, his/her child's school records, and/or employment files, given to the requesting party with the individual's consent, is not covered by HIPAA.<sup>12</sup>

The anti-discrimination provision of HIPAA<sup>13</sup> attempts to prevent discrimination in health insurance coverage based on preexisting conditions and health status of individuals.<sup>14</sup> This provision was inapplicable to insurance policies begun prior to the date of enactment.<sup>15</sup> It does not provide for a private cause of action.<sup>16</sup> Therefore, employers continue to discriminate against smokers by using creative ways to curb healthcare costs, despite these cost-cutting strategies' invasion of a person's right to privacy. These strategies are effective for lowering health-



care costs for the employer and for those employees and other beneficiaries who do not engage in "unhealthy" behaviors.<sup>17</sup>

Smokers are stigmatized by society for a habit perceived as nasty and unhealthy. A smoker's medical information may not remain confidential, and it may be passed on routinely to an employer with the smoker's consent. Employers provide health insurance coverage for their employees and their dependents, routinely ask for the employees' health records and obtain them for insurance purposes. To reduce health insurance costs and to encourage healthy lifestyles, some employers are instituting wellness programs, which include an array of smoking-cessation activities consisting of pamphlets, classes, and support groups. To increase the efficacy of the smoking-cessation activities, some employers implement no-smoking policies under which employees are subjected to periodic screenings for the presence of nicotine in their systems. Employees testing positive for nicotine are usually asked to pay higher premiums for their healthcare coverage. Since the implementation of such programs, healthcare expenditures for employers have decreased. Additionally, some employers are now expanding such wellness programs to include the dependents of employees covered under their health plans.<sup>18</sup>

What if employers decided to track less-stigmatized vices than nicotine? Employers might track their employees' health to ensure they are not consuming "unhealthy" levels of caffeine. Employers could make sure their employees' intake of snacks did not include too much salty potato chips or sweet candy to ensure their employees remain with low cholesterol and low blood sugar levels respectively. Employers can probably begin testing their employees to ensure they are leading healthy lifestyles while on the job and off-duty. Are such employers' behaviors an invasion of employees' privacy? Can the business interests of the employers outweigh concerns about invasion of the privacy rights of the employees and their dependents?

This article addresses the legality of invasions of smokers' privacy and consequent lifestyle discrimination against smokers. Initially, the development of the right of privacy is outlined, the differ-

ent forms of privacy are defined, and the unconstitutionality of restricting smokers' behavior is discussed. Additionally, the invasion of smokers' privacy rights, as a condition of employment and the notion of lifestyle discrimination that results from employers controlling employees' off-duty behaviors, are examined. This article next reviews strategies to challenge and deter lifestyle discrimination against smokers and to uphold a smoker's right to privacy by examining current lifestyle discrimination statutes enacted by various states. Finally, the article proposes the enactment of a Texas lifestyle discrimination statute. Legislative intervention is needed to deter lifestyle discrimination by employers against "unhealthy" individuals. This article advocates for the passage of a bill that makes it unlawful to discriminate against any individual based on his/her medical history, unhealthy practices and/or future medical condition. The legislation should focus on preventing discrimination based on an individual's lifestyle choices that are apparent and discoverable in an individual's medical records.

## PRIVACY LAW PROVIDES SMOKERS SOME PROTECTION

### Right of Privacy in U.S. Constitution

The right of privacy has evolved to become an independent legal concept commonly used to protect and preserve privacy rights. Privacy is a right that many of us take for granted as 'inalienable right'. Thomas Jefferson once noted that the only firm basis of a nation's liberties is the "conviction in the minds of the people that these liberties are . . . the gift of God."<sup>19</sup> Although the U. S. Constitution contains no express right to privacy, the right of privacy is expressed loosely as a collection of ideas in the Bill of Rights. "It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part,"<sup>20</sup> Madison declared in Federalist 51.<sup>21</sup> To protect individuals and minorities against popular controlling majorities, the Reconstruction Amendments were included in the Bill of Rights,<sup>22</sup> which protects different aspects of privacy in several amendments. For example, the

First Amendment protects the privacy of one's beliefs by the guarantee of freedom of speech and association. The Third Amendment provides for the protection of the privacy of an individual's home. The Fourth Amendment provides for the privacy of individuals, houses and personal possessions against warrantless searches and seizures. The Fifth Amendment expresses the privilege against self-incrimination, which entails protection for the privacy of personal information. The Fifth and Fourteenth Amendments guarantee that the state cannot deprive a citizen of life, liberty, or property without due process of law. The Ninth Amendment has been interpreted as a justification for broadly interpreting the Bill of Rights to protect privacy in ways not specifically provided in the first eight amendments.<sup>23</sup> The Ninth Amendment provides an all-encompassing statement which broadly states that the "enumeration of certain rights . . ." in the Bill of Rights "... shall not be construed to deny or disparage other rights retained by the people."<sup>24</sup> The Supreme Court has broadly interpreted the "liberty" guarantee of the Fourteenth Amendment to guarantee a fairly broad right of privacy that has come to encompass decisions about child rearing, procreation, marriage, and termination of medical treatment.<sup>25</sup> However, our right of privacy is constantly challenged by the government and other public and private organizations that collect vast amounts of personal information about us for a variety of purposes. An individual's right of privacy often is not protected adequately when pitted against important countervailing interests, such as efficient consumer transactions, business necessity, and security.<sup>26</sup>

### Forms of Privacy

Privacy law regulates the type of information that may be collected and how this information may be used. Three distinct forms of protected privacy are informational privacy, physical privacy, and decisional privacy, according to Professor Anita Allen.<sup>27</sup>

Physical privacy is the individual's right to seclusion and freedom from others, and often covers areas such as one's home where an individual has a greater expectation of freedom from unwanted

intrusion.<sup>28</sup> The First Amendment's guarantee of freedom of speech and association and the Fourth Amendment's protection against warrantless searches and seizures serve as constitutional guarantees of a right of physical privacy.<sup>29</sup> Smokers' physical privacy rights have been questioned in child custody disputes by the courts that considered a parent's smoking habit as a factor in determining custody awards to the opposing party.<sup>30</sup> The privacy rights of public housing tenants have been breached by housing authorities' requirements that tenants refrain from smoking on the premises.<sup>31</sup>

Informational privacy is "privacy protection for personality, identity, and reputation".<sup>32</sup> The Fifth Amendment's protection against compulsory disclosure of personal information and self-incrimination are constitutional guarantees of informational privacy rights.<sup>33</sup> However, the government has compelled disclosure of personal or intimate information, such as medical records, in some cases.<sup>34</sup> Smokers' informational privacy rights are breached when they are required by their employers to disclose their smoking habit due, even while off duty, to the employer's policies that require new employees to refrain from smoking.<sup>35</sup>

Decisional privacy is the right to make independent decisions without unsolicited interference about personal and intimate matters, such as child-rearing and childbearing issues.<sup>36</sup> The Fourteenth Amendment's guarantee of life, liberty, and due process has been cited as textual support for a constitutional decisional privacy right.<sup>37</sup> Smokers' decisional privacy concerns are implicated most significantly in anti-smoking legislation prohibiting smoking in all public areas, including outdoor parks and public streets.<sup>38</sup>

This paper proposes that smokers' physical, informational and decisional privacy rights have been infringed without probable cause, although the Bill of Rights provides smokers with a right of privacy. The privacy rights of smokers have been infringed by the courts in child custody disputes,<sup>39</sup> by public housing authorities,<sup>40</sup> by employers at the workplace,<sup>41</sup> and by prohibiting smoking in public areas.<sup>42</sup> The constitutionality of these violations of smokers' privacy rights is questionable.

An individual's right to privacy is a constant struggle that is continually defined by judges and legislatures and shaped by society's ever-changing values. Historically, the right of privacy has expanded to encompass the broad interpretation of the Bill of Rights. The right of privacy has expanded to include the protection of lifestyle choices from the intervention of the state, and includes an individual's right to choose a lifestyle that does not necessarily conform to usual code of conduct practiced by most members of society.<sup>43</sup> Some courts, on the other hand, have interpreted different amendments in a restrictive fashion, invading smokers' informational, physical, and decisional privacy rights.<sup>44</sup> Legislative intervention is needed in deterring such invasions of privacy and lifestyle discrimination against smokers.

## CONSTITUTIONAL CLAIMS AGAINST SMOKERS' RIGHT OF PRIVACY

### No Constitutional Right to Breathe Smoke-Free Air

The courts have consistently denied recognition of a constitutional right to breathe smoke-free air. Due to absence of explicit language in the Constitution, plaintiffs have urged courts to infer a constitutional guarantee of the right to freedom from tobacco smoke and to a clean environment from the Ninth Amendment, the First Amendment, and the Due Process Clause.<sup>45</sup> These arguments have been unsuccessful.<sup>46</sup>

The first decision to reject constitutional arguments by non-smokers was *Gasper v. Louisiana Stadium & Exposition District*.<sup>47</sup> The Louisiana Superdome is an enclosed arena located in New Orleans, Louisiana, owned and maintained by a political subdivision of the State of Louisiana known as the Louisiana Stadium and Exposition District (hereinafter referred to as "LSED"). The building is a public, multipurpose facility, and, since its completion, has been used for many events ranging from concerts to Mardi Gras parades.<sup>48</sup> The plaintiffs, individually and as representatives of other non-smokers who have attended, or who will attend, such functions in the Louisiana Superdome, challenged LSED's permissive attitude toward smoking as being constitutionally violative of their

right to breathe smoke-free air while in a state building. The plaintiffs filed under 42 U.S.C. 6 1983 (1982), alleging a constitutional violation by a person acting under color of state law.<sup>49</sup> The plaintiffs asked the court to enjoin smoking in the Louisiana Superdome during scheduled events. In support of their complaint, the plaintiffs stated that by allowing patrons to smoke in the Louisiana Superdome (The "Dome"), LSED was causing other nonsmokers involuntarily to consume hazardous tobacco smoke, thereby causing physical harm and discomfort to those nonsmokers, as well as interfering with their enjoyment of events for which they have paid the price of admission, all in violation of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.<sup>50</sup>

The plaintiffs argued that their First Amendment right freely to receive the thoughts and ideas of others was violated due to the harmful air they had to breathe during their attendance at events in the Dome.<sup>51</sup> The court rejected this argument, stating that nonsmokers had no constitutional right to require the Dome's operators to prohibit smoking in the Dome.<sup>52</sup> The court explained that the plaintiffs' theory that tobacco smoke in the Dome created a chilling effect upon exercise of nonsmokers' First Amendment rights, in that they were required to breathe harmful smoke as a precondition to enjoying events held in the Dome, had no more merit than an argument alleging that admission fees charged at such events have a chilling effect upon the exercise of such rights, or that the selling of beer violates First Amendment rights of those who refuse to attend events where alcoholic beverages are sold.<sup>53</sup>

The plaintiffs also argued that the state was depriving nonsmoking patrons of life, liberty, and property without due process of law by allowing other patrons to smoke in the Dome and involuntarily exposing nonsmokers to smoke.<sup>54</sup> The plaintiffs asserted a violation of the Fifth and Fourteenth Amendments by referring to *Pollak v. Public Utilities Commission*.<sup>55</sup> The court stated that weighing an individual's right to be left alone, as opposed to other individuals' alleged rights under the Fifth and Fourteenth Amendments, is better left to the legislative rather than

the judicial branch.<sup>56</sup> The court found that there was no constitutional right to a clean environment under the Fifth and Fourteenth Amendments.<sup>57</sup> The court emphasized that the Constitution does not provide a remedy for every social and economic ill<sup>58</sup> and refused to permit an individual the ability to resort to the courts to regulate the social habits and liberties of others.<sup>59</sup> The court relied on *Tanner v. Armco Steel Co.*,<sup>60</sup> in which the court rejected the plaintiffs' damage suit for injuries sustained as a result of pollutants emitted by the defendant's refineries.<sup>61</sup>

The plaintiffs further argued that they were deprived of their right to privacy derived from the Ninth Amendment and developed in *Griswold v. Connecticut*.<sup>62</sup> They contended that the right to be free of the hazards of smoke was equally as fundamental as the right to privacy within the marital relationship recognized in *Griswold*.<sup>63</sup> The court disagreed, stating that to hold that the right to privacy extends to the right to a smoke-free environment would mock the noble purposes of the First, Fifth, Ninth, and Fourteenth Amendments.<sup>64</sup> The court cited the decision in *Ely v. Velde*<sup>65</sup> to support its ruling against the plaintiffs' argument. In *Ely*,<sup>66</sup> the residents, of the Green Springs area of Louisa County, Virginia, brought suit against Richard W. Velde and Clarence M. Coster, Associate Administrators of the Law Enforcement Assistance Administration ("LEAA") to halt the proposed funding and construction of a Medical and Reception Center for prisoners in their neighborhood.<sup>67</sup> The court stated:

We decline the invitation to elevate to a constitutional level the concerns voiced by the appellants. While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so. Appellants baldly attempt to stretch rights . . . without citation of a single relevant authority and with no attempt to develop supporting reasons. The general concept of conservation and protection of

the environment has, in the recent past, made vast advances, prompting the adoption of NHPA, NEPA and other legislation. But without any showing whatever, we are not free to lay upon the State of Virginia new obligations on constitutional grounds.<sup>68</sup>

This court refused to derive a constitutional protection for the environment. Historically, courts have not extended constitutional rights to the conservation and protection of the environment, but have allowed legislation to define such protection.<sup>69</sup>

### **Constitutional Claims by Nonsmokers in Workplace Denied By Courts**

Constitutional claims by nonsmokers in the workplace against public employers have been refused by the courts, although applicable common law has been applied by the courts to stop workplace smoking.<sup>70</sup> In *Federal Employees for Non-Smokers Rights v. United States*,<sup>71</sup> the court rejected claims of First and Fifth Amendment violations brought by nonsmoking federal employees seeking to restrict smoking in federal buildings. The plaintiffs contended that exposure to smoke in the workplace violated their First Amendment right to petition the government for redress of grievances and that they had been deprived of life, liberty, and property without due process. The court found that the facts were indistinguishable from *Gasper* and refused to hear the constitutional claims, although it left open the possibility of a common-law action based on the *Shimp*<sup>72</sup> duty to provide a smoke-free workplace. Employers have common law duty to provide a work environment free of smoke, based on *Shimp v. New Jersey Bell Telephone Co.*,<sup>73</sup> which I will further discuss in detail in the next section. It also stated that the legislature, not the court, was the proper forum for the nonsmokers' concerns.<sup>74</sup>

In *Kensell v. Oklahoma*,<sup>75</sup> the court rejected first, fifth, ninth, and fourteenth amendment claims brought by a nonsmoker seeking the elimination of smoking from the workplace.<sup>76</sup> The plaintiff, an employee of the State of Oklahoma, allegedly suffered from respiratory and cardiovascular ailments.<sup>77</sup> The plaintiff sought damages and injunctive relief

against his employer, various officers and employees due to their failure to prohibit smoking in the area where he worked.<sup>78</sup> The plaintiff argued that his exposure to smoke deprived him of his constitutional rights.<sup>79</sup> The plaintiff asserted that the defendants' failure to provide a smoke-free workplace violated his First Amendment rights because the smoke interfered with his ability to think.<sup>80</sup> The plaintiff claimed that the defendants assaulted him by allowing smoking in his workplace.<sup>81</sup> In support of his argument, he cited cases in which police and prison personnel have been held liable under section 1983<sup>82</sup> for assaults against persons in their custody.<sup>83</sup> Furthermore, the plaintiff argued he was deprived of a property right in his job because he was forced to choose between quitting or continued exposure to smoke.<sup>84</sup> The court found that the plaintiff's exposure to smoke was "a far cry from forcible injections of mind altering drugs and assaults committed by police or prison officials to intimidate or punish persons in their custody".<sup>85</sup> The court declared that this was not a case in which governmental officers were abusing their power because the government is sovereign.<sup>86</sup> The court concluded that the plaintiff had voluntarily accepted employment in an office in which he knew or should have known other employees smoke and upon discovering that smoke exacerbated his health problems instead of quitting or transferring, he sought to force his employer to install a no-smoking policy in the workplace or segregate smokers from nonsmokers.<sup>87</sup> The court noted that the state, as his employer, had the power to grant his request and as a sovereign entity, the State of Oklahoma, could have made exposing him to smoke a tort,<sup>88</sup> or a crime.<sup>89</sup> The court found no merit in the plaintiff's claims, stating that the "United States Constitution does not empower the federal judiciary, upon the plaintiff's application, to impose no-smoking rules in the plaintiff's workplace"<sup>90</sup> and that the role of the federal judiciary was not to act as a superlegislature promulgating social change under the pretense of protecting constitutional rights.<sup>91</sup>

### **One Successful Claim in a Prison Context**

The only constitutional claim by a non-

smoker that has met with any success is a claim that involuntary exposure to smoke while in prison is cruel and unusual punishment under the Eighth Amendment.<sup>92</sup> In *Avery v. Powell*,<sup>93</sup> the court concluded that involuntary exposure to environmental tobacco smoke while in prison violated the standards of decency that define fair punishment.<sup>94</sup> The court also found that involuntary exposure to smoke threatened the plaintiff's liberty interest in his own health. The decision by the authorities to confine the plaintiff in a cell in which his health was threatened by smoke was a deliberate decision not reasonably related to any proper governmental interest, and thus deprived him of his liberty interest in his health without due process.<sup>95</sup>

An individual's right of privacy is a delicate balancing act between the interests of the state and the individual's right to privacy. The state can deprive an individual of life, liberty, or property, if it has a sufficiently important interest that outweighs the importance of these guaranteed rights. If the right is fundamental, which generally means it is specifically listed in the Constitution, the state must have a compelling interest to restrict the right using the least-restrictive means possible.<sup>96</sup> If the right is not fundamental, the state needs only to have a rational basis for this restriction, and the means used must be reasonable.<sup>97</sup> In determining the constitutionality of a state restriction, the court balances the state's interest in its restriction and the individual's interest in autonomy to determine if such a restriction is constitutional.

In *Avery v. Powell*,<sup>98</sup> the plaintiff's liberty interest in his own health was not fundamental, as the right was not specifically listed in the Constitution. The state needed only to have a rational basis for its restriction of the plaintiff, his confinement in a cell in which his health was threatened by smoke. The state did not have a compelling interest to expose the plaintiff to involuntary smoke while in prison as a form of punishment. The plaintiff's right to life, demonstrated in the liberty interest in his own health, outweighed the state's interest of punishment. Therefore, the court found that the state's confinement of the plaintiff in a cell in which his health was threatened by smoke was not reasonably related to any rational interest and thus deprived him of

his liberty interest in his health without due process. The court found that the state's action was unconstitutional.

## SMOKERS' PRIVACY RIGHTS IN WORKPLACE AND OFF-DUTY

### Employer's Common Law Duty to Provide a Safe Work Environment

Employers have a common law duty to provide a safe work environment, free of smoke, when courts follow *Shimp v. New Jersey Bell Telephone Co.*<sup>99</sup> The *Shimp* court, by taking judicial notice of the dangers of environmental tobacco smoke, held that employers must prohibit smoking in work areas.<sup>100</sup> In this case, the plaintiff, a secretary, was allergic to cigarette smoke. Her employer, a telephone company, permitted employees to smoke while on the job at their desks, which were situated in the plaintiff's same work area. She sought an injunction requiring her employer to enact an on-the-job smoking ban. The court held that an employee has a common-law right to a safe working environment. The court stated that a smoke-filled working environment was not an occupational hazard the plaintiff voluntarily assumed in pursuing her career as a secretary. The court declared that New Jersey's Workmen's Compensation Act did not bar issuance of injunctive relief against occupational hazards. The court concluded that it was reasonable to expect an employer to foresee health consequences of secondary smoke, since the portion of the population especially sensitive to cigarette smoke is so significant.<sup>101</sup> The court imposed a duty on the employer to abate the hazard, other employees' smoking nearby, which caused the plaintiff's discomfort. The court ordered the employer to provide safe working conditions for the plaintiff by restricting the smoking of employees to non-work areas then used as a lunch room, with no smoking to be permitted in the offices or adjacent customer service area. The court issued an injunction to enact an on-the-job smoking ban. The court took judicial notice of the dangers of smoking and passive smoke<sup>102</sup> and recognized that individuals have a right to risk their own health by smoking, but declined to extend that right to risk the health of the smokers' fellow employees.<sup>103</sup> The *Shimp* court emphasized,

however, that individuals who wished to smoke on their own time should be allowed to do so if their smoking did not intrude on the rights of other employees.<sup>104</sup>

*Shimp* was fundamental to the enactment of on-the-job smoking bans. Employers began enacting on-the-job smoking bans when they realized that they could be liable to their nonsmoking employees for violating this common law duty.<sup>105</sup> Some employers, both public and private, have gone beyond imposing restrictions on smoking in the workplace and have banned off-duty smoking by their employees as well.<sup>106</sup> To date, no court has found any of these bans on smoking to be unconstitutional or otherwise illegal.<sup>107</sup>

### Smoking Restrictions

Constitutional challenges brought by smokers to smoking restrictions at their places of employment have met with hostility from courts. A court rejected a state employee's claims that the smoking restrictions instituted by the Wisconsin Department of Revenue violated the Equal Protection Clause of the Fourteenth Amendment and impaired the obligation of contract under either the state or federal constitution in *Rossie v. Wisconsin Department of Revenue*.<sup>108</sup> Rossie worked for the Department of Revenue (DOR) in a state-owned building.<sup>109</sup> He had been a DOR employee and a pipe smoker for eighteen years.<sup>110</sup> The State of Wisconsin passed the Clean Indoor Air Act forbidding smoking in any enclosed area of a state building, but permitting the person in charge to designate smoking areas.<sup>111</sup> In response, the Department of Revenue instituted a nonsmoking policy, forbidding smoking in most areas of its buildings, including private offices.<sup>112</sup> Rossie brought an action for declaratory judgment and injunctive relief against DOR, asserting four reasons why the DOR could not lawfully discipline him for smoking at work: (1) the two directives "rules" under the Wisconsin statute and the DOR's failure to follow statutory rule-making procedures rendered them invalid; (2) even if the directives were valid, the DOR had exceeded its legislative grant of power under the Wisconsin statute, in issuing them; (3) enforcing the Wisconsin statute against Rossie unconstitutionally denied

him equal protection of the laws; and (4) the Wisconsin statute unconstitutionally impaired Rossie's right to contract with his employer.<sup>113</sup>

Rossie asserted that the statutory classifications that included him "and his fellow smokers at the DOR," while excluding others, denied him the equal protection of the law in violation of the Fourteenth Amendment.<sup>114</sup> He argued that there was no rational basis for the statutory classifications that prohibited his smoking while allowing smoking in many other places.<sup>115</sup> The court held that the Clean Indoor Act did not violate the Equal Protection Clause.<sup>116</sup> The court reviewed the law under a reasonable basis standard, stating that the statute had a presumption of validity that could only be overcome by a showing that the classification made by the legislature was irrational or arbitrary.<sup>117</sup> The court considered whether there was any reasonable basis for the statutory classifications.<sup>118</sup> The court found that treating smokers in public buildings differently than smokers in other areas was not arbitrary or capricious, but rather a rational distinction that presented no equal protection problem.<sup>119</sup> The court declared, "It is no requirement of equal protection that all evils of the same genus be eradicated or none at all."<sup>120</sup> The court explained that the legislature had heard testimony on the risks of smoking and had banned smoking only in areas in which nonsmoking government employees and members of the public could not easily avoid smoke, such as public conveyances, hospitals, and public waiting rooms.<sup>121</sup> The court emphasized that the Wisconsin statute "prohibits smoking in many public places where people must go, and does not prohibit it in many places where people need not go."<sup>122</sup> The court concluded that there was a reasonable basis for the statutory classifications.<sup>123</sup>

Rossie argued that the Clean Indoor Air Act violated his constitutionally protected contract rights.<sup>124</sup> A 1976 directive of the DOR had allowed Rossie to smoke at his desk.<sup>125</sup> He asserted that this directive was part of his implied employment contract, which was impaired by the DOR's smoking ban.<sup>126</sup> The court assumed that the 1976 Directive was part of Rossie's employment contract.<sup>127</sup> Consequently, Rossie had a contractual

right to smoke within the privacy of his office.<sup>128</sup> The Act allowed the DOR free to designate smoking areas in buildings under its control, and it could easily have so designated Rossie's desk.<sup>129</sup> The DOR's choice not to allow smoking at Rossie's desk was not mandated by the Act and, thus, any impairment of contract was the responsibility of the DOR, not the legislature.<sup>130</sup>

Although there is no constitutional right to breathe smoke-free air, many cities have issued local ordinances banning smoking in public places, restaurants, bars, casinos and private workplaces.<sup>131</sup> Most courts that have considered conflicts between local smoking ordinances and state smoking regulations have found, in the absence of express statutory preemption language, that local smoking ordinances are a valid operation of municipal authority to protect the public health.<sup>132</sup> Nineteen states and territories have comprehensive smoke-free laws and over three hundred cities and local jurisdictions have comprehensive smoke-free laws.<sup>133</sup> Some employers, both public and private, have gone beyond imposing restrictions on smoking in the workplace and have banned off-duty smoking by their employees as well.<sup>134</sup> To date, no court has found any of these bans on smoking to be unconstitutional or otherwise illegal.<sup>135</sup>

### Smoking Off-Duty

The right to smoke while off-duty is a liberty that is constitutionally protected by the substantive due process guarantees of the Fifth and Fourteenth Amendments. For public employees, this right is contingent upon employment by the state.<sup>136</sup> For public employees, employment by the state cannot be conditioned by the requirement that the prospective employee give up a constitutional right.<sup>137</sup>

In *Broderick v. Police Commissioner*,<sup>138</sup> police officers brought an action for a declaratory judgment in regard to the necessity for the officers to answer questions addressed to them by their police commissioner in regard to their conduct during an out-of-state celebration.<sup>139</sup> The trial court denied the police officers' call for action and they appealed.<sup>140</sup> The Supreme Judicial Court of Massachusetts held that requiring police officers to answer inquiries directed to their off-

duty activities at an out-of-state Law Day celebration would not infringe their Fifth Amendment privilege against self-incrimination, even though answering questions might lead to loss of employment.<sup>141</sup> The court also held that this permissible questioning of off-duty conduct by a municipality is narrower than an inquiry permitted with respect to official conduct.<sup>142</sup> The court allowed the police officers to be questioned about their private conduct if affirmative answers would unqualifiedly be grounds for dismissal from the police force or warrant other disciplinary action.<sup>143</sup> The court also declared the police officers were not protected by the constitutional right of privacy from answering a questionnaire directed to them by the commissioner of police, in regard to their public conduct during their participation in an out-of-state off-duty celebration.<sup>144</sup>

*Broderick* highlighted that the state may use its police power to condition public employment on the deprivation of constitutional rights, as long as the state interest in the prohibition is either compelling, in the case of a fundamental right,<sup>145</sup> or rationally related to the accomplishment of a state objective, if the right is not fundamental.<sup>146</sup> The state regulation of a public employee carries a presumption of correctness, and the employee challenging the regulation has the burden to establish it is not rationally connected to the state end.<sup>147</sup> This invasion of privacy rights of public employees by the state is much easier than restricting private citizens' off-duty smoking.

An off-duty smoking prohibition implemented by the state towards public employees can be seen as a violation of their substantive due process guarantee under the Fifth and Fourteenth Amendments by invading a liberty and privacy interest without due process of law. In general, if a constitutional right exists and is fundamental, the state must justify the invasion of liberty with a compelling state interest and also must prove that the restriction is the least intrusive means possible to achieve that end.<sup>148</sup> If the right to smoke is less than fundamental, the employee must prove that the state interest is not rational, or that the restriction is not reasonably and rationally related to that interest.<sup>149</sup> Smoking was declared by the courts not



to be a fundamental privacy right in the case of *Grusendorf v. City of Oklahoma City*,<sup>150</sup> where the Oklahoma City Fire Department's nonsmoking rule, which prohibited fire fighter trainees from smoking on or off duty for one year after they were hired, had a rational relationship to a legitimate state purpose in promoting health and safety.<sup>151</sup> The court held that the city had passed the rational basis test because firefighters must be in top physical condition to combat their on-the-job smoke exposure.<sup>152</sup> Therefore, this no-smoking policy did not violate the Due Process Clause or any asserted liberty and privacy interests.<sup>153</sup> The court held that the policy was valid since smoking is not a fundamental privacy right.<sup>154</sup> The burden was placed upon Grusendorf to prove that the regulation is irrational and arbitrary.<sup>155</sup> Although the court agreed that the smoking policy infringed upon Grusendorf's privacy, it allowed his privacy interests to be compromised by requiring him to report legal behavior that he would otherwise keep from his employer.<sup>156</sup> In the interests of public safety, the city validly overrode his individual interest.<sup>157</sup>

More controversial is the case of *City of North Miami v. Kurtz*,<sup>158</sup> in which the Florida Supreme Court upheld the city's anti-smoking regulation and ruled the city did not violate the U.S. Constitution's implicit privacy provision, when it required an applicant to sign an affidavit stating that she had not used tobacco in the preceding year, as condition of considering her for city employment.<sup>159</sup> The Florida constitution, unlike the U.S. Constitution, contains an express privacy provision.<sup>160</sup> The court applied a fundamental rights analysis under Florida constitutional law and a rational basis test under federal constitutional law.<sup>161</sup> In applying the compelling state interest standard, given that individuals must reveal whether they smoke in almost every aspect of life in today's society, the court held that individuals have no reasonable expectation of privacy in the disclosure of his/her smoking habit when applying for a government job and consequently, that Florida's right of privacy was not implicated under the Florida constitution.<sup>162</sup> Since Kurtz did not meet the legitimate expectation of privacy, the court did inquire not into whether the

city had a compelling interest to justify the policy.<sup>163</sup> The court held that the city had met the rational basis standard for a federal privacy interest by offering a legitimate interest.<sup>164</sup> The city had also met the strict scrutiny standard by establishing a compelling interest in reducing the health costs of its employees, increasing productivity, and saving taxpayer money.<sup>165</sup> The court's decision emphasized that reducing the taxpayers' burden was compelling enough to override the individual's privacy right, whether it was considered a fundamental right or merely a protected interest.<sup>166</sup> This court's decision extended the *Grusendorf* rule that bona fide job requirements may override a privacy interest in smoking while off-duty.

Currently, in states not offering smokers statutory protection, there have been no successful legal challenges to restrictions of off-duty smoking concerning restrictions implemented by private employers.<sup>167</sup> An employee might challenge these restrictions using several possible arguments.<sup>168</sup> Under the recently amended Americans with Disabilities Act ("ADA"), which prohibits discrimination against individuals who are mentally or physically disabled, a smoking employee might claim that his or her addiction to cigarettes is a protected disability.<sup>169</sup> The ADA does not list tobacco addiction among the several disorders and conditions that are specifically excluded from the definition of disability.<sup>170</sup> Since smoking is mentioned specifically elsewhere in the Act, it could be inferred that tobacco addiction could be defined as a disability.<sup>171</sup>

A private employee might also argue that an off-duty smoking ban violates Title VII of the Civil Rights Act of 1964.<sup>172</sup> It can be argued that an employer's refusal to hire smokers could lead to a disparate impact on African Americans and Hispanics, since statistical studies show these groups smoke more than Caucasian Americans. This disparate impact could constitute illegal employment discrimination under Title VII.<sup>173</sup> Such challenges could not work, as employers could demonstrate "business necessity" to overcome such illegal discrimination based on disparate impact.

Smokers seem to gain some privacy protection from state legislatures. Legislation prohibiting employers from

requiring employees to abstain from smoking outside the course of employment has been enacted by twenty-nine states.<sup>174</sup> Additionally, many of the cities and private businesses attempting to enact restrictive smoking legislation have faced political opposition and negative public relations campaigns funded by the tobacco industry.<sup>175</sup>

### Lifestyle Discrimination Statutes

Twenty-nine states have enacted statutes to protect employees from various types of lifestyle discrimination.<sup>176</sup> There are many similarities and differences among these statutes. Most of these states limit protection to discrimination in hiring or firing based on "off-duty use of tobacco products,"<sup>177</sup> while a few states protect the "lawful use of lawful products."<sup>178</sup> The biggest problem with smokers' rights laws is that they generally fail to make any meaningful distinction between the implementation of no-smoking policies for new applicants and current employees.<sup>179</sup> Both applicants and current employees are subject to same restrictive smoking policies and discrimination by employers in hiring or firing based on off-duty use of tobacco products.

All of the statutes prohibit employers from requiring any employee or prospective employee to refrain from smoking off-duty, as a condition of employment.<sup>180</sup> Indiana has specifically banned discrimination "based on the employee's use of tobacco products outside the course of the employee's or prospective employee's employment."<sup>181</sup> Colorado, North Dakota, Nevada, and Illinois prohibit discrimination based on an employee's general off-duty participation in legal activities or use of lawful products.<sup>182</sup> However, some states allow restrictions on off-duty smoking if those restrictions are rationally related to the employee's job.<sup>183</sup> Oregon prohibits employer discrimination against smokers "except when the restriction relates to a bona-fide occupational requirement."<sup>184</sup> To date, there is virtually no case law on what jobs qualify as being rationally related to smoking restrictions.<sup>185</sup> Many of these statutes also prohibit employers from discriminating against off-duty smokers with respect to compensation and other terms of employment.<sup>186</sup> Connecticut's smokers' rights law prohibits employer dis-

crimination against smokers with respect to "compensation, terms, conditions or privileges of employment."<sup>187</sup>

Some statutes have extended the protection of the privacy rights of employees by prohibiting employers from discriminating against smokers due to their off-duty behavior. Each state statute contains different provisions. The following section, characterized by state, highlights most distinguishable provisions in each lifestyle discrimination statute concerning off-duty behavior.

- Colorado has gone much further by declaring that it is a discriminatory or unfair employment practice to fire an employee for "engaging in any lawful activity off the premises of the employer during nonworking hours."<sup>188</sup> Colorado's lifestyle statute contains two exceptions:
- First exception states that an employer may discharge an employee because of his or her off-duty activity if that activity relates to "a bona fide occupational requirement" or is "reasonably and rationally related" to the responsibilities of the employee.<sup>189</sup>
- A second exception is made if dismissal is necessary to avoid a conflict of interest or the appearance of such a conflict.<sup>190</sup>
- Colorado's lifestyle statute does not shield potential employees from lifestyle discrimination that occurs during the hiring process.<sup>191</sup>
- Illinois prohibits employer discrimination against employees or applicants who use "lawful products off the premises of the employer during nonworking hours."<sup>192</sup> The Illinois workplace privacy law prohibits employer discrimination with respect to compensation or other conditions of employment.
- New York adopted its version of a lifestyle statute, which specifies that the protected conduct must be legal, and it limits the conduct to political activity, use of consumable products, recreational activities, and membership in a union.<sup>193</sup> New York allows exceptions where a conflict of interest arises, where permissible under the employer's alcohol and substance abuse workplace policy, or for the purpose of creating distinctions in health, disability, or life insurance policies

based on the employee's recreational activities or use of consumable products.

- North Carolina has enacted a statute designed to prevent employers from making employment decisions on the basis of a person's off-duty smoking or drinking habits.<sup>194</sup> North Carolina's statute applies to both employment decisions and terms or conditions of employment.<sup>195</sup> The statute sets forth specific criteria that must be met in order for an employer to distinguish among employees for the purpose of determining their health or life insurance rates. Finally, the statute clearly specifies the remedies available to an aggrieved employee.
- North Dakota added a lifestyle discrimination provision to its general discrimination statute to incorporate off-duty conduct that covers traditional classes such as sex, race, and religion. The statute prohibits discrimination against "participation in lawful activity off the employer's premises during non-working hours." Such activity must not conflict with the "essential business-related interests" of the employer. North Dakota's statute protects employees at the hiring stage.<sup>196</sup>

Almost all states with smokers' rights statutes provide aggrieved employees civil remedies.<sup>197</sup> States generally allow employees to sue for damages, injunctive relief or both.<sup>198</sup> In addition to damages, court costs and attorney's fees, smokers' rights statutes often authorize courts to grant aggrieved employees injunctive relief.<sup>199</sup> The remedies provided under Colorado's lifestyle statute allows the plaintiff to bring a suit for lost wages and damages;<sup>200</sup> (including pain and suffering instead of only back pay and reinstatement;<sup>201</sup> bringing a civil suit for damages in any district court of competent jurisdiction;<sup>202</sup> requiring the court to award the prevailing party costs and attorney's fees).<sup>203</sup> The Illinois law allows a court to award a prevailing employee damages, costs and reasonable attorney's fees. Rhode Island's statute provides that a court may "[a]ward up to three times the actual damages to a prevailing employee or prospective employee [and] . . . [a] ward court costs to a prevailing

employee or prospective employee . . ."<sup>204</sup> However, Oregon's smokers' rights statute provides for criminal as well as civil penalties.<sup>205</sup> The New Jersey statute specifically authorizes a court to reinstate an employee to the same position he or she held before the violation, or the position the employee would have held but for the violation, including full fringe benefits and seniority rights.<sup>206</sup> Under South Dakota's smokers' rights law, an aggrieved employee may only sue for lost wages and benefits up to the date of the judgment.<sup>207</sup> Under Indiana's and New Jersey's smokers' rights laws, a court can award a prevailing employee reasonable attorney's fees in addition to damages and court costs.<sup>208</sup> Surprisingly, Louisiana does not offer employees any civil remedy whatsoever for employer violations of its smokers' rights law. Instead, the statute provides for employer fines of up to \$500.00 per violation.<sup>209</sup>

Some smokers' rights statutes exempt certain organizations and make other exceptions to the prohibition of employer discrimination against off-duty smokers.<sup>210</sup> For example, Rhode Island's smokers' rights law exempts nonprofit organizations, such as the American Cancer Society, which have a primary purpose to discourage smoking by the general public.<sup>211</sup> Indiana exempts religious organizations and churches.<sup>212</sup> Some states make exceptions in relation to the provisions of collective bargaining agreements in those states.<sup>213</sup> Connecticut's smokers' rights law provides, "Nothing contained in this section shall be construed to affect . . . any collective bargaining agreement between a municipality and paid firefighters or paid police officers." Oregon's statute does not apply if a collective bargaining agreement prohibits the off-duty use of tobacco products.<sup>214</sup> The Illinois law also exempts nonprofit organizations that have a primary purpose to discourage the use of certain lawful products from the prohibition of employer discrimination against employees or applicants who use lawful products off-duty.<sup>215</sup>

Lifestyle discrimination statutes protect employees' rights to privacy and autonomy. Due to the enacted lifestyle discrimination statutes by many states, employees are protected from various types of lifestyle discrimination. Most of these statutes limit protection to dis-

crimination in hiring or firing based on off-duty use of tobacco products. The biggest problem with smokers' rights laws is that they generally fail to make any meaningful distinction between applicants and employees.<sup>216</sup> Both applicants and current employees are subject to same restrictive smoking policies and discrimination by employers in hiring or firing based on off-duty use of tobacco products. Some exceptions contained in several of the statutes leave many employees vulnerable to unfair employer discrimination. Many states do not have any laws in place to protect smokers. These states should draft lifestyle discrimination statutes to avoid many of the problems involved with current laws.

### Model for Texas Lifestyle Discrimination Statute

Legislative intervention in Texas is needed to protect the privacy rights of smokers and deter lifestyle discrimination against them. Due to the increased costs of healthcare, when making hiring decisions, employers consider the enormous health and economic costs of smoking. Current smokers' rights laws in Texas fail to distinguish between applicants and employees, who are in very different positions with respect to the fairness of the implemented off-duty smoking bans. As a way to resolve these difficulties, this article proposes the following model of a Texas lifestyle discrimination statute.

The Texas lifestyle discrimination statute should contain a provision that makes it illegal for an employer to discriminate against any current employee, who was permitted by the employer to smoke when hired, with respect to that employee's compensation, terms, conditions or other privileges of employment. This statute also should prohibit any employer from requiring that a prospective employee refrain from smoking outside the scope of his or her employment, as a condition of employment. The Texas lifestyle discrimination statute should not distinguish between employees and applicants. Under the statute, employers would not be permitted to discriminate against any individual based on his/her lifestyle choices.

The remedies available to an aggrieved employee would be similar to current statutes. An employee might bring a civil

action against an employer. If an employer violated the provisions of this statute, the court could award actual damages, court costs, and reasonable attorney's fees to a prevailing employee and enjoin any further violation. The availability of costs and attorney's fees to the prevailing employees would be necessary to allow employees to afford meaningful protection under smokers' rights statutes.

This statute would not allow any bona fide occupational requirement exceptions and/or exceptions, related to an employer's business. Instead, it would allow the courts, not the employers, to decide when smoking is rationally related to a business necessity to prohibit employees from smoking. No exceptions for organizations like the American Cancer Society, which have a primary purpose to discourage smoking by the general public, would be included. Employees of such organizations, who had accepted their jobs in reliance on their being able to smoke, would suffer the same hardships if they were fired as would other employees and thus deserve the same protections.

This model of a Texas lifestyle discrimination statute would protect employees, eliminate certain exceptions and reduce many of the problems involved with current smokers' privacy rights in Texas. Employees, who were permitted to smoke when hired, and new applicants would be protected against unfair employer discrimination. Employers would be able to take into account the health and economic costs of smoking in their business decisions by sustaining a fair, balanced and smoke-free workplace. The recognition and respect by employers of their employees' different lifestyle choices will promote a cooperative, fair and harmonious working environment based on mutual respect, understanding and cooperation. Employees would be empowered to make healthy lifestyle choices, as each employee would feel valued as an individual by his/her employer for his/her contribution, creativity and lifestyle choices.

### CONCLUSION

Employers are seeking new ways to reduce their health insurance costs due to health care costs rising dramatically.<sup>217</sup> Employers have resorted to restrictions based on weight, smoking, cholesterol levels, and "hazardous activities and pur-

suits" to lower insurance rates.<sup>218</sup> Current laws protecting smokers' privacy rights suffer from several serious shortcomings, such as HIPAA. Most significantly, smokers' rights laws allow employers to freely discriminate against current employees and new applicants. Current smokers' rights laws also often contain vague provisions permitting employer discrimination against smokers, where there is a bona fide occupational requirement or a rational relationship between smoking and a certain job. Given the current uncertainty in the law regarding under what circumstances smoking is rationally related to employment, these provisions, as proposed in this article, are a likely source of future litigation. A Texas lifestyle discrimination statute would deter employers from raising health insurance premiums to smokers, eliminate lifestyle discrimination against all employees, eliminate certain provisions, such as bona fide occupational requirement or a rational relationship between smoking and a certain job and define many of the uncertainties surrounding smokers' privacy rights laws in Texas. A Texas lifestyle discrimination statute would clearly define the rights and remedies for smokers in the workplace. It would create a more balanced work environment for smoking and nonsmoking employees to coexist within, as lifestyle discrimination and the possibility of paying higher insurance rates would be eliminated.

*Lina Maraqa is a recent graduate of the legal studies master's program at Texas State.*

<sup>1</sup> Stephen D. Sugarman, "Lifestyle" Discrimination in Employment, 24 BERKJELL 377, 378 (2003).

<sup>2</sup> NATIONAL WORKRIGHTS INSTITUTE, LIFESTYLE DISCRIMINATION: EMPLOYER CONTROL OF LEGAL OFF DUTY EMPLOYEE ACTIVITIES 2 (2006), [http://www.workrights.org/issue\\_lifestyle/ldbrie2.pdf](http://www.workrights.org/issue_lifestyle/ldbrie2.pdf).

<sup>3</sup> PRIVACY RIGHTS CLEARINGHOUSE, FACT SHEET 8: MEDICAL RECORDS PRIVACY (1993), <http://www.privacyrights.org/fs/fs8-med.htm>.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Health Insurance Portability and Accountability Act, 42 U.S.C.S. 6 201 (1996).

<sup>7</sup> PRIVACY RIGHTS CLEARINGHOUSE, FACT SHEET 8: MEDICAL RECORDS PRIVACY (1993), <http://www.privacyrights.org/fs/fs8-med.htm>.

<sup>8</sup> *Id.*

<sup>9</sup> PRIVACY RIGHTS CLEARINGHOUSE, FACT SHEET 8A: HIPAA BASICS (1993), <http://www.privacyrights.org/fs/fs8-med.htm>.

<sup>10</sup> *Id.*

<sup>11</sup> 224 F. Supp. 2d 1115 (S.D. Tex. 2002), *aff'd without opinion*, 67 Fed. Appx. 253 (5th Cir. 2003); see also Deborah F. Buckman, *Validity, Construction, and Application of Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Regulations Promulgated Thereunder*, 194 A.L.R. FED. 133 (2004).

<sup>12</sup> PRIVACY RIGHTS CLEARINGHOUSE, FACT SHEET 8A: HIPAA BASICS (1993), <http://www.privacyrights.org/fs/fs8-med.htm>.

<sup>13</sup> 29 U.S.C.A. 6182(a)(1).

<sup>14</sup> Buckman, *supra* note 11, at 617[a].

<sup>15</sup> *Id.* at 617[b]; see *Stang v. Clifton Gunderson Health Care Plan*, 71 F. Supp. 2d 926 (W.D. Wis. 1999).

<sup>16</sup> Buckman, *supra* note 11, at 618[a]; see O'Donnell v. *Blue Cross Blue Shield of Wyoming*, 173 F. Supp. 2d 1176 (D. Wyo. 2001).

<sup>17</sup> Elizabeth B. Thompson, *Constitutionality of an Off-Duty Smoking Ban for Public Employees Should the State Butt Out?* 43 VAND. L. REV. 491, 497 (1990).

<sup>18</sup> *Id.*

<sup>19</sup> Joel Hefley, *Congress and Religion: One Representative's View*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 335, 345 (2006).

<sup>20</sup> Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 971 (2005). See generally Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1137-1210 (1991).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> U.S. CONST. amend. I-IX.

<sup>24</sup> *Id.* amend. IX.

<sup>25</sup> *Id.* amend. XIV.

<sup>26</sup> Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 480 (2006).

<sup>27</sup> Michele L. Tyler, *Blowing Smoke: Do Smokers Have A Right? Limiting the Privacy Rights of Cigarette Smokers*, 86 GEO. L.J. 783 (1998). See generally Anita L. Allen, *Privacy in Health Care*, in 4 ENCYCLOPEDIA OF BIOETHICS 2064, 2064-66 (Warren Thomas Reich ed., 1995).

<sup>28</sup> Tyler, *supra* note 27, at 786.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 797; see, e.g., *Lizzio v. Lizzio*, 618 N.Y.S.2d 934 (Family Ct. Fulton Co. 1994); *Badeaux v. Badeaux*, 541 So. 2d 301 (La. App. 1989) (reducing the smoking father's visitation rights because he and his smoking parents, with whom he lived, smoked in presence of the asthmatic toddler; mother was nonsmoker); *Pizzitola v. Pizzitola*, 748 S.W.2d 568 (Tex. App.—Houston [1 Dist.] 1988, no writ) (awarding the non-smoking father custody even though the smoking mother was the primary caretaker during marriage). See generally David B. Ezra, *Sticks and Stones Can Break My Bones, But Tobacco Smoke Can Kill Me: Can We Protect Children from Parents That Smoke*, 13 ST. LOUIS U. PUB. L. REV. 547, 571-75 (1994); Allison D. Schwartz, Comment, *Environmental Tobacco Smoke and its Effect on Children: Controlling Smoking in the Home*, 20 B.C. ENVTL. AFF. L. REV. 135, 136, 152-54 (1993).

<sup>31</sup> Tyler, *supra* note 27, at 788; see Ann H. Zgrodinik, Comment, *Smoking Discrimination: Invading an Individual's Right to Privacy in the Home and Outside the Workplace?*, 21 OHIO N.U. L. REV. 1227, 1238, 1239 (1995). See generally Allen, *supra* note 27, 2064-66.

<sup>32</sup> Neil M. Richards, *The Information Privacy Law Project*, 94 GEO. L.J. 1087 (2006). See generally George B. Trubow & Anita L. Allen, *PRIVACY: CASES AND MATERIALS* vii, x-xxv (1992).

<sup>33</sup> Tyler, *supra* note 27, at 786.

<sup>34</sup> *Id.*

<sup>35</sup> Tyler, *supra* note 27, at 789.

<sup>36</sup> *Id.* See generally Allen, *supra* note 27, at 2065-66.

<sup>37</sup> Tyler, *supra* note 27, at 788; see Allen, *supra* note 27, at 2070; *accord Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>38</sup> Tyler, *supra* note 27, at 1239.

<sup>39</sup> *Id.* at 797.

<sup>40</sup> *Id.* at 788.

<sup>41</sup> *Id.* at 789.

<sup>42</sup> *Id.* at 1239.

<sup>43</sup> *Accord Planned Parenthood*, 505 U.S. at 851; *Griswold*, 381 U.S. at 479.

<sup>44</sup> Tyler, *supra* note 27, at 787-797; e.g., *Lizzio v. Lizzio*, 618 N.Y.S.2d 934 (Family Ct. Fulton Co. 1994); *Badeaux v. Badeaux*, 541 So. 2d 301 (La. App. 1989); *Pizzitola v. Pizzitola*, 748 S.W.2d 568 (Tex. App.—Houston [1 Dist.] 1988, no writ); see Zgrodinik, *supra* note 31, at 1238-39. See generally Allen, *supra* note 27, at 2064-66; Ezra, *supra* note 30, at 571-75; Schwartz, *supra* note 30, 152-54.

<sup>45</sup> Schwartz, *supra* note 30, at 136; see also, Paul Axel-Lute, *Legislation Against Smoking Pollution*, 6 ENVTL. AFF. 345, 350 (1977-78); Dennis H. Vaughn, *Smoking in the Workplace: A Management Perspective*, 14 EMPLOYEE REL. L.J. 359, 360 (1988); Lynn F. Vuich, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. U. CHI. L.J. 610, 615 (1974).

<sup>46</sup> *Id.* at 145; see *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716 (1976); *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 463-66 (1952).

<sup>47</sup> 418 F. Supp. 716 (1976).

<sup>48</sup> Thompson, *supra* note 17, at 612.

<sup>49</sup> *Id.*

<sup>50</sup> *Gasper*, 418 F. Supp. at 718.

<sup>51</sup> Thompson, *supra* note 17, at 504.

<sup>52</sup> *Id.*

<sup>53</sup> *Gasper*, 418 F. Supp. at 718.

<sup>54</sup> *Id.*

<sup>55</sup> 191 F.2d 450 (1951), *rev'd*, 343 U.S. 451 (1952). (Pollack discussed the continual programming of a radio broadcast on streetcars. The D.C. Circuit found that forcing the riders to listen to broadcast against their will violated the Fifth Amendment interest in liberty. The Supreme Court reversed, stating that "[t]he liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others"); Thompson, *supra* note 17, at 505.

<sup>56</sup> *Gasper*, 418 F. Supp. at 720. (The court in *Gasper* found that even if it accepted the appellate court's interpretation, the facts were distinguishable because the audience in *Gasper*, unlike the streetcar riders in *Pollack*, were not a captive audience but instead chose to attend Dome events); Thompson, *supra* note 17, at 505.

<sup>57</sup> *Gasper*, 418 F. Supp. at 720-21.

<sup>58</sup> *Id.* at 721 (citing *Lindsey v. Normet*, 405 U.S. 56 (1972)).

<sup>59</sup> *Gasper*, 418 F. Supp. at 721; Thompson, *supra* note 17, at 505.

<sup>60</sup> *Tanner v. Armco Steel Co.*, 340 F. Supp. 532 (S.D. Tex. 1972).

<sup>61</sup> *Accord Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061 (N.D. W. Va. 1973) (holding that plaintiff's allegations that emissions from Union Carbide Corporation's plant in West Virginia were fouling the air did not present a controversy arising under the Fifth, Ninth or Fourteenth Amendments to the Constitution); see also *Doak v. City of Claxton*, 390 F. Supp. 753 (S.D. Ga. 1975).

<sup>62</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>63</sup> Thompson, *supra* note 17, at 505.

<sup>64</sup> *Gasper*, 418 F. Supp. at 721.

<sup>65</sup> 451 F.2d 1130 (4th Cir. 1971).

<sup>66</sup> *Ely*, 451 F.2d at 1139.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Gasper*, 418 F. Supp. at 721; *accord Hagedorn v. Union Carbide Corp.*, 363 F. Supp. 1061 (N.D. W. Va. 1973); see also *Doak v. City of Claxton*, 390 F. Supp. 753 (S.D. Ga. 1975).

<sup>70</sup> Thompson, *supra* note 17, at 620.

<sup>71</sup> *Federal Employees for Non-Smokers Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978).

<sup>72</sup> *Shimp v. New Jersey Bell Telephone Co.*, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).

<sup>73</sup> 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).

<sup>74</sup> *Id.*

<sup>75</sup> 716 F.2d 1350 (10th Cir. 1983).

<sup>76</sup> Thompson, *supra* note 17, at 506.

<sup>77</sup> *Kensell*, 716 F.2d at 1350.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1351.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 42 U.S.C.A. 61983.

<sup>83</sup> *Kensell*, 716 F.2d at 1351, citing *Rogers v. Okin*, 478 F. Supp. 1342 (D. Mass. 1979), *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980), *vacated sub nom; Mills v. Rogers*, 457 U.S. 291 (1982) (A class action brought by patients at a Massachusetts state mental institution. Part of the relief those patients sought was an injunction against the forcible injection of psychotropic drugs. The district court held that the right to think was an aspect of the right of privacy, with its roots in the First Amendment, and that, absent an emergency, forcible injections of such drugs violated the patients' right to think).

<sup>84</sup> *Kensell*, 716 F.2d at 1351.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> See *Shimp v. New Jersey Bell Telephone Co.*, 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).

<sup>89</sup> *Kensell*, 716 F.2d at 1351; see OKLA. STAT. ANN. tit. 21, 61247.

<sup>90</sup> *Kensell*, 716 F.2d at 1351.

<sup>91</sup> *Id.*; Thompson, *supra* note 17, at 506.

<sup>92</sup> Thompson, *supra* note 17, at 507.

<sup>93</sup> 695 F. Supp. 632 (D.N.H. 1988).

<sup>94</sup> Thompson, *supra* note 17, at 507.

<sup>95</sup> *Id.*

<sup>96</sup> See *Roe v. Wade*, 410 U.S. 113, 155 (1973).

<sup>97</sup> See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).

<sup>98</sup> 695 F. Supp. 632 (D.N.H. 1988).

<sup>99</sup> 368 A.2d 408 (N.J. Super. Ct. Ch. Div. 1976).

<sup>100</sup> Tyler, *supra* note 27, at 416; see also *Smith v. Western Elec.*

*Co.*, 643 S.W.2d 10 (Mo. App. 1982) (holding an employer has a duty to use due care to eliminate harmful conditions, including tobacco smoke); *McCarthy v. Department of Soc. & Health Serv.*, 759 P.2d 351 (Wash. 1988) (holding employer has duty to take "reasonable precautions" to protect employees from environmental tobacco smoke).

<sup>101</sup> *Shimp*, 368 A.2d at 414.

<sup>102</sup> *Id.* at 414 (stating that these dangers were "generally accepted by mankind as true and . . . capable of ready demonstration by means commonly recognized as authoritative").

<sup>103</sup> *Id.* at 415. The *Shimp* court stated:

The evidence is clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs.

<sup>104</sup> *Id.* at 416. The *Shimp* court stated:

In determining the extent to which smoking must be restricted the rights and interests of smoking and nonsmoking employees alike must be considered. . . . The employee who desires to smoke on his own time, during coffee breaks and lunch hours, should have a reasonably accessible area in which to smoke.

<sup>105</sup> Tyler, *supra* note 27, at 789; see Kathleen Sablone, Note, *A Spark in the Battle Between Smokers and Nonsmokers: Johannesen v. New York City Department of Housing Preservation & Development*, 36 B.C. L. REV. 1089, 1090 (1995).

<sup>106</sup> Tyler, *supra* note 27, at 789.

<sup>107</sup> *Id.*

<sup>108</sup> 395 N.W.2d 801 (Wis. Ct. App. 1986).

<sup>109</sup> *Rossie*, 395 N.W.2d at 804.

<sup>110</sup> *Id.*

<sup>111</sup> Thompson, *supra* note 17, at 508; see WIS. STAT. ANN. 610.123(2) (10), (3), (4) (West 1988).

<sup>112</sup> Thompson, *supra* note 17, at 508.

<sup>113</sup> *Rossie*, 395 N.W.2d at 804.

<sup>114</sup> *Id.* at 806.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 807.

<sup>117</sup> *Rossie*, 395 N.W.2d at 804; Thompson, *supra* note 17, at 508.

<sup>118</sup> *Rossie*, 395 N.W.2d at 806.

<sup>119</sup> *Id.* at 807.

<sup>120</sup> *Rossie*, 395 N.W.2d at 807 (citing *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 110 (1949)).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Rossie*, 395 N.W.2d at 807-08; see U.S. CONST. art. I, 6 10; WIS. CONST. art. I, 6 12.

<sup>125</sup> *Rossie*, 395 N.W.2d at 808.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*; see U.S. CONST. art. I, 6 10; WIS. CONST. art. I, 6 12.

<sup>130</sup> *Rossie*, 395 N.W.2d at 808.

<sup>131</sup> Action on Smoking and Health, *State Smokefree Air Laws At-A-Glance*, Feb. 9, 2009, <http://www.ash.org/smokingbans.html> (listing states and types of bans).

<sup>132</sup> Ryan Hackney, *Don't Mess with Houston, Texas: The Clean Air Act and State/Local Preemption*, 88 TEX. L. REV. 639, 667 (2010).

<sup>133</sup> GLOBAL SMOKEFREE PARTNERSHIP, GLOBAL VOICES REPORT: REBUTTING THE TOBACCO INDUSTRY, WINNING SMOKEFREE AIR, STATUS REPORT (2009), [http://www.globalSmokefreePartnership.org/ficheiro/GV\\_report\\_09.pdf](http://www.globalSmokefreePartnership.org/ficheiro/GV_report_09.pdf).

<sup>134</sup> Thomas W. Sculco, *Smokers' Rights Legislation: Should the State "Butt Out" of the Workplace?* 33 B.C. L. REV. 879, 879 (1992).

<sup>135</sup> *Id.*; see *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987).

<sup>136</sup> See e.g., *Federal Employees for Non-Smokers Rights v. United States*, 446 F. Supp. 181 (D.D.C. 1978); *Kensell v. Oklahoma*, 716 F.2d 1350 (10th Cir. 1983).

<sup>137</sup> Sculco, *supra* note 134 at 511; see, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968); *Keyishian v. Regents of the Univ. of N.Y.*, 385 U.S. 589, 605 (1967).

<sup>138</sup> 330 N.E.2d 199 (Mass. 1975).

<sup>139</sup> *Broderick v. Police Commissioner*, 330 N.E.2d 199, 199 (Mass. 1975).

<sup>140</sup> *Id.* at 199.

<sup>141</sup> *Id.* at 202.

<sup>142</sup> *Id.* at 204-05.

<sup>143</sup> *Id.* at 205.

<sup>144</sup> *Id.* at 206.

<sup>145</sup> See Thompson, *supra* note 17, at 511; see, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*,

- 413 U.S. 548, 554-56 (1973).
- <sup>146</sup> See Thompson, *supra* note 17, at 511; see, e.g., *Kelley v. Johnson*, 425 U.S. 238, 247-48 (1976); *McAuliffe v. Mayor & Aldermen*, 29 N.E. 517, 517 (Mass. 1892).
- <sup>147</sup> See Thompson, *supra* note 17, at 511; see *Kelley*, 425 U.S. at 245.
- <sup>148</sup> Thompson, *supra* note 17, at 511. See generally, BUREAU OF NAT'L AFFAIRS, WHERE THERE'S SMOKE: PROBLEMS AND POLICIES CONCERNING SMOKING IN THE WORKPLACE 137 (1987).
- <sup>149</sup> Thompson, *supra* note 17, at 512; see *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487-88 (1955).
- <sup>150</sup> 816 F.2d 539 (10th Cir. 1987).
- <sup>151</sup> *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 540 (10th Cir. 1987).
- <sup>152</sup> *Id.* at 541-42.; Tyler, *supra* note 27, at 789.
- <sup>153</sup> *Grusendorf*, 816 F.2d at 542.
- <sup>154</sup> *Id.*
- <sup>155</sup> *Id.* at 543.
- <sup>156</sup> *Id.*
- <sup>157</sup> Tyler, *supra* note 27, at 789.
- <sup>158</sup> 653 So. 2d 1025 (Fla.1995).
- <sup>159</sup> *City of North Miami v. Kurtz*, 653 So. 2d 1025, 1026-29 (Fla.1995).
- <sup>160</sup> *Kurtz*, 653 So. 2d at 1027; see *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977); *Shaktman v. State*, 553 So. 2d 148 (Fla.1989); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544 (Fla.1985).
- <sup>161</sup> Tyler, *supra* note 27, at 791; see *Kurtz*, 653 So. 2d at 1027-29 (the court held that the Federal Constitution's right to privacy was not implicated because that right applies only to fundamental interests such as "marriage, procreation, contraception, family relationships, and the rearing and educating of children." citing *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir. 1987)).
- <sup>162</sup> *Kurtz*, 653 So. 2d at 1028.
- <sup>163</sup> *Id.*
- <sup>164</sup> *Id.*
- <sup>165</sup> *Id.*; see Tyler, *supra* note 27, at 791.
- <sup>166</sup> See Tyler, *supra* note 27, at 791.
- <sup>167</sup> *Sculco*, *supra* note 134, at 888.
- <sup>168</sup> See Mark A. Rothstein, *Refusing to Employ Smokers: Good Public Health or Bad Public Policy?* 62 NOTRE DAME L. REV. 940, 956 (1987).
- <sup>169</sup> *Sculco*, *supra* note 134, at 888; see 42 U.S.C.A. 6 12101-12213 (West 1991).
- <sup>170</sup> See *Sculco*, *supra* note 134, at 888.
- <sup>171</sup> *Id.*
- <sup>172</sup> *Sculco*, *supra* note 134, at 888.
- <sup>173</sup> *Id.*
- <sup>174</sup> See Paul F. Gerhart, *Employee Privacy Rights in the United States*, 17 COMP. LAB. L.J. 175, 188 (1995).
- <sup>175</sup> See Renee M. Szobonya, *City of North Miami v. Kurtz: Is Sacrificing Employee Privacy Rights the Cost of Health Care Reform?* 27 U. TOL. L. REV. 545, 554 (1996).
- <sup>176</sup> See *Sculco*, *supra* note 134, at 889; ARIZ. REV. STAT. ANN. 6 36-601.02(F) (1993); COLO. REV. STAT. 6 24-34-402.5 (Supp. 1995); CONN. GEN. STAT. 6 31-408 (Supp. 1995); ILL. ANN. STAT. ch. 820, para. 55/5 (Smith-Hurd 1993); IND. CODE ANN. 6 22-5-4-1 (Burns 1992); KY. REV. STAT. ANN. 6 344.040 (Baldwin 1993); LA. REV. STAT. ANN. 6 23:966 (West Supp. 1995); ME. REV. STAT. ANN. tit. 26, 6 597 (West Supp. 1994); MINN. STAT. 6 181.938 (1993); MISS. CODE ANN. 6 71-7-33 (1993); MONT. CODE ANN. 6 39-2-313 (1993); NEV. REV. STAT. ANN. 6 613.333 (Michie 1995); N.H. REV. STAT. ANN. 6 275:37-a (Supp. 1994); N.J. REV. STAT. 6 34:6B-1 (1994); N.M. STAT. ANN. 6 50-11-3 (Michie 1993); N.Y. LAB. LAW 6 201-d (McKinney Supp. 1995); N.C. GEN. STAT. 6 95-28.2 (1994); N.D. CENT. CODE 6 14-02.401 (1991 & Supp. 1995); OKLA. STAT. tit. 40, 6 500 (Supp. 1996); OR. REV. STAT. 6 659.380 (Supp. 1994); R.I. GEN. LAWS 6 23-20.7.1-1 (Supp. 1994); S.C. CODE ANN. 6 41-1-85 (Law. Co-op Supp. 1994); S.D. CODIFIED LAWS ANN. 6 60-4-11 (1993); TENN. CODE ANN. 6 50-1-304 (1991); VA. CODE ANN. 6 15.1-29.18 (Michie 1989); W. VA. CODE 6 21-3-19 (Supp. 1995); WIS. STAT. 6 111.31 (1988 & Supp. 1994); WYO. STAT. 6 27-9-105 (1991 & Supp. 1995).
- <sup>177</sup> *Sculco*, *supra* note 134, at 888; see, e.g., ME. REV. STAT. ANN. tit. 26, 6 597 (West Supp. 1994); OR. REV. STAT. 6 659.380 (Supp. 1994); VA. CODE ANN. 6 15.1-29.18 (Michie 1989).
- <sup>178</sup> *Sculco*, *supra* note 134, at 888; see ILL. ANN. STAT. ch. 820, para. 55/5 (Smith-Hurd 1993); NEV. REV. STAT. ANN. 6 613.333 (Michie 1995); N.C. GEN. STAT. 6 95-28.2 (1994).
- <sup>179</sup> *Sculco*, *supra* note 134, at 897; see, e.g., 1991 Conn. Legis. Serv. 271(3) (West).
- <sup>180</sup> *Sculco*, *supra* note 134, at 890.
- <sup>181</sup> See IND.CODE 6 22-5-4-1 (1991).
- <sup>182</sup> COLO. REV. STAT. 6 24-34-402.5 (1990); 1991 NEV. STAT. 359(1-4); 1991 N.D. LAWS 142(14-02.4-01); and 1991 Ill. Legis. Serv. 87-807 (West).
- <sup>183</sup> *Sculco*, *supra* note 134, at 888.
- <sup>184</sup> See OR. REV. STAT. 6 659.380 (1989).
- <sup>185</sup> *Sculco*, *supra* note 134, at 888; see OR. REV. STAT. 6 659.380 (1989).
- <sup>186</sup> *Sculco*, *supra* note 134, at 889; see, e.g., 1991 N.H. Laws 275:37-a.
- <sup>187</sup> *Sculco*, *supra* note 134, at 889; see, e.g., 1991 Conn. Legis. Serv. 271(3) (West).
- <sup>188</sup> Jessica Jackson, Comment, *Colorado's Lifestyle Discrimination Statute: A Vast and Muddled Expansion of Traditional Employment Law*, 67 U. COLO. L. REV. 143, 145 (1996); see COLO. REV. STAT. 6 24-34-402.5 (Supp. 1995).
- <sup>189</sup> Jackson, *supra* note 188, at 145; COLO. REV. STAT. 6 24-34-402.5(1)(a) (Supp. 1995).
- <sup>190</sup> COLO. REV. STAT. 6 24-34-402.5(1)(a) (Supp. 1995).
- <sup>191</sup> See Jackson, *supra* note 188, at 145.
- <sup>192</sup> See 1991 Ill. Legis. Serv. 87-807 (West).
- <sup>193</sup> *Id.* at 155. See generally, N.Y. LAB. LAW 6 201-d(2) (McKinney Supp. 1995).
- <sup>194</sup> See N.C. GEN. STAT. 6 95-28.2 (1994).
- <sup>195</sup> *Id.*
- <sup>196</sup> Jackson, *supra* note 188, at 154; N.D. CENT. CODE 6 14-02.4-01.
- <sup>197</sup> *Sculco*, *supra* note 134, at 890; see, e.g., 1991 S.D. CODIFIED LAWS ANN. 6 60-4-14 (1991).
- <sup>198</sup> *Sculco*, *supra* note 134, at 890; see, e.g., 1991 N.J. Sess. Law Serv. 207(34:6B3) (West).
- <sup>199</sup> *Sculco*, *supra* note 134, at 890; see, e.g., IND. CODE 6 22-5-4-2 (1991); R.I. GEN. LAWS 6 23-20.7.1-1 (1989).
- <sup>200</sup> Jackson, *supra* note 202, at 146; COLO. REV. STAT. 6 24-34-402.5(2)(a).
- <sup>201</sup> COLO. REV. STAT. 6 24-34-405.
- <sup>202</sup> COLO. REV. STAT. 6 24-34-402.5(2)(a); see also, *Galieti v. State Farm Mut. Auto. Ins. Co.*, 840 F. Supp. 104, 105 (D. Colo. 1993).
- <sup>203</sup> COLO. REV. STAT. 6 24-34-402.5(2)(a).
- <sup>204</sup> *Sculco*, *supra* note 134, at 889.
- <sup>205</sup> *Id.*
- <sup>206</sup> *Sculco*, *supra* note 134, at 889; see 1991 N.J. Sess. Law Serv. 207(34:6B3) (West).
- <sup>207</sup> *Sculco*, *supra* note 134, at 889; see S.D. CODIFIED LAWS ANN. 6 60-4-14 (1991).
- <sup>208</sup> *Sculco*, *supra* note 134, at 889; see, e.g., IND. CODE 6 22-5-4-2 (1991); 1991 N.J. Sess. Law Serv. 207(34:6B3) (West).
- <sup>209</sup> *Sculco*, *supra* note 134, at 889; 1991 La. Sess. Law Serv. 762(966) (West).
- <sup>210</sup> *Sculco*, *supra* note 134, at 889; see, e.g., R.I. GEN. LAWS 6 23-20.7.1-1 (1989).
- <sup>211</sup> See, e.g., R.I. Gen. Laws 6 23-20.7.1-1 (1989).
- <sup>212</sup> See *Sculco*, *supra* note 134, at 891; see, e.g., IND.CODE 6 22-5-4-4 (1991).
- <sup>213</sup> *Sculco*, *supra* note 134, at 889; see, e.g., 1991 Conn. Legis. Serv. 271(3) (West).
- <sup>214</sup> *Sculco*, *supra* note 134, at 888; OR. REV. STAT. 6 659.380 (1989).
- <sup>215</sup> *Id.*
- <sup>216</sup> *Sculco*, *supra* note 134, at 897; see, e.g., 1991 Conn. Legis. Serv. 271(3) (West).
- <sup>217</sup> Jackson, *supra* note 188, at 144; see Paula Span, *Smokers' New Hazard: No Work; Health Costs Behind Job Bias Issue*, WASH. POST, Nov. 12, 1991, at A1.
- <sup>218</sup> Jackson, *supra* note 188, at 144.

# Visual Presentation and Persuasion (in the Courtroom)

By Deirdre Trotter, ACP

The Honorable Larry Noll, Judge of the 408th District Court in San Antonio, Texas, stated in his paper "Top Ten Things in the Courtroom in a Bench Trial" prepared for the Ultimate Trial Notebook: Family Law seminar (December 2009), "Show me: pictures... bring a case to life" which supports the old sayings: "seeing is believing" and a "picture is worth a thousand words." All of this is as important in the courtroom as it is in the classroom. A story can be

told and thought to be understood; then once the story is placed into the actual scene, it is learned that the actions told of could not have happened in the way in which the teller remembered or in the way the listener visualized the event. Visual presentation can assist an individual to understand the message presented and can help individuals recall information more accurately. This paper will discuss opinions and information pertaining to different forms of persuasion, retention

and learning. In certain situations, hearing a message is good enough, reading a message is good enough; in a courtroom, seeing the message and perhaps "living" the message can be vital.

While "we like to think of the courtroom as a setting where we seek truth and justice, in reality the courtroom is fundamentally a world where the art of persuasion is paramount. Evidence...is presented to persuade" (Kritzer, 2009, p. 43). In that vein, Najjar (1998) suggested that we use the "medium that best communicates the information" and that small amounts of information that need to be remembered for short periods of time are remembered best when presented auditorily. Elaborate and unnecessary visual presentations must not be allowed to get in the way of the message. Some concepts like "freedom" cannot be presented visually, but



verbally, engaging the emotions of the listener. "If visual aids are poorly selected or inadequately done, they will distract from what you are saying" (OSHA, 1996, n.p.). In addition, it is important to keep in mind that the audience should be asked to "read" or "listen" but not both; visual aids should not provide reading material while you talk" (OSHA, n.p.).

In an experiment conducted by Douglas R. Vogel, Assistant Professor of MIS, University of Arizona (June 1986), and others, it was concluded that visual presentations were "43% more persuasive than unaided presentations" (1.0 Introduction). In this study, researchers at the University of Minnesota and at 3M Corporation "set out to explore how the use of visual support by a presenter affects the persuasiveness of a presentation" (1.0 Introduction). This research reached the following additional conclusions:

- 1) The persuasive impact of a presentation depends on characteristics of the support used. Presentation support in color is more persuasive than that in black and white. Image enhanced graphics are effective only when used selectively and carefully.
- 2) Presentation support effectiveness varies as a function of speaker quality. A "typical" presenter using presentation support has nothing to lose and can be as effective as a better presenter using no visuals. The better a presenter is, however, the more one needs to use high quality visual support (Vogel, n.p.).

OSHA Office of Training and Education (1996) confirms that "People tend to be eye-minded..."

- ...experimental psychologists and educators have found that retention of information *three days after* a meeting or other event is *six times greater* when information is presented by visual and oral means than when the information is presented by the spoken word alone.
- Studies by educational researchers suggest that approximately 83% of *human learning occurs visually*, and the remaining 17% through the other senses—11% through hearing...
- The studies suggest that *three days after*

an event, people retain 10% of what they heard from an oral presentation, 35% from a visual presentation and 65% *from a visual and oral presentation [emphasis added]* (n.p.)."

In *Power Persuasion*, trial lawyer and computer expert Craig Ball (2006) suggests that presentations be broken up "with flip charts, three-dimensional evidence, even the familiar blowup mounted on a foam board" to prevent boredom with on-screen presentations (p. 12). Ball also suggests that "the importance of key evidence" will be emphasized if it is presented "in the flesh" and not "on-screen, undistinguished from other exhibits." In other words, "the smoking gun" should not "debut" on-screen (p. 12). Ball also suggests that "every idea you want the jury to accept and retain" should have a "visual anchor" (p. 42).

It seems to be the consensus that visual presentation is more persuasive than an auditory presentation alone but combining visual presentation with text or audio achieves the best result (Nugent, 1982, as cited in Najjar, 1998, n.p.).

Taking this a step further, as cited in Najjar (1998) "interactive user interface appears to have a significant positive effect on learning from multimedia (e.g., Bosco, 1986; Fletcher, 1989, 1990; Stafford, 1990; Verano, 1987)" (n.p.). Bosco (1986) and Fletcher (1989, 1990) "examined 75 learning studies and found that participants learned the material faster and had better attitudes toward learning the material when they learned in an interactive instructional environment" (as cited in Najjar, 1998, n.p.). Of course, the courtroom is not customarily conducive to interaction between the lawyers and the jury during a trial. However, engaging jurors through narration synchronized with visual presentation is a start.

Of interest is Najjar's (1998) conclusion that "Multimedia information appears to be more effective for learners with low prior knowledge or aptitude in the domain being learned...." and "benefit most from the elaborative and explanatory advantages offered by multimedia." Multimedia presentation seems to be less important for high aptitude learners (n.p.).

James J. ("Jim") Blascovich, Ph.D. is

currently a Professor of Psychology at the University of California, Santa Barbara. Dr. Blascovich earned a B.S. in psychology at Loyola University of Chicago (1968) and a Ph.D. in social psychology at the University of Nevada, Reno (1972). Dr. Blascovich's "two major research interests are social motivation, and social influence within technologically mediated environments" (Univ. of California, Santa Barbara, Biography, n.d., n.p.). The balance of this paper pertains to the use of Dr. Blascovich's theory pertaining to "Social influence within immersive virtual environments" (Blascovich, 2002) as it applies in the courtroom.

Dr. Blascovich began his research in virtual environments after "walking into the virtual reality lab" of "Jack Loomis, a perception researcher" (Myers, 2008, p. 232). After trying out the virtual environment for himself, he had a thought, "Could virtual environments offer people real seeming experiences?...to explore persuasion?" (p. 232). Dr. Blascovich determined that virtual environments "costs less, requires less effort...provides a greater degree of experimental control..." than the use of actual people and environments would allow. In addition, he concluded "Digital people can be perfectly controlled."

Bailenson, Blascovich, Beall and Noveck (2006) "examines the possibilities and implications of employing virtual environments [VE], immersive virtual environments [IVE] and collaborative virtual environments [CAVE] in the courtroom" (p. 249). Bailenson, et al. (2006) conclude that this technology is "mature enough to be seriously considered for courtroom use" (p. 265). Dr. Blascovich and his colleagues suggest that "If a picture is worth a thousand words, then an immersive virtual reality simulation should be worth at least ten thousand" (p. 265).

Virtual environments are both "immersive and interactive." Some believe that the "risk of manipulation should prevent multimedia from being adopted in trial practice, but it is precisely because these new technologies produce simulated yet interactive reality that they are an ideal technique for rhetorical persuasion and argument....where a subjective measurement of perspective is called

for and where that perspective needs to be tested and even impeached" (p. 250).

Blascovich (2002) defines "virtual environments" as "synthetic sensory information that leads to perceptions of environments and their contents as if they were not synthetic" (as cited in Bailenson, et al., 2006, p. 250). A person can interact with a digital VE by seeing, (head-mounted display), by hearing (earphones), by touching (feedback gloves), by smelling (nosepiece) or by tasting. An IVE "surrounds the user of the system" (Bailenson, et al., 2006, p. 251). IVEs will track (1) "a user's position and head direction, facial expression, and sometimes eye direction to render the scene, providing a wealth of information about where the user is focusing his or her attention...(2) the designer...has a tremendous amount of control over the user's experience, and can design the virtual world to look and feel in almost any desired manner" (pp. 251-252). Another type of VE is a Cave Automatic Virtual Environment (CAVE). Reminiscent of the "holodeck" on *Star Trek: The Next Generation*. The "user stands inside a cube-shaped room with rear-projection screens as walls...the world is projected all around the user on the six sides of the cube....the user wears shutterglasses (for stereoscopic vision) and receives updated visual images by looking at the screens covering the walls" (p. 253).

"One of the most promising courtroom applications of IVEs is re-creating crime and accident scenes" (Phillips 1990, as cited in Bailenson et al., 2006, p. 255) giving "jury members a 'first hand' experience of a crime or accident scene..." (Bailenson et al., 2006, p. 256). "While we would not suggest that any tool can be used to ascertain an objective truth, these immersive simulations can greatly help to impeach the testimony of unreliable witnesses, test forensic assertions, and enhance understanding of a past experience" (p. 255). An IVE would also allow lawyers to better perceive a "witness' experience before the trial begins" (p. 262). In addition, Pertaub, Slater & Barker (2001) assert that "Lawyers can employ IVEs to acquaint witnesses with the stress and rigors of being in a crowded courtroom" and that "Research with IVEs demonstrates that people speaking

in front of groups of 'virtual people' in an IVE feel similar degrees of social anxiety and stress that they do speaking *in vivo* in front of actual people" (Bailenson et al, 2006, p. 262).

While the current state of IVEs lack the realism of "actual situations and people" Bailenson et al. (2006), they believe this has the effect of keeping everyone honest (p. 262). The lack of complete realism minimizes the risk of manipulation and abuse of the simulation, "But so long as we can see the wizard behind the curtain, the more we can trust the trier of fact to distinguish between the 'truth' and rhetorical persuasion" (p. 262). However, a pitfall of IVEs in the courtroom is that the IVE may be so persuasive as to prevent the juror from visualizing an opposing viewpoint. Bailenson et al. believe to prevent this from occurring, all parties must be allowed to manipulate the virtual environment introduced into evidence and have suggested that specific "rules of civil procedure" be implemented to govern the use of immersive virtual environments including that "IVEs:

- (1) not intentionally deceive;
  - (2) be substantially similar to actual events;
  - (3) be rendered so as to minimize the chances jurors might mistake argument for fact;
  - (4) give rise to sanctions for lawyers who intentionally misuse them;
  - (5) and most important, be subject to inspection, manipulation, and modification by the opposing party"
- (p. 263).

However, Bailenson et al. do not believe that the potential of the IVEs for providing inflammatory information exceeds that which is already present in courtrooms.

While IVEs may seem like science fiction, who wants to be the dinosaur in the courtroom? Although visual presentation can be overdone and even interfere with the message in certain circumstances, it is an important part of persuasion. Even Abraham Lincoln took his audience to the battlefield; with visual presentations and IVEs, the battlefield can be brought to the audience, greatly improving the ability to "bring a case to life."

Deirdre Trotter, ACP is with Field, Manning, Stone, Hawthorne & Aycock, P.C. in Lubbock

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# Scruples

## The Ethics of Cloud Computing and Client Data

by Ellen Lockwood, ACP, RP

**W**hat is cloud computing? The National Institute of Standards and Technology (NIST) defines cloud computing as follows:

Cloud computing is a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction. This cloud model promotes availability and is composed of five essential **characteristics**, three **service models**, and four **deployment models**. (*NIST Definition of Cloud Computing, Version 15, 10/07/2009*)

Even if you have never heard of cloud computing or “the cloud,” you probably have used cloud services. Web-based email offered by Internet Service Providers, Google, Yahoo, and others allows users to access their email from any Internet connection because some of the users’ email is stored on the providers’ servers. Google Documents allows users to share documents with others. Dropbox is a service that synchronizes the data stored on the user’s servers on Dropbox’s servers, and synchronizes the



user’s data among the user’s computers.

While cloud computing is often a cost-effective, efficient way to store data, use software, and provide access to data and documents by members of a firm and its clients, there are ethical considerations. The

Texas Disciplinary Rules of Professional Conduct require competent representation (Rule 1.01), keep information confidential (Rules 1.06), and to adequately supervise non-attorney staff to ensure they conform to the Disciplinary Rules.

Competent representation likely includes knowledge of technology used, and/or the use of experienced and capable staff or vendors. While paralegals cannot be expected to become experts on all technology, paralegals should make an effort to gain at least the basic skills for the technology they use.

Of course, paralegals should be aware of the rules regarding confidentiality. In regard to cloud computing, this includes researching the provider to determine the provider’s assurances regarding the following:

- Physical security of the provider’s data center; this could include video surveillance, staff authentication, control of access by visitors and contractors, and intrusion detection systems
- Security of the data; this could include

encrypted communication as security during data transmission, encrypted storage, storage in multiple storage centers as security from regional disasters, multiple environmental and power failure protections

Regardless of the security offered by a cloud computing provider, the law firm or legal department is responsible for controlling access to its data by its employees, vendors, and clients. Most systems permit configuring specific permissions and access rights depending on the type of user. Someone should also have responsibility for deleting permissions of those no longer allowed access. Firms and companies should also incorporate firewalls and application filters, and all computers should include anti-virus and anti-spyware software with automatic updates.

Security precautions should also be taken for servers and backup media. Often these items are unsecured and located under a desk, near windows, or in the same room as the copier/printer. Access to these items should be limited to key employees and kept in a secure area.

While nothing can be absolutely guaranteed secure, paralegals are an important part of the efforts to keep client information confidential, whether in the office, or in the cloud.

*Ellen Lockwood, ACP, RP, is the Chair of the Professional Ethics Committee of the Paralegal Division and a past President of the Division. She is a frequent speaker on paralegal ethics and intellectual property and the lead author of the Division’s Paralegal Ethics Handbook published by West Legalworks. You may follow her on Twitter @paralegaethics. She may be contacted at ethics@txpd.org.*



## In Memoriam— Bob Towery, September 19, 1932—October 29, 2010

Robert “Bob” Towery, a former attorney with the State Bar of Texas, is credited with implementing the idea (promoted by Tom Hanna, former Executive Director) for a Division of the State Bar for paralegals. Texas was the first state in the United States to create a Division of the Bar for paralegals.

Mr. Towery attended the 25th Anniversary of the Division and shared with the attendees that starting the Division was “one of the most memorable projects” of his career. Mr. Towery’s obituary noted that being recognized for his contribution to the paralegal profession in Texas in 1981 “remained an honor he cherished dearly.”

The Division honors Mr. Towery and his efforts that created the beginning of what we have today as a state paralegal organization.

## Ellis County Courthouse is Most Recent “Courthouse of the Month”

The Ellis County courthouse in Waxahachie is the latest “Courthouse of the Month,” designated by Hollerbach & Associates.

Built at the height of the cotton boom in 1897, the Ellis County Courthouse underwent almost \$11 million in restoration work in the early part of the 21st century, reopening in 2002.

“Ellis County is home to one of the most unique courthouses in the entire Southwest,” said Jim Hollerbach, President & CEO of Hollerbach & Associates. “Its restoration is a great testimonial to the hard work being done at the county level with the support of the Texas Historical Commission. We want people to know about the success stories.”

The program, which supports the Texas Historical Commission’s Historic Courthouse Preservation Program, is comprised of a monthly e-newsletter focusing on the restoration successes in a

number of courthouses across the state. Learn more at <http://www.hollerbach.com/texas-historic-courthouse-preservation.html>.



## PD Member Named Among 2011 Paralegal Superstars

Allen F. Mihecoby, CLAS, RP is among 12 paralegals across the country, and the only one in Texas, to be named a 2011 Paralegal Superstar by ParalegalGateway.com, a paralegal social networking website, as it celebrates its tenth anniversary. In naming the recipients, ParalegalGateway.com described the Superstars as those who clearly exemplify some of the best and brightest of our profession. As a Superstar, Allen will be featured in the 2011 Paralegal Superstar Calendar, which was expected to be available in early December.

Allen F. Mihecoby, CLAS, RP is manager of the Law Department, BNSF Railway Company, in Fort Worth.



# TAPS 2010

The 2010 Texas Advanced Paralegal Seminar (TAPS) was held at the Austin DoubleTree Hotel on September 29—October 1, 2010 and was a great SUCCESS. There were 291 registered attendees from all over Texas.

Speaking of success, the TAPS exhibit hall was more than sold out. There were a total of 47 companies that exhibited during the tradeshow held on Thursday, September 30.

In addition the tradeshow, TAPS is the place for networking. In 2010, TAPS featured a Capital Networking Social on Wednesday evening, an off-site social, Capital Laugh-In, at Esther's Follies (a comedy club on Sixth Street on Thursday), and an attendee luncheon, TAPS CAUCUS, on Friday, October 1.

The keynote speaker for the luncheon was Dr. Howard T. Prince, a professor from the LBJ School of Public Affairs at the University of Texas. Dr. Prince's presentation was entitled *The Importance of Leadership in Your Profession and Community*. Many of the attendees raved about his presentation and visited with Dr. Prince before departing that afternoon.

New to TAPS was a panel discussion on the Texas Board of Legal Specialization (TBLS) certification examinations for paralegals. The panel included Lisa Sprinkle, TBLS Board Certified Paralegal—Civil Trial Law, Shannon Watts, TBLS Board Certified Paralegal—Family Law, Rhonda Brashears, TBLS Board Certified Paralegal—Personal Injury Law, Molly Galvez and Brenda Martinez. It was very well attended and attendees expressed a great interest in the TBLS information that was presented.

The Paralegal Division offers two education scholarships to the annual TAPS seminar. This year the recipients of the scholarship, which is based on member-



ship in the Paralegal Division, professionalism, and financial need, were awarded to Kristina Kennedy (Austin) and LaShell Bartholow (Temple).

Many, many thanks go to the Grand Prize sponsors: Cox Smith (San Antonio), Family Law Section of the State Bar, and Jenkins & Kamin (Houston).

The lucky recipients of the three grand prizes drawings for 2010 (\$500 each) were Anne Woods of Houston, Cynthia R. Deviney of Cedar Park, and Priscilla Brooks of Denton.

And of course, last but not least, there were 65 substantive CLE topics presented over three days. Each three-day attendee





could earn up to 14 CLE hours. A few of the presentations are summarized below:

Ranelle M. Meroney of Chamberlain McHaney presented an explanation of the magnitude of *Medicare, Medicaid and the Schip Extension Act* by defining the rights of reimbursement and how it is managed by those in the personal injury arena. Although these amendments are arguably complex, her presentation helped many to understand the functions and fundamentals of a very challenging area of law. Her explanations were concise, straightforward and will assist many of us in our efforts to comply with these very complicated laws.

Judy Kostura of Judge, Kostura & Putman, P.C. gave an in-depth

presentation on *Subrogations and Liens in Personal Injury Cases*, exploring the state and federal statutes and cases on the topic of subrogation from the plaintiff's view point. The material was easy to follow and well structured. She included examples of cases and her paper enabled a better comprehension of the framework of subrogation.

Bennette Zivley, Director of Inspections & Compliance, Texas State Securities Board, gave a very informative presentation on the *Top Ten Investment Scams*. He spoke of the functions and goals of the Texas State Securities Board and gave practical suggestions for investor protection, how swindlers find victims, and precautions to take to avoid becoming a victim. Mr.

Zivley then gave a detailed explanation of the top ten investor traps.

Donna Brown, attorney in Austin, presented *Post Judgment Remedies*, which included not only the legal considerations in enforcements of judgments but provided practical applications that paralegals can apply to assist in post judgment collection efforts from the time a judgment is taken through the various post judgment methods available to recover property of the judgment debtor to satisfy the judgment.

*Spy Wars—Electronic Surveillance in the Digital Age* was presented by Richel Rivers of Brown McCarroll in Austin. Ms. Rivers' topic was very timely in today's world of "information overload." What are our individual rights to privacy versus the public's right to know and the balance between them? Many times these concepts and balance result in conflicts that are decided on fine-line distinctions and technical applications. Ms. Rivers explained the laws and rationale by which the answer is derived.

*Social Networking—Litigation and Discovery Implications* was presented by Mary Ellen King of Martin, Disiere, Jefferson & Wisdom in Austin. Ms. King provided information about using social media for practical purposes and mistakes to avoid when using information learned through these sources in the litigation process including privacy considerations as well as ethical considerations. Ms. King also discussed authentication and admissibility of information found through social media.

*Benched! How the State Commission on Judicial Conduct Oversees and Administers the Judicial Branch*—Seana Willing, of the Executive Director for the State Commission on Judicial Conduct, gave an excellent, concise overview of this agency that was created

in 1965 by an amendment to the Texas Constitution. The 13-member Commission, with a staff of 14, is responsible for investigating allegations of judicial misconduct or disability and for disciplining judges. The Commission has jurisdiction over 3000 judges in Texas from Justices of the Peace to Appellate Judges and their conduct, both on and off the bench. The governing provisions can be found in the Texas Constitution, Texas Government Code and Texas Code of Judicial Conduct. Ms. Willing's presentation included the process the Commission undertakes from when a complaint is filed through the sanction phase, if a judge is found to have engaged in misconduct, to formal proceedings. Ms. Willing explained the mission of the State Commission on Judicial Conduct is to protect the public, promote public confidence in the integrity, independence, competence, and impartiality of the judiciary, and encourage judges to maintain high standards of conduct both on and off the bench.

Attorney and forensic technologist Craig Ball's presentation entitled, *Splendid Search (In E-Discovery)*, explored the finer details of the keyword search when processing e-Discovery materials. Taking into account the one dimensional way that legal professionals often process keyword searches, this presentation focused on the additional steps and methods that legal professionals can employ to execute a successful keyword search. Mr. Ball explored the different coding challenges and limitations that can reduce keyword search effectiveness. In response to these challenges, Mr. Ball presented 10 steps that the legal professional can take to broaden their keyword search skills and produce a more relevant and non-duplicative result.

Kudos to the TAPS Planning Committee,



which did a fantastic job. The TAPS Planning Committee members are always the best of the best and willing to do whatever is needed to make this event a success; this year's committee was no exception.

Members on the TAPS 2010 Planning Committee are listed below:

- Rhonda Brashears and Patti Giuliano, Co-Chairs, TAPS Planning Committee
- Michele Flowers Brooks, Marketing
- Debbie Oaks, Board Advisor and Volunteer Coordinator
- Elizabeth Box and Shannon Watts, Door Prizes
- Rhonda Brashears, On-Line CLE
- Jennifer Barnes, Socials
- Star Moore, Registration
- Ro Buchanan, Speakers
- Patti Giuliano and Rhonda Brashears, Vendors
- Frank Hinnant, Innovative Legal Solutions, Public Member
- Anne Saner, HG Litigation Services, Public Member

As with any event, its success also depends on its supporters. TAPS 2010 was very fortunate to be supported by the following legal service companies. As a special thank you, here is a complete list of those companies that helped make TAPS 2010 a wonderful event for all of the paralegal attendees:

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 The Legal Connection, Inc., Austin  
 U.S. Legal Support, Houston  
 Westlaw Deposition Services, Eagan, MN

*Don't miss TAPS 2011 that will be held in Fort Worth on October 5, 6, & 7, 2011!*

# Computer Skills for the Well-Trained Paralegal

by Aida Kennedy Ziemnicki

**S**trong computer skills are essential for today's paralegals. Included in these skills are the paralegal's ability to adapt to differences in their employer's computer system, selected software programs, and the supervising attorney's personal preferences for document formatting.

The variety of computer systems that we have today range from the most basic freestanding PC with pre-loaded software to the customized international firm's network. Therefore, when training paralegals, we need to focus on conceptual skills in order for the paralegal to be able to transfer this knowledge to another system or software with minimal re-training. These skills can be categorized as software skills and general computer skills.

## Software Skills

A skilled paralegal must have exemplary word processing skills. These include knowing the proper format for a variety of documents and keeping track of the particular drafting preferences of their attorneys. Many paralegals struggle with correct grammar, punctuation, and word usage.

While there is no quick method of improving writing skills, Microsoft Word has some options that can improve writing quality beyond the basic 'Spell Check' feature. In Word 2007, one can access this by selecting File/Word Options/Proofing/Writing Style. Change the selection from 'Grammar only' to 'Grammar and Style,' and then select specific options on the menu for formal writing. Many paralegals



are also interested in seeing the grade level of their writing, which can be seen by selecting 'Readability Statistics.'

Knowing how to implement Boolean search techniques successfully when creating a database query dramatically increases the quality of the paralegal's search results. This skill is used in both legal databases as well as the internet in general. Paralegals who master using terms and the proper Boolean connectors in legal databases are often amazed at how much better their results or 'hits' are in general internet searches. Each database has default connectors and specific symbols for certain connector functions, so one should always check the database's help page for successful search results.

There are many different time management and client conflict checking software, some of which are integrated with other legal administrative software. Whichever software a firm uses, the concept is the same. Use of a timer activated at the initiation of a phone call or task captures many billable hours that are otherwise forgotten.

Paralegals need to recognize their role in the firm as a profit center, as distinguished from an overhead staff member, and utilize the software to document

accurately how each work hour is spent. Many paralegals find accounting for all of their minutes at work is difficult at first, and are surprised to see how much of their day is not accounted for. Some firms have paralegals who have sole responsibility for client conflict checks throughout the firm. However, in smaller firms, a paralegal should know how to check the database for client conflicts.

Paralegals can be particularly valuable to a firm if they have experience in the use of 'slide show' software such as Microsoft PowerPoint. These are used in a variety of ways in the mediation and litigation process. When the paralegal is familiar with the important issues and evidence of the case, as well how to create powerful visual presentations, the result is more successful and cost effective. This does not require that the paralegal be particularly artistic. Features include using appropriate color schemes, use of cropping and enlarging photographs, highlighting techniques for text documents, and subtle animation that brings the slide to life at the mouse click of the presenter. Attention to detail turns a static slide show into a persuasive presentation.

While some firms still use stacks of boxes to store litigation evidence, software has been developed to improve the litigation documentation process. Scanning or importing documents into a database not only allows multiple users to see them at once, but also protects the original document or photo from loss or damage. Some software has the capability to allow users to date, issue code, or otherwise identify database items, which can then be searched for specific terms.

Each user can maintain their own results or notes that can be shared with other users. Once a paralegal has used litigation support software, they have a skill set that is transferrable to many other similar software programs.

## General Computer Skills

There are many general computer safety issues, but three in particular that need to be understood and followed by a paralegal: Data backup, safe internet usage, and disposal of drives and disks.

Every paralegal needs to verify that there is a backup data system in place and that it is used according to the plan. One of the simplest methods for documents is built into Microsoft Word. Auto recover is accessed in Word 2007 by selecting File/Save. To the left of the Save button is a drop down menu called Tools/Save Options. One can select how often the software auto saves and where to store the files.

Each firm that has a network should have an automatic data backup system that is maintained by the technical department. However, for a freestanding PC, one should have a device that automatically backs up one's data to an external hard disk on schedule. How often one backs up is a personal choice as well as the method and selection of backing up the data. Good questions to ask are: how

long it would take to redo the document? Is there data that would be lost or forgotten if not backed up immediately? The answers to these questions will help determine a suitable auto backup schedule.

Online backup programs are available for use over the Internet. Some of them are free for limited amount of data. Be sure to consider the security issues, as well as unsettled attorney-client confidentiality and privilege issues involved, if selecting this storage method.

The widespread use of laptops has created serious questions of internet safety, particularly in the use of public access Wi-Fi spots. Given the sensitive client data that can be stored on a business laptop, paralegals need to consider avoiding all public access Wi-Fi sites and using only secured internet networks. If public sites are used, be sure to turn on encryption software and consider using one of the mobile Virtual Private Networking software programs available.

Finally, when the computer dies, or is determined to have become technologically obsolete, the disposal of the hard drive becomes a sensitive issue. Some firms back up the internal drive to the new system and then dispose of the old drive by physical destruction. Some internal drives are saved and archived to be used later if necessary. An external enclosure can inexpensively create an external

drive from an original internal drive.

Under no circumstances should a computer be given away, even to an employee, without wiping it clean of the data. This can be done by restoring the internal hard drive to its original condition using the restore disks created when the computer was brand new.

Lastly, any CDs or DVDs created for backup purposes and no longer needed should be shredded. Many paper shredders now have the capacity to shred CDs or DVDs. Electronic data needs to be treated as sensitively as paper documents to prevent client information from being released.

Maintaining paralegal skills is a never-ending task. A well-trained paralegal must stay up to date with technology so that the firm can best represent the client both ethically and profitably. Paralegals, either in coordination with the firm's technology department or on their own, can create a structure that works well for the firm using the latest technology and observing the ethical rules.

*Aida Kennedy Ziemnicki is in private practice in Houston, Texas and is also an instructor of "Computers and the Law" and a variety of other traditional and online paralegal courses at the Center for Advanced Legal Studies.*

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