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Municipal Lawyer

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Contents

6 **Laws Affecting Local Regulations and Public Resources for Non-Legal Immigrants**
By Diane Wetherbee and Paige Mims
In 2007, state legislatures across the United States introduced more than 1,000 immigration measures and passed 150 of them – three times more than in 2006. In addition, more than 100 municipalities across the country are regulating unauthorized immigration at a local level. Laws on this topic are complex, and local government lawyers must be careful in responding to calls for greater local regulations in this area.





14 **Witness Demeanor Preparation: Ignoring Your Witness's Nonverbal Testimony Could Kill Your Case**
By S. D. Chambers, III
For years, studies have shown that nonverbal messages play a critical role in communication. Witness demeanor is testimony, and the task of witness demeanor preparation is to ensure that your witness's words match the coinciding demeanor. Because nonverbal messages are always associated with the accompanying verbal statement, they must be controlled to secure effective testimony.

24 **A Picture is Worth a Thousand Words – Maximizing the Impact of Visual Presentations**
By Melinda H. Barlow
Who can forget the visual of O.J. Simpson struggling to put on the too-small black gloves? Who does not recall the moment in *To Kill a Mockingbird* when Tom Robinson demonstrates his useless left arm before the jury? With today's electronically advanced court rooms, a trial attorney must spend as much time on the visual presentation as the oral presentation. Maximize your message by following a few critical tips.

DEPARTMENTS

4 News from IMLA
18 Federal
23 Supreme Court
28 Inside Canada
29 Ordinances
30 ListServ
32 Cases

Municipal Lawyer

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Crisis Management: Global is Local

by Charles Thompson, Jr., General Counsel and Executive Director

Just as we start to believe that our economy is turning around, we must adjust to a new threat: a pandemic flu. In 2005, I delivered a paper at the World Jurist Association's Congress in Beijing on the issue of preparing for, and dealing with, a pandemic. (That paper is available to our members on the IMLA website.) At the time of writing, I don't know whether the current virus – H1N1 Influenza A – turns into a true pandemic, but, certainly, I am seeing its potential.

Forget the CDC and forget FEMA – local governments are the center of action in responding to emergencies, whether they are natural disasters, human disasters, or pandemics. With that in mind, local governments need to consider what they must do to prepare themselves and their communities. When it comes to the potential for a pandemic or bioweapons disaster, no local government will be able to respond with sufficient protective equipment, treatments or medicines; yet, they can put in place protocols for an orderly response. The world has changed since 1918, when the Great Influenza devastated the world and took millions of lives. In 1918, people did not move between continents with the same speed and frequency that we do today – jumping on a plane in England in the morning and landing in New York the same day. While the ease of travel makes our lives more vibrant, the same ease of travel enables the more efficient spread of disease.

In 1918, people did not move between continents with the same speed and frequency that we do today – jumping on a plane in England in the morning and landing in New York the same day. While the ease of travel makes our lives more vibrant, the same ease of travel enables the more efficient spread of disease.

For years, the use of a quarantine in some form or another served as something of a "levee" against the spread of disease. In 1918, the population of the United States was still primarily agrarian. True; we had large cities, but the suburbs were pretty much non-existent. How does this affect a quarantine? In those days, folks on the farm generally could get by and survive for a time without leaving their farm. Folks in the city could often depend on their neighbors for help in times of crisis. Today, if you quarantine a suburb, just the logistics of feeding those people, itself, creates a much more complex and costly dynamic. Without planning, a quarantine will not work, as people will need food. If faced with a loss of income, many residents will try to "break quarantine" to go to work and protect against losing their homes. Should someone break a quarantine order or wish to contest the order, where will the judicial proceedings take place? These contingencies require plans, and (as you can see from a glance at the newspapers) these are but a few of the issues that must be considered.



At IMLA, we are working harder than ever to find ways to help our members find value in membership and to provide necessary services. At the recently-concluded Mid-Year Seminar, the Large Population Centers group suggested we should set up a working group to discuss and work through issues associated with the Stimulus Plan. We have set up that group and, by the time you read this, we should have had at least one conference call for the group.

We have also set up several other working groups or common interest groups. So far, the most active group has been the Code Enforcement group, under the leadership of Roxann Pais of the Dallas City Attorney's Office. The group has had regular conference calls. So far, it has discussed Chicago's Vacant Building Registration law and Portland, Oregon's Distressed Property Receivership program, in addition to having a presentation on how to get stimulus money for code enforcement projects. Another group, the University Cities/College Towns group, under the leadership of Marion Radson (Gainesville, Florida) met at the Seminar and will be getting more active with conference calls and a program at the Annual Conference. The Sports Cities group (made up of cities and counties with professional sports

franchises or major facilities) plans to hold a program at the Conference on "naming rights," and we expect that to be an exceptional program.

IMLA has also set up two special groups: one for the city attorneys of their state's capital city; the other is for those communities engaged in, or contemplating, litigation with lenders over the foreclosure crisis. Both groups have been active in sharing information, and we hope that these groups will find value in the service.

Other groups that are in varying stages of formation: those for border communities, coastal communities, counties, police legal advisors, employment law, and construction law. We have also put together a group for young lawyers. I wish I could explain better what they are, but it has been so long now, I don't remember – anyway, I'm told this group is for lawyers who are 40 years old or less, or who have been in practice for less than ten years.

One last group we are working on, and a new service we hope to unveil shortly, involve ethics. We hope we can set up an Ethics Hotline for IMLA members; further, to use our ethics group to write and develop opinions on ethics for the guidance of our members and to aid state ethics committees as they analyze ethical issues that might affect local government lawyers.

If you have not yet registered for IMLA's 74th Annual Conference in Miami, you'd better hurry! Although the economy still stinks, the hotel rates we negotiated are awesome, and airfares are at some of the lowest rates in years. More importantly, we expect to have one of the best programs ever. This year, we are planning special programming for city/county managers, so bring yours! You should not miss this opportunity to let your city, county or town manager join you in better understanding some of the most important issues that affect us: furloughs, layoffs, impairment of contracts in emergencies, finding ways to save money through energy contracts, understanding the IRS position on public pension plans, and post-issuance bond disclosure and compliance – just to name a few.

The City of Miami embraces dynamic and energetic communities that harmonize to make it one of America's truly unique urban centers. Through programs like *Miami Vice* and *CSI Miami*, television viewers have been treated to the City's skyline, shoreline, energy and beauty. You should not miss this chance to join with Miami's city attorneys to learn how they have helped to make Miami the jewel that it is – and join the rest of us from around the country who also help to make our communities special. See the IMLA website at www.imla.org for registration information and discounts, including the Early Bird discount that ends on July 15, 2009.

Coming in Our Next Issue!

Coming in the **July/ August 2009** Municipal Lawyer! The magazine on *Civil Rights Issues for Local Governments* will include articles on the *Pleasant Grove City v. Summum* ruling; religious freedom issues and local governments; a model for report use of force by police; and the use of red light cameras.

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Laws Affecting Local Regulations and Public Resources for Non-Legal Immigrants

— by Diane Wetherbee and Paige Mims —



Immigration laws (or their shortcomings) are an integral part of the political platforms of many elected officials, both local and national, and the topic is likely a hotbed of discussion for citizens in your community. Although immigration regulations have traditionally been the purview of the federal government, the lack of comprehensive reform in Washington has resulted in state and local governments taking a more significant role in addressing the legal issues related to undocumented workers. In 2007, state legislatures across the United States had introduced more than 1,000 immigration measures, and passed 150 of them – three times more than in 2006.[1] In addition, more than 100 municipalities across the country are regulating unauthorized immigration at a local level.[2] Local solutions have resulted in both pro-immigration policies that seek to embrace and integrate immigrants into the community, and in anti-immigration policies that often bring unintended consequences: community opposition, court challenges, the loss of citizenry, and lost business revenues.

Laws on this topic are complex, and local government lawyers must be careful in responding to calls for greater local regulations in this area. This article will reviews the key legal principles that come into play when local entities enact regulations that affect non-legal aliens and those who provide services to them. It also includes examples of contrasting approaches of cities to this sensitive and complex topic. Second, it provides an overview of the law that affects or limits local governments in their distribution of public resources to non-legal aliens. The article is by no means an exhaustive review of the issues, but is intended as a guide for the local practitioner in responding to inquiries about the role the local government may play in this arena, and the limits of its authority.

Constitutional Considerations – Preemption

There is a common theme running through the anti-immigration ordinances. Generally, these regulations crack down on unauthorized immigrants and push for comprehensive reform by addressing a variety of concerns – day laborers, employment status, housing and perceived overcrowding, identification and drivers' licenses, local law enforcement, education, and English as the official language. These measures often penalize not only the undocumented workers, but their families, business owners, landlords, and others who interact with the unauthorized immigrants.[3]

There are several legal obstacles to the regulation of the immigration issue at the local level. Ordinances that target immigrants raise a number of constitutional issues, including federal preemption, due process, and equal protection questions. There are several issues to evaluate in determining if a proposed ordinance is consistent with constitutional principles. In addition, an examination of court decisions regarding municipal regulations targeting undocumented workers provides insight into the legality of anti-immigration initiatives.

The Constitution makes it clear that ordinances or statutes that conflict with, or duplicate, provisions found in the federal law are preempted.[4] Although it is an oversimplification to say that all state and local laws related to immigrants are preempted by federal law, the courts have consistently held that the federal government is vested with the right to regulate immigration.[5] As a result, ordinances that attempt to confer this power on state or local governments often run afoul of the Constitution.[6] Examples of local laws that would most likely be found unconstitutional because they "regulate immigration" are ordinances that try to define who is a "lawful" immigrant.[7] These ordinances may also be overly vague in their attempt to classify undocumented immigrants, and inadvertently exclude certain categories of lawfully protected immigrants from their definitions. The U.S. Supreme Court has held that state laws that burden the residence of lawfully present immigrants are attempts to regulate immigration and preempted by federal law.[8] Thus, an ordinance that had the effect of denying housing to lawful immigrants because it denied housing to their undocumented relatives would likely be found to be unconstitutional.

Express preemption occurs when a federal law contains a provision that directly prohibits states and municipalities from legislating in that area. For example, the Immigration Reform and Control Act of 1986 (IRCA)[9] expressly states that it preempts any state or local law that attempts to impose civil or criminal sanctions upon those who employ or recruit unauthorized immigrants, or refer them for employment for a fee.[10] Any ordinance that sought to penalize persons who employ undocumented immigrants would probably be found unconstitutional; however, if the regulation simply prohibited employers from knowingly hiring undocumented workers, there probably would not be a preemption obstacle because the provisions would merely reinforce IRCA.

Local ordinances can also be challenged by implied preemption, which can occur in two ways. First, field preemption applies if a regulation is so comprehensive that it is clear that the federal gov-

continued on page 8



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ernment intended to fully occupy the field.[11] The Constitution gives Congress and the federal government exclusive power over immigration, naturalization, and deportation,[12] thus, "Congress has fully occupied the field of immigration regulation through enactment and implementation of the" Immigration and Nationality Act.[13] Second, conflict preemption operates to preempt a law that conflicts with federal law, making it physically impossible to comply with either regulation. This can also apply if the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[14] For instance, a local regulation that creates different time lines or penalties than those in federal laws may be preempted through the operation of this doctrine.[15]

Other Constitutional Issues

In reviewing ordinances, courts also analyze individual rights issues – whether a law provides due process and equal protection.

The Fourteenth Amendment forbids deprivation to any person of life, liberty, or property without due process.[16] Generally, a local government cannot deprive people of a property interest without adequate notice and an opportunity to be heard on any charge. Courts have found that both landlords and tenants have protected property interests under constitutional principles, and that both employers and employees have protected constitutional liberty interests.[17] It is important to note that the constitutional protections contained in the Fourteenth Amendment extend to all persons, not just those that are legally in the country.[18] In determining if a specific law complies with due process, several factors need to be examined.

The regulation needs to be clear and straightforward, so that a reasonable person would understand what is expected of them under the law. For example, if a law requires proof of documentation, it should be precise as to what forms of identification are satisfactory.

Second, there should be a fair hearing process, with notice of any alleged violation of the law and an opportunity for the purported violator to present his side of the matter to an impartial decision-maker within a specified, reasonable time frame.

The Fourteenth Amendment forbids deprivation to any person of life, liberty, or property without due process. Generally, a local government cannot deprive people of a property interest without adequate notice and an opportunity to be heard on any charge.

Equal protection concerns are another area where anti-immigration ordinances falter or fail in legal challenges. The Equal Protection Clause, in brief, directs that all people similarly situated must be treated alike.[19] Ordinances that provide different treatment to different classes of people are suspect under constitutional review if they restrict fundamental rights, such as voting or interstate travel.[20] Laws can also be found to be defective in equal protection analysis if they discriminate based on suspect classifications, such as race or national origin.[21] A regulation may appear to be neutral on its face, but may be challenged because it reflects an intent to discriminate.

Case Studies

Many immigrant-related ordinances are currently under court review and have not been enforced; in other cases, the laws have already been successfully challenged.[22]

In Hazleton, Pennsylvania, Mayor Louis Barletta crusaded against undocumented immigrants in his city, claiming that crime and the burden on social services increased after an influx of Hispanic immigrants in the area.[23] In 2006, city officials passed the Illegal Immigration Relief Act Ordinance (IIRA), which was amended several times, and a Tenant Registration Ordinance.[24] The IIRA proposed to deny business permits to any company hiring illegal immigrants, and impose fines against landlords who rented to them.[25] A suit was filed to block enactment of the ordinances, with the plaintiffs including lawful permanent residents, undocumented aliens, and a number of organizations, including Latino business and immigrant rights groups. They claimed that the ordinances deprived residents of their equal protection and due process rights and violated state and federal housing laws.[26] The plaintiffs also argued that the law usurped the federal government's exclusive power to regulate immigration, and that allowing every city to set its own local regulations would create a dysfunctional set of dueling rules and regulations. In 2007, a federal judge ruled against the City, finding that the IIRA was preempted by federal law[27] and violated due process.[28] That ruling was appealed to the U.S. Court of Appeals for the Third Circuit, with oral argument in late October of 2008.[29] A ruling is still pending. The Hazelton case is the only lawsuit challenging a local anti-immigrant law to have been decided after a full trial, and the outcome will be important to cities seeking to regulate in this area.[30]

Farmers Branch, Texas also embarked upon immigration reform several years ago. In 2006, its city council unanimously passed an ordinance that required tenants to provide proof, to landlords, of U.S. citizenship or eligible immigration status as a prerequisite to entering into a lease.[31] In response to legal challenges, the rule was later revised to include exemptions for minors, seniors and some mixed-immigration-status families.[32] Citizens endorsed the law in 2007, the Nation's first public vote on a local government ordinance aimed at challenging unauthorized immigration.[33] Subsequently, however, a federal judge enjoined the City from enforcing its law, finding that the ordinance regulated immigration and was, therefore, preempted by federal law.[34]

Farmers Branch subsequently hired a law firm and consulted with a University of Missouri law professor to redraft the ordinance and address the legal issues raised.[35] The result was a new proposal, adopted by city council in early 2008, that required prospective tenants to get a city license to rent houses and apartments.[36] This version of the ordinance would require the City, as opposed to landlords, to verify tenant residency

requirements. Farmers Branch officials wanted the municipal building inspector to use the Systematic Alien Verification for Entitlements Program (SAVE) program, administered by the federal government, to check the immigration status of renters, although there seems to be disagreement about whether the system can confirm if a person is residing legally in the U.S.[37] The City continued to face court challenges over its legislation: three apartment complexes filed suit against the City, claiming the licensing requirements were unconstitutional.[38]

Fighting such challenges to local regulations of immigration can be expensive. As of the end of 2008, an estimated $2 million dollars had been spent in legal fees by the City of Farmers Branch on this issue.[39]

Given these costs, it's not surprising that some cities – like Riverside, New Jersey – opt to abandon their efforts to regulate migrants.[40] The "Riverside Township Illegal Immigration Relief Act"[41] attempted to ban undocumented immigrants from renting, residing, using property, or being employed in the town. The Township subsequently decided to repeal its ordinance in the face of costly litigation.[42] It is significant to note that the costs associated with anti-immigration measures are not limited to the expense of legal proceedings. The Riverside ordinance had a profound impact on the Township: one-third of its immigrant population moved away, causing some businesses to close, while other businesses saw their sales decline by as much as 50 percent.[43]

The inadvertent consequences of these types of ordinances should be carefully considered because they create public policy concerns for local officials. As shown by Riverside Township, cities that pass anti-immigration legislation may experience large numbers of residents moving away, economic losses, falling tax revenues, and companies avoiding the area because of the difficulties in complying with the laws. Enforcement of local regulations is costly and not as easy as one might assume. While it seems straightforward – either someone is here legally, or not – there are multiple types of immigration status with various forms of proof, which complicate a determination of whether someone is violating the law. Lastly, anti-immigration sentiment and legislation can compromise community relations.[44]

Pro-Immigration Policies

Not all municipalities are passing legislation that discourages immigrants from assimilating locally. Some local governments are finding new and innovative ways to integrate undocumented residents into the community and facilitate relationships with the long-time citizenry. Several municipalities have passed pro-immigrant, or immigration-neutral, legislation. Some of these provisions include prohibiting local law enforcement agencies from enforcing federal immigration laws, and declaring that people will be treated equally regardless of immigration status.[45] Other local resolutions include supporting "English as a second language" programs and laws encouraging the federal government to pass comprehensive immigration reforms.[46]

A Model

Yale Law School's Community Lawyering Clinic, in collaboration with JUNTA (a nonprofit entity serving the Latino and immigrant communities in New Haven) and ULA (a Latina action group that advocates for immigrants), prepared a report, *A City to Model – Six Proposals for Protecting Public Safety and Improving Relationships Between Immigrant Communities and the City of New Haven*, that was presented to the New Haven, Connecticut, city council in March 2005.[47]

Fair Haven is a port community in New Haven, and Latinos account for 50.3% of all of Fair Haven's residents. The report sought to address the unique needs of the Latino immigrant population and improve the conditions of life for New Haven immigrants. The organizations that worked on the report recognized a need to create an atmosphere of respect and civil treatment for all immigrants, including undocumented individuals. The following outlines their suggestions for ordinances to address the security concerns of the immigrant population, improve the effectiveness of local government, and create opportunities for new types of city-community relationships:

Communicate with Local Banks.[48] The proposal recommended that the City open up channels of communication and educate banks (and other financial institutions) so customers could open accounts without providing social security numbers (SSNs). This would include helping banks understand that the law did not require SSNs in order to open accounts, and helping to create reasonable guidelines for acceptable and alternative forms of customer identification (ID).

City ID Cards.[49] The proposal suggested a mechanism to assist residents who could not participate in community affairs because of proper identification barriers. Federal and state laws did not prohibit municipalities from creating and issuing ID cards, and issuing such cards to immigrants would help them to engage in local commerce. Local governments throughout Connecticut and the U.S. have issued IDs for a wide range of reasons – for example, Washington, D.C., issues ID cards to residents who can prove that they are over 15 years of age and reside in the District.

Police Policy of Non-Enforcement of Federal Immigration Laws.[50] The proposal advocates that the City implement a police department policy recognizing that immigration is a matter best handled by the federal government. Federal and local authorities have traditionally worked cooperatively on criminal issues, but civil matters based in immigration have historically been solely a federal concern. After Sept. 11, 2001, the federal Department of Justice issued a memo advising that local law enforcement officers did have the ability to make civil immigration arrests; however, it was up to each municipality to decide if it wanted to enforce such matters locally. Referring to the chilling effect that police enforcement of immigration laws could have on relations with immigrant populations, the proposal indicates that a non-enforcement policy would allow police resources to be spent on dealing with local crime, and could help to build trust between local authorities and immigrant populations.

Police Department Enforcement of Criminal Wage Laws.[51] Cities can develop policies to protect undocumented workers from being exploited on-the-job and in wage payment through programs

that create a mechanism for police enforcement of criminal laws that protect workers. The Central Texas Immigrant Workers Rights Center (CTIWoRC) in Austin, Texas, has developed a program that is the model for the rest of the country. CTIWoRC worked with the police and the county attorney to enforce a Texas Penal Code provision on theft of services (the law makes it a crime to agree to compensate someone for a service and, after the service is performed, fail to make payment after receiving notice of a demand for payment).[52] Austin advocates were successful in getting the definition of "services" interpreted to include wages, making a failure to pay wages to immigrant workers a crime under the statute. The following elements are required for a successful theft of services program: an applicable state or municipal law; relationships with local police and prosecutors; a police department non-enforcement policy regarding immigration laws; a formal procedure for police and prosecutors to process the cases; and a good system for coordinating the management of the complaint and the follow-up process. The Austin program has all of these elements and has been successful, but these programs take considerable time and resources.

Looking to Best Practices Nationwide.[53] The proposal encouraged the City to look to best practices for improving police-community relations, by reviewing initiatives taken by other cities to improve police department relationships with immigrant communities. This may help to build trust and diminish fear, so that citizens will cooperate with law enforcement in reporting crimes. Police departments that have effectively instituted multi-faceted "best practice" programs include: Charlotte-Mecklenburg, North Carolina; Vegas, Nevada; and Clearwater, Florida. An initiative that has been particularly successful is the establishment of a bilingual and multi-cultural team of officers designated to address Latino-immigrant matters. This initiative results in increased crime reporting, increased accessibility of services, expanded information flow, and a more efficient response and information-gathering. Other programs include citizen programs (e.g., a Spanish-language citizen police academy), administrative solutions (Spanish-language signs and pamphlets), employee cultural-awareness training, program for police station visits for immigrants, and mayor-sponsored outreaches (liaison offices or commissions) that focus on integrating immigrants into the local government and community.

Creating an Office of Immigrant Affairs.[54] The proposal encourages the establishment of a city office aimed at assisting new immigrant residents, to help familiarize them with city services and programs, and which could also create and manage program areas for immigrants. This office could also provide an opportunity for the City to interact with and learn more about its citizens. The office director would act as a liaison between the immigrant community, the mayor, and community-based immigrant organizations. Cities that have already established this type of office include New York, Boston, and Philadelphia.

Public Resources and Non-Legal Aliens

The federal policy for immigrants and their access to public resources contains the following three principles: immigrants should strive for self-sufficiency as their primary goal; immigrants within our borders should not depend on public resources, but on their own capabilities, sponsors, and private organizations; and, public benefits should not be an incentive for immigration.[55]

With that in mind, there are many public programs that are available to immigrants who are legally within our borders, but not citizens. The fact that non-citizens are provided with any public services or benefits may be repugnant to some people; however, there are instances where immigrants,[56] including non-legal aliens (those who have entered this country unlawfully), are entitled to services and benefits. This section will focus primarily on the obligations or restrictions respecting providing public services and benefits to non-qualified aliens, including non-legal aliens.

Federal Restrictions on Public Subsidies for Aliens

Title IV of the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996[57] (PRWORA) prohibits a state or local government from providing public subsidies/benefits to non-qualified aliens.[58] Although "non-qualified alien" is undefined, the law defines a "qualified alien" as including an individual admitted into the United States for permanent residence under the Immigration and Nationality Act of 1990 (INA);[59] one granted asylum under Section 208 of INA; a refugee pursuant to Section 207 of INA; those paroled into the United States, detained pending deportation, or granted conditional entry; a Cuban or Haitian refugee; and certain battered aliens and their children.

Non-qualified aliens include some classes of aliens who have entered the country lawfully, as well as illegal aliens. The following public benefits may not be provided to non-qualified aliens: grants, contracts, loans, professional or commercial licenses provided by local government; and retirement, welfare, health, disability, public or assisted housing, post-secondary education, food assistance, unemployment benefits or other similar benefits for which payments are provided to an individual or family by a state or local government agency or by appropriated funds of the same.[60]

PRWORA has several exceptions to the restriction on public assistance, including assistance for health-care items and services for emergency medical conditions (except organ transplant procedures); public health assistance for immunization; and testing and treatment of communicable diseases.[61] Another exception that allows programs for non-legal aliens are those that are authorized by the U.S. Attorney General, as long as those programs are:

> In-kind services provided at the community level, including those offered by public or private nonprofit agencies that do not condition the assistance or amount on the individual's income or resources; and are necessary to protect life or safety.[62]

In 2001, then Attorney General Janet Reno implemented that authority and issued AG Order No. 2353-2001, outlining the types of programs that were authorized for non-qualified aliens. Programs covered by this Order are:

- General government service widely available to the public, such as police, fire, ambulance, transportation, sanitation, and other widely-available services;
- Programs for crisis counseling and intervention; services related to child and adult protection, victims of domestic violence, or victims of other criminal activity; violence and abuse prevention, or the treatment of mental illness or substance abuse;
- Short-term shelter or housing assistance for the homeless, for victims of domestic violence, or for runaway, abused, or abandoned children;
- Programs, services, or assistance to help individuals during adverse weather conditions;
- Soup kitchens, community food banks, senior nutrition programs, and other nutritional programs for persons requiring special assistance;
- Activities designed to protect the life or safety of workers, children, or community residents; and
- Any other program, service, or assistance necessary for the protection of life or safety.[63]

These exceptions are not permissive and providers may not rely on the PRWORA in denying services covered by this Order.

Violations of PRWORA

PRWORA does not provide any specific criminal or civil penalty for violations, and there are no reported cases of any enforcement efforts; thus, it would seem that violations may be limited to obtaining injunctive relief. A word of caution, however: entities should review whether there are any references to PRWORA-compliance in a federal grant program in which they are a recipient. Federal subsidy programs often contain commitments that require recipients to comply with an array of federal laws unrelated to the grant's purpose, and violations of those requirements may result in the forfeiture of, or a requirement to repay, the grant funds. Lastly, even though PRWORA has restrictions, Congress has authorized states to allow non-legal aliens to be eligible for their state or local benefits if the state law was enacted after 1996.[64] This explains why some states have provided financial or other assistance broader than what is described above.

Are You PRWORA-Compliant?

Does your city ask for proof of legal status before providing a license, service or benefit? (A community can require verification of alien status in the distribution of its public benefits.[65]) Is the information sought uniformly for all, or only certain, applicants? If only some applicants are asked, a city may be faced with a race or national origin discrimination claim over that practice. Even for the well-intentioned and proactively-minded, there are a number of hurdles in showing compliance with PRWORA, particularly for those trying to distinguish between qualified and non-qualified aliens.

From a practical perspective, discerning who is eligible, under PRWORA, to receive a benefit/service/license is not a minor undertaking. Many people in this country may be here on immigrant visas that cover: foreign government officials and their families and personal employees; visitors; those under a visa waiver program; aliens in transit; students and their spouses and children; temporary workers (nurses, fashion models, agricultural workers, and spouses and children); persons engaged to marry a U.S. citizen; employees who are part of an intra-company transfer, and others.

Given this range of classes of legal aliens, will most city employees who administer programs know the visas that are associated with these classes to determine eligibility?

Other Exceptions

Aliens are eligible for post-secondary education benefits if the same benefit is offered to citizens and nationals without regard to residency in the state.[66] Many states offer in-state tuition to non-qualified aliens, provided the student files an affidavit stating that he has applied to legalize his immigration status or will do so upon becoming eligible to do so, and for those who have attended high school in their state for three or more years.[67] Those states may rely on the fact that in-state tuition is not a "monetary payment" that would otherwise violate PRWORA; instead, in-state tuition is a status benefit.

Children may attend public schools without proof of immigration documentation, and participate in all programs.[68] Further, a student who is eligible for free public education benefits is also eligible for free school breakfasts and lunches, without regard to citizenship, or alien or immigration status, pursuant to the Russell National School Lunch Act and Child Nutrition Acts.[69]

A hospital with emergency care facilities is required to comply with the federal Emergency Medical Treatment and Active Labor Act, and assess and stabilize any individual needing such assistance.[70] The obligation to provide emergency treatment extends to anyone, regardless of their status or ability to pay, and a violation can incur a penalty up to $50,000 per offense.

Language for Information or Services

There are occasions where translation needs for non-English speakers must be met. For example, jurisdictions covered by the Voting Rights Act must print their election materials in the language applicable to the minority group;[71] another example is a state law that may obligate a court to provide translation services for a defendant or a witness.[72]

Cities that receive federal assistance must also comply with Executive Order 13166,[73] intended to ensure that those with limited English proficiency (LEP) have meaningful access to programs, employment, and benefits and activities that are funded, in whole or part, by the federal government (including loans). This extends to federal programs that are passed through local governments to administer. The following factors are considered in determining whether meaningful access has been provided, as required by the Order: the number or proportion of LEP persons in the eligible service population, the frequency with which LEP individuals come into contact with the program, the importance of the service provided by the program, and the resources available to the recipient.[74]

In sum, municipalities need to evaluate their services, eligible population, and resources to determine the extent to which they must offer translation services to comply with this Order.

Conclusion

Immigration reform generates much discussion and debate in the United States. Despite the cost and unfavorable court rulings for local governments engaged in anti-immigration reform, many cities and states continue to pass legislation that is hostile towards unauthorized immigrants. Communities across the Nation are experiencing hardship in the form of economic loss, bad publicity, and loss of population as a result of ordinances targeting immigrants, their families, and their employers. Municipalities need to find new ways to address immigration reform, and some cities are already putting into practice pro-immigration policies with favorable results. These programs are strengthening relationships in the community and improving the effectiveness of local government. Cities need to consider the goals of the community and weigh the potential legal restrictions when deciding what, if any, immigration reforms they want to implement.

Notes

1. C. Rodriguez, M. Chishti, and K. Nortman, *Testing the Limits: A Framework for Assessing the Legality of State and Local Immigration Measures*, Migration Policy Institute, Washington D.C. (2007), at www.migrationpolicy.org.
2. *Id.* at i.
3. For example, the preamble to an "Illegal Immigration Relief Act Ordinance" adopted by Hazleton, Pa. in 2006 states: "[i]llegal immigration leads to higher crime rates, subjects our hospitals to fiscal hardship and legal residents to substandard quality of care, contributes to other burdens on public services, increasing their cost and diminishing their availability to legal residents, and diminishes our overall quality of life." The ordinance sought to regulate business entities that hired or employed illegal workers, and made it unlawful for any person or business entity that owned a dwelling unit in the City to harbor an illegal alien in the dwelling unit. Hazleton, Pa., Ordinance 2006-18 (Sept. 08, 2006).
4. U.S. CONST. art. VI, cl. 2.
5. *See* DeCanas v. Bica, 424 U.S. 351, 354-55 (1976); *see also*, Kleindienst v. Mandel, 408 U.S. 753 (1972), Fiallo v. Bell, 430 U.S. 787 (1977).
6. *See* Lozano v. City of Hazleton, No. 07-3531 (3d Cir. Filed Aug. 30, 2007); Villas at Parkside Partners v. City of Farmers Branch, Nos. 3:06-CV-2371-L, 3:06-CV-2376-L, 3:07-CV-0061-L, 2007 WL 1498763 (N.D. Tex. May 21, 2007); *see also*, *DeCanas*, 424 U.S. at 355-56; Graham v. Richardson, 403 U.S. 365 (1971) (statute restricting benefits to certain legal permanent residents held unconstitutional); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 419 (1948).
7. *See* League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755 (C.D. Cal. 1995) (a voter-approved initiative measure requiring state personnel to verify the immigration status of persons with whom they came into contact, to report persons who were in the country unlawfully and to deny those persons social services, health care, and education benefits, and that required state officials to notify individuals that they were present in the country unlawfully and had to "either obtain legal status or leave the United States," were preempted by federal immigration law because they had a direct and substantial effect on immigration).
8. *Takahashi*, 334 U.S. 410, 420 (1948).
9. 8 U.S.C. § 1101 *et seq.* (West 2009). IRCA prohibits the employment of aliens who are not lawfully present in the country and not lawfully authorized to work in the U.S.; 8 U.S.C. § 1324a(h)(3). It requires employers to verify the identity and eligibility for work of new employees by reviewing specified documents. 8 U.S.C. § 1324(a)(b). It prohibits the hiring of aliens who do not have proper documentation. 8 U.S.C. § 1324(a)(1).
10. IRCA's express preemption clause states: "The provisions of this section preempt any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1324a(h)(2).
11. DeCanas v. Bica, 424 U.S. 351, 356-57 (1976).
12. Hines v. Davidowitz, 312 U.S. 52, 62 (1941); *see also DeCanas*, 424 U.S. at 354, 356.
13. League of United Latin Am. Citizens v. Wilson, 908 F. Supp. 755, 775-76 (C.D. Cal. 1995), citing *Gonzales v. City of Peoria*, 722 F.2d 468 (9th Cir. 1983).
14. *Id.* at 768, citing *Michigan Canners & Freezers v. Agric. Mktg & Bargaining Bd.*, 467 U.S. 461, 469 (1984); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).
15. For more about preemption, see Amanda G. Lewis, *Federal Preemption of State and Local Laws: State and Local Efforts to Impose Sanctions on Employers of Unauthorized Aliens*, Advanced Seminar on State Attorneys General (May 5, 2008) at http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=15237&rtcontentdisposition=file.
16. U.S. CONST., amend. XIV.
17. Lindsey v. Normet, 405 U.S. 56 (1972); Lozano v. City of Hazelton, 496 F. Supp.2d 477 (M.D. Pa. 2007).
18. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).
19. U.S. CONST. amend XIV. *See also*, Plyler v. Doe, 457 U.S. 202 (1982).
20. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1964); Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, ex. rel. Williamson, 316 U.S. 535 (1942).
21. McLaughlin v. Florida, 379 U.S. 184 (1864); Graham v. Richardson, 403 U.S. 365 (1971).
22. The ACLU's website lists local anti-immigrant ordinance cases at http://www.aclu.org/immigrants/discrim/27848res20070105.html.
23. Milan Simonich, *Hazleton ordinance aimed at illegal immigrants puts mayor at center stage*, PITTSBURGH POST-GAZETTE, Aug. 27, 2006.

24. Hazleton, Pa., Ordinance 2006-10 (July 13, 2006); as amended by Ordinance 2006-18 (Sept. 08, 2006), Ordinance 2006-35 (Dec. 13, 2006), and Ordinance 2007-6 (Mar. 15, 2007). Another measure, Ordinance 2006-13 (Aug. 15, 2006) (the Tenant Registration Ordinance) required occupants of all rental units, as defined, to obtain an "occupancy permit" by showing proof of legal citizenship or residence; and Ordinance 2006-19 (Sept. 21, 2006) (the Official English Ordinance) made English the City's official language.
25. *Id.*
26. Lozano v. City of Hazelton, 496 F. Supp. 2d 477 (M.D. Pa. 2007).
27. *Id.* at 519-22.
28. *Id.* at 536 (employer and employee provisions); 538 (landlord and tenant provisions).
29. Lozano v. City of Hazleton, No. 07-3531 (3d Cir. Filed Aug. 30, 2007).
30.Earlier this year, the Ninth Circuit ruled on the validity of the Legal Arizona Workers Act, which allowed Arizona courts to suspend or revoke the business licenses of employers who knowingly or intentionally hired unauthorized aliens. The court affirmed the district court's finding that the Act was not preempted by IRCA and did not, on its face, violate employers' right to procedural due process. Chicanos Por La Causa, Inc. v. Napolitano, 558 F.3d 856 (9th Cir. 2009).
31. Farmers Branch, Tex., Ordinance 2892 (Nov. 13, 2006).
32. Farmers Branch, Tex., Ordinance 2903 (Jan. 22, 2007).
33.The May 12, 2007, referendum passed by a margin of 68% to 32%. Stephanie Sandoval, *FB immigration law wins easily*, The Dallas Morning News, May 13, 2007.
34. Villas at Parkside Partners v. City of Farmers Branch, Nos. 3:06-CV-2371-L, 3:06-CV-2376-L, 3:07-CV-0061-L, 2007 WL 1498763 (N.D. Tex. May 21, 2007).
35. *Judge Strikes Down Farmers Branch Immigration Rule*, cbs11tv.com at http://cbs11tv.com/local/farmers.branch.immigration.2.734923.html.
36. Farmers Branch, Tex., Ordinance 2952 (Jan. 22, 2008).
37. *Database Doesn't Say Who is Illegally in the Country*, The Associated Press, Nov. 06, 2008.
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39. *For Whom the Bill Tolls, Farmers Branch has Some Explaining to Do*, Dallas Morning News, Dec. 26, 2008.
40. Ken Belson and Jill P. Capuzzo, Towns Rethink Laws Against Illegal Immigrants, New York Times, Sept. 26, 2007 at http://www.nytimes.com/2007/09/26/nyregion/26riverside.html; The Associated Press, *ACLU Makes Town Drop Anti-Illegals Law*, Sept. 17, 2007, at http://sweetness-light.com/archive/nj-town-quietly-drops-anti-illegals-ordinance.
41. Town of Riverside, N.J., Ordinance 2006-16 (July 26, 2006), as amended by Ordinance 2006-26 (Nov. 22, 2006).
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44. For a more detailed analysis of issues associated with immigration regulation, see http://www.migrationinformation.org/DataHub, and reference the National Center on Immigrant Integration Policy, a crossroads for elected officials, researchers, state and local agency managers, grassroots leaders and activists, local service providers, and others who seek to understand and respond to the challenges and opportunities that immigration creates in communities.
45. Anthony Faiola, *Looking the Other Way on Immigrants*, Washington Post, April 10, 2007, at http://www.washingtonpost.com/wp-dyn/content/article/2007/04/09/AR2007040901471_pf.html.
46. *A City to Model–Six Proposals for Protecting Public Safety and Improving Relationships Between Immigrant Communities and the City of New Haven* (Oct. 2005), New Haven, Co. Junta for Progressive Action, Inc. and Unidad Latina en Acción, at http://newhavenindependent.org/archives/2005/10/A_City_to_Model.pdf (hereinafter, "the proposal").
47. *Id.*
48. *Id.* at 3-4.
49. *Id.* at 5-8.
50. *Id.* at 9-11.
51. *Id.* at 12-14.
52. David Hafetz, *Unpaid Workers Speak Up and Police Listen, Act*, May 27, 2003, at http://equaljusticecenter.org/2003-05-27_Austin_A-S.htm.
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55. 8 U.S.C.A. §1601 (West 2009) (statements of national policy concerning welfare and immigration).
56. "Immigrant" and "alien" will be used interchangeably.
57. 8 U.S.C.A. §1621 (West 2009).
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59. 8 U.S.C. § 1460 *et seq.* (West 2009).
60.8 U.S.C.A. § 1621(c)(1) (West 2009).
61. 8 U.S.C.A. § 1621(b) (West 2009).
62. 8 U.S.C.A. §1621(b) (West 2009) (emphasis added).
63. 66 Fed. Reg. 3613 (Jan. 16, 2001).
64. 8 U.S.C.A. §1621(d) (West 2009).
65. 8 U.S.C.A. §1625 (West 2009).
66. 8 U.S.C. A. §1623 (West 2009).
67. *See, e.g.*, Kan. Stat. Ann. §76-731a (West 2009); Tex. Educ. Code Ann. §54.052 (Vernon 2005).
68. Plyler v. Doe, 457 U.S. 202 (1982).
69. 8 U.S.C.A. §1615(a) (West 2009).
70. 42 U.S.C.A. §1395dd (West 2009 .
71. 42 U.S.C.A. §1973aa-1a(c) (West 2009).
72. Tex. Gov't Code Ann. §57.002 (Vernon 2007); Cal. Const. Art. I, §14 (West 2009); Wash. Rev. Code Ann. § 2.43.010 (West 2009).
73. Exec. Order No. 13166, 67 Fed. Reg. 41455 (June 18, 2002).
74. *Id.* at § 41459. ML

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Witness Demeanor Preparation—Ignoring Your Witness's Nonverbal Testimony Could Kill Your Case

— by S. D. Chambers, III —



"Actions speak louder than words." This timeworn maxim is still true today. Witness demeanor is testimony, and the task of witness demeanor preparation is to ensure that your witness's words match the coinciding demeanor. It is well established that witness credibility results from consistency in all the information offered through testimony. As with the substantive information offered, consistency between a witness's verbal and nonverbal statements is vital to gain juror confidence. A witness must not only tell the truth, but tell it in a way that is both strong and believable.[1] Conflicting verbal and nonverbal testimony can negate convincing facts and kill a strong case.

For years, studies have shown that nonverbal messages play a critical role in communication. In fact, vocal characteristics (volume, pace, hesitations) and visual behavior (eye contact, posture, gestures) may constitute as much as 93 percent of the total information offered in an interaction.[2] The power of testimony depends not upon the intended message of substance, as one might assume, but, rather, the demeanor associated with the expressed verbal statement. To obtain accurate, clear, and credible testimony, your witnesses must control even the most subtle nonverbal messages that distract from, confuse, and contradict their verbal statements.

Recognizing the importance of nonverbal communication offers many general advantages to attorneys. In his article, *Body Language, Speaking from the Other Side*, attorney John Barkai presents a few of the valuable practical applications nonverbal communication skills provide every practicing attorney.[3] Communication research demonstrates a strong correlation between specific nonverbal signals and the important human qualities of persuasion and credibility upon which jurors rely.[4] Incorporating such knowledge into one's case presentation can be an invaluable asset for litigators. Government defense attorneys have much to gain from paying closer attention to the unconscious and nonverbal communication their defendants broadcast to jurors.[5] Trial attorneys who prepare for the significant effect nonverbal messages have upon credibility are at a clear advantage.

A general understanding of nonverbal communication is clearly beneficial to all practicing attorneys. When preparing your witnesses to testify, it is helpful to know the factors that underlie your witness's demeanor. Demeanor conveys feelings. The feelings expressed through demeanor convey the human character qualities that determine how your witness is perceived. These character qualities are essential to both witness credibility and your case theme. Jurors formulate their opinion of each witness's character based upon their own observations. If your witness does not appear as you claim, you lose credibility.

Our jury system relies upon each juror's intuitive feeling as the ultimate judge of witness credibility. Certainly, the facts matter; however, the substance you offer at trial is only as strong as its source. If your witness's demeanor conflicts with the verbal testimony, jurors believe the demeanor, credibility is lost, and the substance is compromised—if not totally rejected. Witness preparation should conscientiously address all the factors that could negatively impact your witness's substantive testimony. Planning for the influence of demeanor helps to ensure witness credibility by protecting against unexpected, inconsistent, and misleading nonverbal testimony.

Human Factors Speak

Physical traits, personal speaking skills, and learned habits can have an important influence upon testimony. Studies show that fear, distress, and anger, which can control a witness's temperament, may partially be a function of his or her biology.[6] Given this fact, simply telling your witnesses not to be nervous will do little to help them manage their feelings in the way that you need.

Environmental influences, such as accents, slang words, and colloquialisms, may be misunderstood and rejected by jurors. Idiosyncracies and routine habits may distract or confuse jurors. In a recent case I observed, an important witness worried that he would be disliked in California because he spoke with a strong New York accent. True or not, the apprehension he felt concerning his own communication skill was real and could have deeply affected his confidence and demeanor at trial. Speaker anxiety increases if the audience is perceived as less friendly.[7] The relaxed communicator conveys confidence.[8] Confidence conveys conviction with what one is saying. Successful witness preparation requires knowing how your witness's personal communication skills may affect both your witness and the jury.

Evaluating your witness's ability to clearly communicate important substantive information to a specific jury population should be a standard consideration for witness preparation. The value of each witness to your case demands identifying and limiting the negative influence personal traits, speaking skills, and habits have upon communicating important facts in a clear and accurate manner. Know your witness's personal style and know your audience.

Physical health affects communication. Back problems can cause excessive twisting or shifting and mistakenly convey discomfort with the substance. Poor vision can cause excessive squinting and create a hostile appearance. Poor hearing can cause leaning forward, tilting the head, not hearing the question—all making your witness appear defensive or evasive. Aching muscles or joints invite self-touching, commonly

continued on page 16



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associated with excessive nervousness and deception. All of these nonverbal signals affect the qualities of persuasiveness and credibility.[9]

The problem with these seemingly innocuous nonverbal signals is that jurors mistakenly associate them with the accompanying verbal comments. The complete message becomes a confusing statement that jurors are forced to interpret. Demeanor preparation should prevent mixed messages that force jurors to interpret who your witnesses are and what they mean to say. Anticipating unavoidable, distracting, nonverbal testimony caused by physical health will ensure that your witnesses will be heard clearly and not misunderstood.

Similarly, personal stress can have a confusing effect upon communication. Just speaking in public is perceived to be one of the most anxiety-inducing experiences that a person can encounter.[10] You do it for a living. Most witnesses do not. For the ordinary lay witness, litigation is extremely stressful. The demand to offer testimony under an oath can affect careers, relationships at work, friendships, and most significantly, relations at home. In the end, your witnesses' ability to testify effectively depends a great deal upon their ability to manage all their emotions at a time when they will be facing the unfamiliar burden of testifying.

We know that intense emotions are primarily conveyed through visual behavior and audible voice characteristics.[11] Studies show that people decide whether a person is likable or not likable, and then use this judgment as the foundation on which to organize all subsequent information.[12] Credibility is correlated with three perceived human qualities: competence, trustworthiness, and energy.[13] Conveying strength and stability through fluent, non-hesitant speech affects perceived credibility.[14] On any given day, your witness's personal stressors can affect the ability to effectively convey competence, trustworthiness, and energy. Witness demeanor preparation should carefully and sensitively explore how your witnesses' personal stress could affect their ability to communicate effectively under pressure, when it counts.

Earning Credibility Under Unfamiliar Pressure

Our physical surroundings influence how we feel. In unfamiliar territory, we can feel unsure of ourselves. When feeling unsure, we nonverbally convey feelings of doubt and insecurity that become associated with our verbal statements. Situational factors influence our anxiety.[15] When we are in familiar surroundings, we feel confident. When we feel confident, we feel comfortable, remain focused, and convey the self-assuredness essential to credibility.

Is the complete message a confusing statement that jurors are forced to interpret? Demeanor preparation should prevent mixed messages that force jurors to interpret who your witnesses are and what they mean to say.

It is easy for an experienced attorney to forget what it was like to speak in court for the first time. This can lead to mistakes when attempting to prepare witnesses who do not make their living speaking under pressure. The common instruction, "Don't be nervous," only heightens their stress. Rather, your preparation should anticipate this common reaction and help prepare witnesses to manage their anxiety in a constructive way.

Assuming your witness will feel comfortable speaking in a formal setting under an oath is a risk. Asking lay witnesses to deliver effectively what you need from them, under unfamiliar pressure, is a large demand. For you, the courtroom is a routine environment. It is your workplace. For a nonprofessional witness, it is not.

The best approach is to assume that your witnesses will experience stress and then take the steps necessary to identify and minimize the damage their stress could cause. This might call for a trip to the courtroom, watching a real trial on television, or observing a trial or deposition in person. Familiarity breeds confidence. Creating a realistic environment and role-playing using mock questions helps to trigger and correct the specific stress related demeanor that surfaces only under the pressure of the situation. Describing your opening statement to your boss and performing it are two different things. In the latter case, your feelings come into play. Don't base your evaluation of your witness on a cerebral office chat, because you will be ignoring the most important factors that determine credibility.

Our self-image influences both how we communicate and how we are perceived. The shy witness may speak with a quiet voice and appear uncertain, guilty, or apologetic. The confident or domineering personality may convey indifference, arrogance, or disrespect for the process. Jurors react positively or negatively based upon the personality qualities communicated by specific demeanor. Posture, shifting, pausing, pace, and elaborations are just a few of the nonverbal signals that influence whether a witness is likable or not likable.[16] Even jury selection is a function of communication traits, style, and perceived juror personality, apart from the case relevant issues.[17]

Despite the uncomfortable circumstance, shy witnesses cannot allow the opposing counsel to control their testimony and, most important, how they are perceived. In the same manner, witnesses with strong personalities must understand and control the effect their communication style has upon the interpretation of their words and character. Your witnesses, despite their personalities, must be able to stand firm, in a likeable manner, and convey the important substantive points you expect them to bring to your case.

Breaking Stereotypes and Representing the "Evil Empire"

Government witnesses must be prepared to break negative stereotypes and convey the genuine human character qualities that jurors want to sense in them. The "evil" bureaucracy you represent must have a human face. However, despite your fervent claim that your officer-defendant is patient and reasonable, that your administrator is kind and fair-minded, or that your health professional is indeed compassionate, jurors

will not accept your word, alone. Jurors develop their opinions based upon the feelings your witness communicates in their presence. In the case of defendants, this evaluation begins long before the defendant takes the stand. During jury selection, opening statements, and witness testimony, the jury is watching and formulating an impression of your defendant. Nonverbal testimony occurs as long as your witness can be seen by the jury.

One of the most obscure yet important issues witness preparation should address concerns the influence a witness's occupation has upon his or her communication style. The police-witness wants to maintain authority and often gives commands. The educator-witness wants to theorize and speak in abstracts. The politician-witness wants to tell jokes, be cute, and campaign. The health professional often conveys guilt and self-blame. The attorney-witness wants to argue the case. The habits, style, and routine demeanor common to our occupations can become confusing and damaging when offering testimony. Unless witnesses understand their new role, they will continue to communicate in the manner they are most familiar. Testifying effectively demands that your witnesses communicate in the manner fitting to their role in the trial.

Clear, accurate, and credible testimony occurs when the feelings communicated with a verbal statement pertain only to the subject of that statement. The difficult challenge for every witness is to control all nonverbal messages that have nothing to do with the specific question asked. In normal conversation, we expect appropriate emotions to be conveyed with certain subject matters. We don't have to think about it. In comfortable circumstances, we do it naturally. The human qualities others attribute to us are a result of this natural expression of subjects with their congruent emotions. Communicating in the same natural manner while under the unfamiliar pressure of testifying is difficult, to say the least. Nevertheless, jurors expect witnesses to convey appropriate feelings with whatever topic they are asked to address. This is a natural and unconscious expectation. I submit this is what is meant with the instruction to, "Use your human experience to decide who is telling the truth." If your witnesses fail to be "human," jurors are forced to interpret why their feelings don't support their words. Most often, the interpretation is wrong and witnesses are misjudged.

Conclusion

Some of the factors that influence nonverbal testimony are easy to identify and control. Others are more obscure, have deep roots, and exert greater control over demeanor. Regardless of the source, all of these factors, if ignored, are potentially damaging to your witness's testimony. Because nonverbal messages are always associated with the accompanying verbal statement, they must be controlled to secure effective testimony.

Witness demeanor preparation should address the powerful influence of demeanor upon testimony. With proper demeanor preparation, your witnesses can improve personal communication skills, build confidence, and face the unfamiliar pressure of testifying feeling comfortable and in control. When your witnesses feel confident and comfortable, they will effectively convey the important factual substance and the essential character qualities that determine their credibility. The feelings you need your witness to convey must be communicated in a genuine manner and in a way that will not be misunderstood. Your witnesses will be successful conveying confidence and self-assuredness if your preparation sends them to the stand actually feeling that way. Take the extra time. Don't get caught ignoring nonverbal testimony that could kill a winning case.

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continued on page 37



Round 2 – The Stink Surrounding Emissions

by Devala A. Janardan, Associate Counsel

It has been over two years since the United States Supreme Court released its decision in *Massachusetts v EPA*, ruling that the U.S. Environmental Protection Agency (EPA) had the authority, under the Clean Air Act,[1] to regulate emissions of greenhouse gases (GHGs) since these emissions "fit well within the Clean Air Act's capacious definition of [an] air pollutant."[2] This decision, while hailed as a landmark by environmentalists,[3] was only the first round in an all-out brawl between both sides of the global warming debate. While the first round focused on the ability of the federal government to regulate GHGs, the ongoing, second, round focuses on the ability of California (and states that adopt California's emission regulations) to employ stricter GHG emission regulations. There have been significant developments, discussed below, including a new, committed federal direction by President Obama, and lawsuits filed in the Second and Ninth Circuits.

Round two started with an opening shot by the State of California.[4] In 2004, the California Air Resources Board (CARB) released regulations to reduce GHGs, with the first regulation coming into effect in 2009. The Clean Air Act expressly preempts state regulation of motor vehicle emissions, but Section 209 of the Act provides that "any state which has adopted standards ... for the control of emissions from new motor vehicles ... prior to March 30, 1966,"[5] may be granted a waiver by the Administrator of the EPA as long as the state regulations are "in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[6] While previous requests for a preemption waiver had been granted, the EPA Administrator countered by refusing to grant a waiver in this case, stating, "[w]hile I recognize that global climate change is a serious challenge, I have concluded that Section 209(b) was intended to allow California to promulgate state standards applicable to emissions from new motor vehicles to address pollution problems that are local or regional ... [and not] global climate change problems."[7] California brought suit against the EPA in a case that ultimately ended up before the D.C. Circuit Court of Appeals.[8] However, the case is "on hold" following President Obama's memorandum to the Administrator of the EPA, ordering the EPA to reassess whether the "EPA's decision to deny a waiver on California's application is appropriate in light of the Clean Air Act."[9] By making this move, many believe that President Obama is preparing to reverse the previous denial by the EPA.[10]

While the progress concerning the California case has slowed, a few GHG-related cases now in front of the Second and Ninth Circuits are heating up quickly. These cases, *Central Valley Chrysler Jeep v. Goldstene*[11] and *Green Mountain Chrysler v. Crombie*,[12] are efforts by the auto industry[13] to prevent California (and any state that adopts California's standards) from regulating GHGs. The argument centers around the Energy Policy and Conservation Act[14] (EPCA), which addresses the overall national fuel economy of a manufacturer's sales fleet. The EPCA states that "[w]hen an average fuel economy standard prescribed under [the EPCA] is in effect, a State or a political subdivision of a State may not adopt or enforce a law or regulation related to fuel economy standards or average fuel economy standards for automobiles covered by an average fuel economy standard under this chapter." The auto industry argues that there is a fundamental and direct relationship between carbon dioxide emissions (a greenhouse gas) and fuel economy. The National Highway Traffic Safety Administration (NHTSA) has itself stated that, "CO2 emissions are always and directly linked to fuel consumption because CO2 is the ultimate end product of burning gasoline."[15] In addition, automobile manufacturers are required to calculate vehicle fuel economy by measuring CO2 emissions and converting those results into a miles-per-gallon figure.[16] In short, the position taken by the industry is that, by adopting GHG regulations, California was performing the functional equivalent of adopting a fuel economy standard, an action preempted by EPCA.

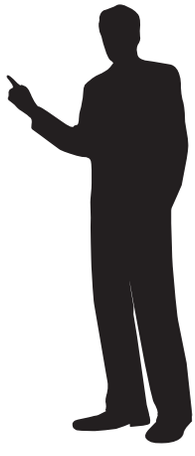
This position has been rejected by the district courts, one of which has stated that:

> [t]he general language of the preemption clause and the absence of any indication of Congressional intent about its limits, combined with the specific requirement to take EPA-approved California emissions regulations into consideration, supports a conclusion that Congress did not clearly intend to preempt such regulations. ... Unless this Court is to ignore decades of EPA-issued and approved regulations that also can be said to "relate to" fuel economy, this regulation does not "relate to" fuel economy within the meaning intended by Congress.[17]

continued on page 37

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Technology Tips for the City Attorney, by **Peter Haskel** (Deputy City Attorney, Dallas, TX) on **Thursday, June 25,** from 1:00 pm to 2:00 pm EST.

Superfund Liability: A Continuing Obstacle to Brownfields Redevelopment, with speaker **Elaine Lippmann** (Spiegel & McDiarmid) on **Thursday, August 13,** from 1:00 pm to 2:00 pm EST.

Parliamentary Procedure - An Overview and Approaches, with speaker **Fleming Bell** (Professor of Public Law and Government, University of North Carolina) on **Thursday, August 20,** from 1:00 pm to 2:00 pm EST.

Putting the Squeeze on Sleaze: Adult Business Regulation Issues, with speaker **Scott Bergthold** (Law Office of Scott D. Bergthold, PLLC) on **Thursday, September 24,** from 1:00 pm to 2:00 pm EST.

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August 4 – Reduction in Force Policies, by **Bettye Lynn**
September 22 – FMLA and Dealing with Overtime, by **Dan Crean**
December 8 – Major Personnel Issues for 2010, by **Dan Crean**

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Cases To Watch

by Sophia M. Stadnyk, Senior Associate Counsel

Cases of interest to be argued in the coming October Term include *Alvarez v. Smith*, 524 F.3d 834 (7th Cir. 2008), *cert. granted*, 129 S.Ct. 1401 (U.S. Feb. 23, 2009) (No. 08-351); *Maryland v. Shatzer*, 954 A.2d 1118 (Md. 2008), *cert. granted*, 129 S.Ct. 1043 (U.S. Jan. 26, 2009) (No. 08-680); and *Perdue, Governor of Georgia v. Kenny A.*, 532 F.3d 1209 (11th Cir. 2008), *cert. granted*, 77 U.S.L.W. 3442 (U.S. Apr. 6, 2009) (No. 08-970).

In *Alvarez v. Smith*, the issue revolves around the Fourteenth Amendment's prohibition on the taking of property without "due process;" what this requires in the context of property seizures; and what line of reasoning the courts should follow in making that determination. Chicago's Police Department, acting under the Illinois Drug Asset Forfeiture Procedure Act (DAFPA), seized property belonging to the six plaintiffs. DAFPA permitted law enforcement officers to seize vehicles and money involved in certain drug crimes, without a warrant but on probable cause that the item seized was involved in a drug crime. When property was seized, forfeiture proceedings had to be instituted by the state's attorney. For property worth more than $20,000, up to 97 days could elapse between the seizure and the filing of judicial forfeiture proceedings; for property worth less than $20,000, it could be a maximum of 187 days. However, the proceeding could be delayed indefinitely for "good cause" or if there was a related proceeding pending in criminal court. The plaintiffs (three of whom never had criminal charges brought against them) filed a Section 1983 suit against the City of Chicago, its police superintendent, and the state's attorney, claiming that due process required that they be given a prompt post-seizure, probable cause hearing, even though the DAFPA did not require such a hearing. The U.S. Court of Appeals for the Seventh Circuit agreed. "[O]ur fresh look at this issue causes us to conclude that given the length of time which can result between the seizure of property and the opportunity for an owner to contest the seizure under the DAFPA, some sort of mechanism to test the validity of the retention of the property is required." Anita Alvarez, the Cook County State Attorney, sought review of the decision on the basis that it gave rise to a circuit split. The questions presented include: in determining whether due process requires a state or local government to provide a post-seizure probable cause hearing prior to a statutory judicial forfeiture proceeding, should the district courts apply the "speedy trial" test (*United States v. $8,850*, 461 U.S. 555 (1983) and *Barker v. Wingo*, 407 U.S. 514 (1972)) or the three-part due process analysis in *Mathews v. Eldridge*, 424 U.S. 319 (1976)?

Maryland v. Shatzer addresses the ability of the police to resume questioning a suspect after the suspect demands an attorney and after the passage of a significant period of time between interrogations – in this case, two years and seven months. In 2003, police interviewed Shatzer in prison regarding allegations of child sexual abuse made against him. After the detective explained what he wanted to discuss, Shatzer invoked his Miranda rights and made it clear that he refused to talk without his attorney being present. As a result, the interview was terminated. In 2006, the investigation was revived because the child, now older, was able to make more specific allegations. A different detective, who was apparently unaware of the details of the 2003 interview, met with Shatzer (still incarcerated) and advised him of his Miranda rights. Shatzer signed a form waiving his right to an attorney and his right to remain silent. At no time did he indicate that he wished to have an attorney present. After Shatzer made admissions which formed the basis of child sexual abuse and other charges being brought against him, he moved to suppress his statements, arguing that his 2003 request for counsel during the interrogation prevented further interrogation without the presence of an attorney, pursuant to *Edwards v. Arizona*, 451 U.S. 477 (1981) (when an accused has invokes his right to have counsel present during custodial interrogation, a valid waiver cannot be established by showing only that he responded to further police-initiated interrogation, even if he has been advised of his rights, unless the accused himself initiates further communication, exchanges, or conversations with the police). The district court held that, because of the length of time, there had been a break in custody for Miranda purposes, so *Edwards* did not apply. The Court of Appeals of Maryland reversed and remanded, finding that the passage of time alone was insufficient to do away with the protections afforded by *Edwards*, and declined to recognize a "break in custody" exception to *Edwards* in the case of an inmate-suspect subject to uninterrupted, continuous incarceration between the first interrogation and the second. The question before the Supreme Court is whether the *Edwards* prohibition becomes inapplicable if, after the suspect invokes his right to counsel, there is a break in custody or a substantial lapse in time before re-interrogation commences pursuant to Miranda.

The last of the three cases involves entitlement to over $10M in attorneys' fees (to be paid by the taxpayers of Georgia) arising from a class action

continued on page 37

A Picture Is Worth A Thousand Words—Maximizing The Impact Of Visual Presentations

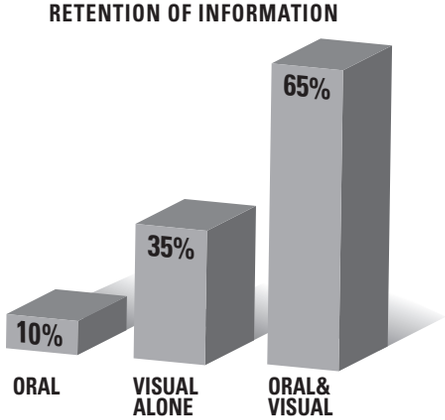
— by Melinda H. Barlow —



The phrase "a picture is worth a thousand words" has been identified as a Chinese proverb attributed to Confucius. However, its likely origin is a little closer to home, being an article in a 1920s trade journal by Fred R. Barnard, promoting the use of images in advertisements on streetcars.[1] It is more than a bit apt that the saying is the creation of an advertising salesman (although Barnard later stated he attributed the phrase to a Chinese proverb so that people would take it seriously).[2] Regardless, Mr. Barnard was not only correct, but he was at the forefront of society's (and, more particularly, advertisers') addiction to visual images through the media. Regardless of the phrase's origin, the message has long been understood by those who want to "sell" their story, whatever that story may be.

Lawyers, too, have recognized the value of demonstrative evidence.[3] Who will ever forget the visual of O.J. Simpson struggling to put on the too-small black gloves? Who does not recall the moment in *To Kill a Mockingbird* when Tom Robinson demonstrates his useless left arm before the jury? With today's electronically advanced courtrooms, a trial attorney must spend as much time on the visual presentation as the oral presentation. Further, with the rapid progression of technology, a lawyer is not limited to the existing physical evidence: he can now digitally create the visual aids needed to illustrate his case and tell his client's story. Gone are the days when only the deep-pocket clients or high-dollar cases utilized technology – from federal to state courts across the country, courtrooms are increasingly equipped with multiple screens, monitors, exhibit cameras and Internet capabilities. For the municipal lawyer, council chambers and other public forums are, likewise, increasingly equipped with a variety of electronic media.

Certainly, as advocates and communicators, attorneys recognize the story in the image and owe it to their clients to continue to bring the highest level of skill possible to conveying important messages. Not only are visual presentations more effective and convey more information than words alone, today's technologically aware audiences *expect* to be engaged visually. It should come as no surprise that, according to research, the use of visual aids in an oral presentation increases understanding and retention levels by as much as 65%, while information perceived through a variety of methods (auditory, visual, and written) is retained at a substantially higher level.[4] Other studies reveal interesting statistics that support these findings. Experimental psychologists and educators have found that, when information is presented at a meeting using visual and oral means, the retention of information three days after is six times greater than when the information was presented by the spoken word alone.[5] Studies by educational researchers suggest that approximately 83% of human learning occurs visually, while the remaining 17% occurs through the other senses – 11% through hearing, over three percent through smell, one percent through taste, and over one percent through touch.[6] 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 combined visual and oral presentation.[7]



Given audience expectations and the high impact on audience retention, the use of visual aids is essential to any presentation. As a municipal lawyer, visual aids should be employed to reinforce the message, clarify points, and create interest. Visual aids bolster the main points, thus reaching an audience far more effectively, and leave a lasting impression after the presentation ends. Understanding the importance of visual aids in a presentation is the first step in utilizing visual components to enhance the message. A simple and easy rule of thumb in making an effective presentation is: "Know your stuff. Know whom you are stuffing. Know when they are stuffed."[8]

Whom Are You Stuffing?

Creating a presentation that enhances receptivity through visual and auditory senses starts with identifying your audience. The first step in preparing any presentation is analyzing the audience. The target audience determines how much information to present and in what degree of detail, and the extent to which "high tech" graphics and animation are used. Further, the formality of the presentation is determined by the audience. The audience of a municipal lawyer varies from the city council and other municipal boards or commissions, citizens, and the courtroom judge or jury.

Audience analysis should also be considered in light of the purpose of the presentation. Is the presentation to inform, to create interest, to educate, to persuade, or to move to action? If the goal of the presentation is to persuade or motivate, consider what biases, concerns, or fears of the audience need to be addressed in order to achieve your goal.[9] While it is often impossible to completely dispel such audience concerns or apprehensions, you can, by recognizing these at the onset, position yourself strategically – in taking those concerns into account, you demonstrate awareness and sensitivity. Importantly, the biases, concerns, and fears of the audience oftentimes dictate the degree to which technology is used

continued on page 26



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in the presentation. A senior citizens' group of concerned taxpayers is likely to be unimpressed by fancy digital graphics or computer animation, while a planning and zoning board will appreciate a computer model that creates a visual image of the end product. Similarly, if the goal of the presentation is to educate, the presentation should be geared to the level of knowledge of the audience. For example, some city councils have a sophisticated understanding of the legal issues that arise in local government; others, however, may have a more rudimentary knowledge. Keep that in mind, and in presenting possible legal outcomes, the visual aids should be direct, concise, and informative.

Juries have been perplexing lawyers since the beginning of the jury system and remain the most difficult audience to analyze. Mark Twain once described the system by which jurors are selected as putting "a ban upon intelligence and honesty, and a premium upon ignorance, stupidity, and perjury."[10] Although Twain's characterization might seem harsh, there is a bit of truth in it: most jury selection processes ensure that any panel member with any passion, knowledge, or personal interest in the subject matter will be struck or challenged for cause. Accordingly, always assume that the jury is a reluctant, if not completely disinterested, audience. As an advocate for your client, you must first and foremost give them a reason to care about or be interested in what you have to say. For example, visual aids can greatly diminish the minutiae that a jury is normally presented with by highlighting only the important text, photos, or video testimony. Further, visual aids that synthesize key information convey a message that recognizes the jury's time is important. Since many jurors are reluctant participants, and unfamiliar with legal formalities, anything that speeds up the presentation of evidence and promotes their understanding is likely to be viewed positively.

In summary, the "audience analysis" phase of presentation preparation is essential in determining how to organize information and the presentation method, including the use of visual aids and other technological media. The more information the presenter has about the audience, the more the presentation can be tailored to maximize the impact of visual components, and the more likely the presentation will be to meet the presenter's goals.

Know Your Stuff

Of course, the municipal lawyer knows the substantive material that is being presented. However, it is also important to understand the techniques available for presenting the material and the equipment to use. Examples of communication advances available for illustrative use include computer animation, interactive video, flat visual images, and three-dimensional models. Computer animation and videos can provide images that would otherwise be unavailable – for example, by "placing" audiences in locations that would be impossible or inconvenient to travel to.[11] Depending on the scope and importance of the message, computer animation models can be very affordable. They can demonstrate a proposed neighborhood development building by gradually adding to the current state of the area, culminating in the proposed final concept. Such animation can be so precise as to take the audience from aerial views to street-level views, giving them the ability to "walk" through the streets of a yet-to-be-constructed project. In cases involving police officers, vehicles are often equipped with on-board cameras. The video produced from these cameras will likely become a central piece of evidence in litigation. To maximize the effect of these videos, audio deposition testimony can be combined to stream with the camera video-recording. The power of the images from the camera, when combined with the audio explanation from an officer, creates a much more powerful demonstration than either piece of evidence standing alone.

Fortunately for the high-tech impaired, many programs can assist even the most computer-illiterate user in producing a visually pleasing presentation. Generally, programs such as PowerPoint make presentations simple to create and operate. However, regardless of the program, follow these basic tips to maximize a visual presentation:

- Familiarize yourself with the presentation, the equipment and how to operate the program prior to the presentation.
- Keep your audio-visual aids simple and uncluttered. Too many visual aids are distracting, and too much information at a time will not be absorbed. For example, an entire slide of text from a statute will not reinforce your message and will likely disengage your audience. If you must cite from an ordinance or statute, choose key words and phrases only.
- Demonstrate the whole before covering the parts. For example, present an overview of the entire proposed residential or commercial development before focusing on the individual features and attributes. For a jury or a judge, define the issue that you will be asking them to decide before demonstrating the conclusion you would like them to reach.
- With each visual change, pause one to two seconds so your audience has the opportunity to absorb the information.
- Finally, and most importantly, remember that visual aids are just aids and not the whole show. Aids increase the impact of the message but, in the end, people still respond best to other people – the confidence and demeanor of the presenter are also important visual images that impact the message and strengthen credibility.

Demonstrative Evidence – The Courtroom

The general techniques and applications for audio-visual presentations apply equally to visual aids in the courtroom; however, some evidentiary concerns can arise. It is estimated that illustrative aids currently comprise more than half of the items shown during a jury trial.[12] Because many state and federal courtrooms have become "electronic," evidentiary issues within the discretionary area of illustrative aids or demonstrative evidence have arisen.

Visual presentations in the courtroom will fall into one of two categories: demonstrative evidence or admitted evidence. Demonstrative evidence, prob-

ably one of the most powerful visual aids, is not offered or admitted into evidence, but is merely presented to assist the jury in understanding the evidence. Thus, the only foundation for demonstrative evidence is that it is fairly accurate and assists the fact-finder in understanding matters at issue. Any deficiencies in the demonstrative evidence must be identified for the fact-finder.[13] For example, a party seeking to introduce a computer-animated accident re-enactment must prove that the re-enactment is substantially similar to the conditions of the accident itself. If the re-enactment is a video demonstration, the demonstration must be substantially similar to the circumstances of the accident at issue.[14] Since the foundation requirement for demonstrative evidence is much less stringent than for admitted evidence, it can be a powerful tool in conveying a message that would not otherwise be presented to a jury through more traditional means.

Because computer reproductions or animations and edited video depositions can have a dramatic effect on juries, attorneys must guard against their inappropriate use by the opposing counsel. Altered video testimony and computer animations or reproductions should be reviewed outside the presence of the jury to determine issues of relevance and the potential for unfair prejudice.[15] Further, case law suggests that judges should review video or computer evidence outside the presence of the jury for evaluation as to proper foundation, relevance, and potential undue prejudice.[16]

Attorneys must also be mindful of and prepared for objections that can be made as to demonstrative evidence, whether they are offering the evidence or the evidence is being offered against them. Completeness objections are raised when one side believes that material other than that which is presented should be considered contemporaneously with the presented material.[17] Such objections often arise with regard to edited text graphics, cropped photographs, or carefully edited video testimony.[18] Objections as to the fairness of demonstrative evidence arise when the depiction offered has been so materially altered as to affect the message. Examples of this are playing video testimony at an altered speed, or using still frames of videos out of context. Further, some software re-enactments that add sound and graphics, which enlarge certain aspects while diminishing others, would arguably provide an unfair image. To exclude these types of images, the objecting party must demonstrate that the effect has a material impact.[19] Moreover, a computerized exhibit used in direct or cross-examination may be objectionable if it leads the witness, or is presented prior to laying a proper foundation.[20]

Jurors are unlikely to recognize the distinction between visual evidence that is admitted, as opposed to demonstrative, evidence; however, attorneys must recognize that the evidentiary basis of some admitted evidence must be provided before the visual aid is presented to the jury. Every evidentiary analysis begins with the Federal Rule of Evidence 402 and the question of relevancy.[21] Physical evidence may also have to clear hearsay and authentication hurdles.[22] Sometimes, an end run around the hearsay and authentication rules can be made if the physical evidence is presented through an expert witness and is the type of evidence relied upon by the expert in that particular field, provided that the evidence has probative value that outweighs the prejudicial effect.[23] Additionally, Federal Rule of Evidence 1006 (regarding summaries of voluminous writings, records or photographs) should and can be used liberally to support the admission of visual aids.

Another critical question is whether the demonstrative or physical evidence will be allowed in the jury room. Obviously, the impact of the illustrative aids is exponentially increased if the jury is allowed the discretion to review the evidence over again in the jury room. The issue of whether an illustrative aid is allowed in the jury room is at the judge's discretion.[24]

Know When They Are Stuffed

An American proverb cautions that "many speak much who cannot speak well." Lawyers often become so focused on delivery of a prepared message that they fail to interact with the audience and determine, through observation and communication, when the message has been received or rejected. An example of this comes from my own experience. As a young lawyer, I was allowed to handle the pre-trial motions in a fairly large case. I prepared (probably over-prepared) and anxiously anticipated my opportunity to speak. Each time the judge asked a question, I answered with zeal and gave him even more information than he requested. Part of the way through the motions and my rebuttal, the judge abruptly cut me off and ruled in my favor. It was a mixed celebration: I won, but I sensed the judge's irritation. The judge pulled me aside later and gave me a sound piece of advice: "Know when you have won the argument and stop talking." As a presenter, it is important to be aware of the cues that your audience provides, either through body language, their questions, or the lack of questions.

Lastly, then – know when to stop.

Notes

1. The phrase reportedly first appeared as "One look is worth a thousand words" in PRINTERS' INK, Dec. 08, 1921, p. 96; Fred R. Barnard changed it later in *One Picture is Worth Ten Thousand Words*, PRINTERS' INK, Mar. 10, 1927, pp. 114-15.
2. ROGERS, JAMES, THE DICTIONARY OF CLICHÉS (Ballantine Books, 1985).
3. Karen D. Butera, *Seeing is Believing: A Practitioner's Guide to the Admissibility of Demonstrative Computer Evidence*, 46 CLEV. ST. L. REV. 511, 514 (1998).
4. *Id.* at 513.
5. U.S. Department of Labor, OSHA Office of Training and Education, May 1996, *Presenting Effective Presentations with Visual Aids*, available at http://www.osha.gov/doc/outreachtraining/htmlfiles/traintec.html (last visited March 23, 2009).
6. *Id.*
7. *Id.*
8. Unknown Author cited by Boyd, Stephen D., Ph.D., CSP, July 17, 2004, *A Short Guide to Effective Public Speaking*, available at http://www.school-for-champions.com/speaking/boyd_short_guide.htm (last visited March 31, 2009).
9. *You Talkin' To Me? Know Your Audience… And What It Takes to Persuade, Inspire and Motivate Them*, THE TOTAL COMMUNICATOR, vol. 1, issue 4 (Fall

continued on page 38



The Organizational Cold Shoulder: A Shunning Saga

by Sophia M. Stadnyk, Senior Associate Counsel

The word "shun," derived from the Middle English *shunnen* and the Old English *scunian* ("to abhor"), refers to the act of deliberately avoiding association with, and habitually keeping away from, an individual or a group. The practice has a "long history as a means of organizational influence and control," and its targets often include those who defy or fail to comply with the standards of the shunning group.

In 2008, Duncan Barnett was an elected member of the Cariboo Regional District (CRD) Board of Directors, and had served as an elected member for several terms previously. The CRD claimed that his unpleasant conduct as a member had led to numerous complaints from its staff, other Board members, and the public. As a result, the Board's Chair and Vice-Chair directed that the municipality's Chief Administrative Officer, Ms. Bell, prepare a report with the purpose of addressing Barnett's "behaviour and its negative effect on CRD staff." The result was a seven-page "Bell Report," dated September 2008. This apparently contained nothing specific – no complaining staffers were named and no particular misconduct was identified – and apart from allegations of "harassment" and "intimidation," it concluded that Mr. Barnett was not much liked by the staff and some of the other Board members, that he could be abrasive and difficult to deal with, and that the staff preferred not to deal with him.

On October 10, 2008, the CRD held an open meeting, followed by a closed meeting. The agenda for both meetings was published electronically for the Board members a week earlier and stated that there would be "various items suitable for discussion In-camera." Two items were identified for the closed session, but the agenda did not mention that the Bell Report would be discussed as part of that meeting. Although the CRD's procedural bylaw required that materials be distributed to the Board at the commencement of the meeting or "as soon thereafter as practical and possible," the decision not to provide copies of the report in advance was to avoid having CRD staff "contacted with respect to any of the underlying details." The decision to close the meeting to the public was based in s. 90(1)(d) of the *Community Charter* ("the subject matter being considered" related to "the security of the property of the municipality").

The report was distributed at the closed session, after which the Board passed a resolution, #IC.08-10A-6, directing that "Duncan Barnett not have contact or communication with staff, on a person to person basis, except through e-mail or written correspondence delivered to the front desk, addressed to the Chief Administrative Officer or designate. Further, that this directive be brought forward for review by the Board in a period of one year." All copies of the report were then collected, in accordance with the usual practices of the Board. Barnett was later refused a reconsideration of the decision. He was subsequently offered a copy of the report on the condition of undertakings, which he rejected. The resolution was later reaffirmed after a new Board was elected and sworn-in at the end of 2008.

Barnett brought an application for judicial review, challenging the resolution on the grounds that the CRD had no jurisdiction to pass the resolution, or, alternatively, if it had jurisdiction, that he was denied reasonable notice and denied basic procedural fairness. Barnett also alleged bias, claiming the CRD Chair had previously threatened him, and had responded to his concerns by saying that "in other circumstances he would deal with my situation by... laying a beating on me." Barnett sought an order setting the resolution aside and requiring the CRD to disclose the Bell Report. His counsel described the CRD's process as characteristic of "nasty small town politics," adding that the court should "take the opportunity to rein in an errant council that has been thwarting due process for years." The CRD's position was that the action was well within its jurisdiction to govern its own internal procedure by regulating the conduct of its members; that any procedural defects at the October 10 meeting were rectified by the later meetings which re-affirmed the resolution; and that Barnett could have applied under the *Freedom of Information and Protection of Privacy Act* to obtain a copy of the report.

The court began its analysis with an overview of the *Local Government Act*, noting that there was no provision in the Act or otherwise that limited the CRD's Board from exercising its "powers, duties and functions" in terms of addressing the day-to-day conduct of a member. "The weight of the statutory and judicial authority suggests that a Regional Board has the ability to determine its own internal procedures, which surely must include the ability to control misconduct by a Director." While the subject matter was within the CRD's jurisdiction, the court found significant problems with the procedural aspects. The court expressed "serious concerns in relation to why the CRD relied on s. 90(1)(d) of the *Community Charter*

continued on page 38



ORDINANCES

Sign Wars

by Devala A. Janardan, Associate Counsel

It's no secret that billboards make big money for their owners. Clear Channel Outdoor is a "global leader in the outdoor advertising industry, providing clients with advertising opportunities through billboards, street furniture displays, transit displays, and other out-of-home advertising displays."[1] In 2008, Clear Channel Outdoor reported revenues of $3.29 billion.[2] Even California Governor Arnold Schwarzenegger has considered collecting revenue for his state by selling space on the public "Amber Alert" signs that line California's freeway system.[3] All this potential revenue has resulted in an enormous headache and litigation for city attorneys across the country. Here's a review of two Ninth Circuit cases that have made recent headlines.

In one of its first rulings of 2009, the U.S. Court of Appeals for the Ninth Circuit decided *Metro Lights, LLC v. City of Los Angeles*.[4] Los Angeles had a longstanding practice of entering into contracts with private entities, which would build public structures (transit shelters) at their own expense in exchange for the exclusive right to advertise on the structures. One such arrangement concerned CBS, a company that agreed to install and maintain public facilities at city-owned transit stops in exchange for exclusive advertising rights on those facilities. The following year, the Los Angeles City Council adopted an ordinance that prohibited off-site signs, except when such signs were "specifically permitted pursuant to a variance, legally adopted specific plan, supplemental use district or an approved development agreement."[5] Metro Lights, LLC, was a company that owned and operated outdoor signs. In 2003, after it installed new off-site signs, it was cited for violating the ordinance. Metro filed suit against the City, arguing that the private contract with CBS undermined the City's purported grounds for enacting the ordinance. The district court agreed with Metro, stating "[t]he City cannot, on one hand, preclude [Metro] from displaying messages on its off-site signs as a supposed legitimate exercise of its police powers while, on the other hand, authorizing its Street Furniture contractor to erect off-site signs in or near the public rights of way throughout [the City]."[6]

On appeal, the arguments centered around the test in *Central Hudson Gas & Electric v. Public Service Commission of New York*, 447 U.S. 557 (1980), a four-part inquiry to analyze the constitutionality of a restriction on commercial speech that included whether the restriction directly advanced the state interest involved, and whether it was more extensive than was necessary to serve that interest. Metro had argued that, by permitting the street furniture signs, but not other, similar signs, the City was underinclusive in protecting its interest in traffic safety and aesthetics. Metro also introduced a photograph showing two adjacent, identical signs – the only difference was that one was on a building, and one was on a bus shelter – and argued that, under the ordinance, one sign would be impermissible while the other was exempted. The Ninth Circuit disagreed with both arguments. The Supreme Court had upheld similar exceptions to a sign ordinance in *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1980), and the claim that similar signs were treated differently under the law did not undermine the City's objectives; in fact, the ordinance would "halve the clutter on the street shown in the photograph."[7] In addition, the Ninth Circuit relied on *Metromedia*'s rationale "with its emphasis on deference to legislative judgment,"[8] and ruled that the law was not more restrictive than necessary to further the government's interest: the City could "silence speakers in general but permit them to bid for the right to speak on City-owned land, assuming that the speakers on the City-owned land [did] not undermine the goal of the City's prohibition."[9]

Since then, the Ninth Circuit has ruled in another sign case, *Maldonado v. Morales*.[10] Maldonado owned property along U.S. Highway 101, and applied to the California Department of Transportation (Caltrans) for a permit for a billboard with off-site advertising. The permit was refused on the ground that the California Outdoor Advertising Act (COAA) banned off-site advertising billboards along "landscaped freeways," which included Maldonado's land. When Maldonado used his land for a billboard with off-site commercial advertising, Caltrans sued him in state court for nuisance and obtained an injunction prohibiting such further use. Maldonado brought an action claiming that the COAA was overbroad, vague, and violated his equal protection rights, because a grandfathering clause allowed some off-site commercial billboards (those that existed in 1967, when the COAA was enacted).

The Ninth Circuit dismissed Maldonado's argument that the distinction between commercial and non-commercial speech was vague: the "settled law of this circuit [was] that the commercial/non-commercial and onsite/offsite distinctions [were] not unconstitutionally vague."[11] The law was also not overbroad, since "[t]he COAA [did] not ban all signs, or even nearly all signs, but only off premises, commercial billboards."[12] Maldonado's equal protection claims fared no better. The court applied intermediate scrutiny and found that the State's

continued on page 38



Why We Fight, Part II

by Don Knight

In the last column, inspired by Frank Capra's World War II era series of short films designed to motivate the troops going to battle and titled *Why We Fight*, we heard from several municipal attorneys who answered the question: What do you get out of representing a local government that you wouldn't get from representing private clients?

There were more great responses than space allowed, so in this column I will share the rest.

More Chicken Soup for the Municipal Attorney

Anne C. Linn, Attorney for the City of Waukegan (Building, Zoning and Code Compliance) is a second-generation municipal attorney:

> As my father, Murray Conzelman (a 50-year municipal practitioner) and my long-time mentor, Tom Compere (the dean of municipal lawyers in Illinois, and great friend to all in the old NIMLO) both said, "You won't get rich being a municipal lawyer, but that's not why you do it. You practice municipal law because you love the variety, the challenge, and the feeling that you are making a difference." This is especially true if you practice in the same town in which you live. I am so proud to be a part of the municipal community.

Annette Jones (Assistant City Attorney, Waco, Texas) adds:

> As a student at Austin College, I participated in a Jan Term at the [Texas] Constitutional Convention in January 1974… Hawkins Menefee …helped to set up the month long internships. At the end of that, he sent everyone a letter. ...[that] made reference to a statement of Theodore Roosevelt. Essentially, good people must enter government or be content to be governed by those who do. I believe that. And any time I get a little depressed or irritated, I remember that letter. From the time I left Austin College to go to Baylor Law School, I never wanted to go into private practice. I wanted to go into government service.
>
> We have lived through several decades of certain politicians demonizing government. Yet, when things are at their worst, it is the government that people turn to. The last eight years have really created a situation where it is difficult for people to believe in government. These people seem to view government that only exists to serve their personal interests, not the good of the whole country, or the whole community. I believe that government can serve people and provide for the betterment of the community as a whole.

Robert Spence (Staggs & Spence, LLC, Tuscaloosa, Alabama) wants you to know that it isn't just the American Civil Liberties Union (ACLU) that safeguards civil liberties:

> At the [International Association of Chiefs of Police] meeting last year, a retired North Carolina lawyer spoke movingly about one of her mentors early in her career. He lamented that the ACLU was credited with safeguarding civil liberties in America. In his view, the true champions of civil liberties were the lawyers who actually provided legal advice to law enforcement. They were the ones who saw to it that the officers knew and followed the law. I'm an adherent of this view, and I have to say that I believe the officers I represent believe that, too. They are dedicated to protecting the citizens in their communities, but they want to do so in a way that upholds the principles of the Constitution. I love the fact that I get to help them do that.

Frank Bartolone, Senior Specialist Attorney for South Florida Water Management District, sums it up succinctly:

> As a college Latin major ... I found that the writings of Cicero had a profound impact on where my life was headed. One of my favorite quotes and one which has inspired me for almost 30 years as a local government lawyer is: *Salus populi suprema est lex*. (The people's good is the highest law.) That about says it all for me.

Marcus W. Norris (City Attorney, Amarillo, Texas) gives the perspective of a reformed commercial litigator:

> For seven years, I was in a private law firm doing both plaintiff and defense commercial litigation in San Antonio. By the seventh year, I was very cynical about the law. I felt like it was simply a wealth transfer system between business owners in the community, who always wanted to complain about the

fee. (Private practice was not totally negative, as I learned much from a wonderful mentor about practicing law. The disciplines, outlooks, and methods I learned there have contributed to my success as a municipal attorney.)

When I entered municipal law, I took a 50% pay cut .... I have now been in municipal law over 16 years and have never once regretted the move. To my delight, not every legal assignment is determined solely by money, as it was in private practice. Instead, constitutional principles or public policy often determine the direction of our legal work. Moreover, I feel like I am on the inside of what is happening in my city so I have a meaningful opportunity to use my knowledge and abilities to help solve problems in my community and to make my city government more responsive. Besides, what other lawyer can occasionally go ride in a fire truck or police car as part of his field research on city personnel needs and concerns? Most days, I feel very good about my job when I go home.

Lauren O'Connor (Assistant City Attorney, San Antonio, Texas) likes representing clients whose job requires them to focus on the common good:

> When representing individuals, it is generally all about that person's self interests. While there is nothing wrong with that (after all, it's the lawyer's job), there is something much more satisfying in working with people on a daily basis whose sole interest is in benefiting the public at large, and my fair city.

Steve Kemp (City Attorney, Peoria, Arizona) shares a purpose that we can all relate to:

> [I]n 25 years of practice, I have represented both private and public clients. For me, public service has been about participating in and building a community. The work that I have done as a local government lawyer has led to an innovative outside storage ordinance in a rural Arizona county, a joint-use agreements for retention and parks that permitted parks to be built years ahead of schedule. I mention these not because I desire any credit [but] rather, as examples of how our work as a local government lawyer can directly impact the lives of the people who live in the communities that we serve. Our profession allows us to say that we leave our communities after our service in a better place than we found them.

Lynn Gordon, who represents the City of St. Petersburg, Florida, knows it is important to remember who your client is.

> I love my municipal work because of the challenge and variety. Although much of what I do involves collections, foreclosures, and bankruptcy, I do it all because it's in the best interest of my client, the City. I treat my municipal client the same way I would treat a client if I were in private practice. I often remind my departments that we have to consider what is in the City's best interest. Some of what I do may adversely impact a citizen (getting a judgment against someone or foreclosing a mortgage), but for the greater good, I must do what is sometimes a most unpleasant task. At the end of the day, most days, I leave work feeling satisfied, not because I accomplished everything on my to do list that day, but because I know I represented my client to the very best of my ability, while still being as fair as I can to those on the other side, because those on the other side are the citizens of the City I represent.

I'm going to let a fellow Texan put it in terms anyone can understand. Mary Ann Powell, the First Assistant City Attorney for the City of College Station, Texas, says, "As in the old westerns on TV, I tell people I get to wear the white cowboy hat."

A Good Reminder

I don't know about you, but reading these contributions helps remind me why I do what I do. So I think I'll take my advice from last time and keep this list handy for those days when I start to forget.

To join the Listserve, go to http://www.municode.com and select the *Listservs* link to get the page on *Mailing Lists*. In the first paragraph, click on *Municipal Attorneys* to bring up the subscription page. Fill it out and hit *Subscribe*.

Don Knight is an Assistant City Attorney for the City of Dallas. He advises and represents city officials on a variety of legal matters, including telecommunications, cable, electric and gas utility regulation, technology acquisitions and electric service agreements. Since 2001, Mr. Knight has served as the Chair of the Texas Coalition of Cities For Utilities Issues (TCCFUI), which represents over 100 Texas cities of all sizes. **ML**

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Cases



Civil Rights
Pat-Down Inspections – Stadium

In 2005, a football team, the San Francisco 49ers, Ltd., implemented a policy of the National Football League (NFL) that required all patrons at their football games to submit to a pat-down search as a condition of entering the stadium at San Francisco's Candlestick Park. This consisted of non-police screeners running their hands around the patrons' backs and down the sides of their bodies and their legs. Members of the San Francisco Police Department stood nearby, observing the searches. The Sheehans, two long-time season ticket holders, sued the team seeking declaratory and injunctive relief, claiming that the pat-down policy violated their state constitutional right to privacy. (The California State Constitution, article I, section 1, specifically refers to an inalienable right of "privacy"). The team demurred, arguing that the suit did not state a cause of action, without giving any explanation or justification for the alleged search policy, or asserting any defenses. The trial court sustained the demurrer without leave to amend and dismissed the action with prejudice. The plaintiffs appealed and the California Court of Appeal affirmed, finding that the plaintiffs had validly consented to the search and failed to show that they had a reasonable expectation of privacy, because "rather than submit to the pat-down[,] the Sheehans had the choice of walking away, no questions asked."

On further appeal, the Supreme Court of California reversed and remanded, ruling that the plaintiffs had adequately alleged a reasonable expectation of privacy not to be subjected to a pat-down inspection when entering the stadium. Referring to the analytical framework of *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633 (Cal. 1994), the court held that the plaintiffs had established a legally protected privacy interest ("a right not to have others pat them down") and a reasonable expectation of privacy under the circumstances. While consent was a factor in the latter determination, the court held that a person who chose to attend an entertainment event could not, in doing so, be taken to consent to any security measure the promoters decided to impose, "no matter how intrusive or unnecessary." Other factors were the team's identity as a private, not public, entity, and the availability of less invasive alternatives. "Private entities that present entertainment events, like the 49ers', necessarily retain primary responsibility for determining what security measures are appropriate to ensure the safety of their patrons, subject, when those security measures substantially infringe on a privacy interest, to judicial review for reasonableness." In this case, given the absence of an adequate factual record, further inquiry was necessary to determine whether the challenged policy was reasonable, and the matter was remanded for the trial court to consider the circumstances. However, three of the judges signed onto a concurring opinion that rejected the "extreme deference to the judgment of private interests" in the majority opinion, finding that the intrusion, "far from being trivial or insignificant, involve[d] a substantial invasion of citizens' interests and expectations of physical autonomy," and suggesting that the policy should be subjected to a greater level of scrutiny. *Sheehan v. San Francisco 49ers, Ltd.*, 201 P.3d 472, 45 Cal. 4th 992 (Cal. 2009).

First Amendment
Soliciting Ban Valid

As part of his campaigning for public office, Del Gallo attempted to solicit signatures in support of his election campaign in the lobby of the Pittsfield Post Office. The staff started receiving complaints, and Del Gallo was told that, although he could not solicit signatures in the post office, he could do so on the post office sidewalk, which separated the post office parking lot from the post office itself. Later that month, Del Gallo returned to solicit signatures on the post office sidewalk. This time, Del Gallo was instructed by a post office supervisor that he could not continue campaigning on the post office sidewalk. This supervisor was aware of a postal service regulation, 39 C.F.R. § 232.1, which banned "campaigning for election to any public office" on post office property. Del Gallo refused to comply and was arrested. He sued the Post Office and its staff on First Amendment grounds, alleging a violation of his rights. The district court granted summary judgment in favor of the defendants.

The U.S. Court of Appeals for the First Circuit agreed with the district court. Reviewing the purpose behind 39 C.F.R. § 232.1, the court found that, until the 1970's, the Post Office was closely tied to partisan politics. It was a Cabinet-level department within the executive branch and Congress was extensively involved in the management of the post office (including selecting local postmasters). In 1970, Congress "recognized that partisan political entanglement was one of the most foremost problems facing the post office." As part of the reorganization of the Post Office, the regulation which banned campaigning on post office property was passed to "prevent abuses and to preclude any appearance of partisan endorsement or preference." With this historical angle in mind, the First Circuit analyzed the First Amendment implications of the regulation. The first inquiry was whether the post office sidewalk constituted a traditional public forum. In this case, it was held not to "have the characteristics of public sidewalks traditionally open to expressive activity." The sidewalk was clearly distinguishable from the municipal sidewalk and was not used as a public thoroughfare or a gathering place. It was constructed for the sole purpose of providing passage into the post office for individuals "engaged in post office business ... [and] not to facilitate the daily commerce and life of the neigh-

borhood or city." Accordingly, the sidewalk was a non-public forum. The regulation was content-neutral, and its rationale, to prevent "abuses and to preclude any appearance of partisan endorsement of preference," was held to be reasonable. *Del Gallo v. Parent*, 557 F.3d 58 (1st Cir. 2009).

Violent Video Games Law

In 2005, California Governor Schwarzenegger signed into law Assembly Bill 1179. The law, among other things, stated that "[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor." The plaintiff, the Video Software Dealers Association, filed suit, claiming that the law unconstitutionally restricted freedom of expression, being an impermissible content-based regulation. The State argued that, as the law dealt with minors, the court should analyze the law under the "variable obscenity" standard, rather than the strict scrutiny standard that applied to the majority of content-based regulations. In *Ginsberg v. New York*, 390 U.S. 629 (1968), the U.S. Supreme Court held that New York State could prohibit the sale of sexually-explicit material to minors, despite the fact that the material was not considered obscene with respect to adults. Here, however, the U.S. Court of Appeals for the Ninth Circuit rejected this approach. "*Ginsberg* is specifically rooted in the Court's First Amendment obscenity jurisprudence, which relates to non-protected sex-based expression – not violent content, which is presumably protected by the First Amendment." Instead, the court reviewed the law using strict scrutiny analysis, finding that the State did not demonstrate the necessary compelling interest, nor did it show that less restrictive means for addressing the perceived harm were unavailable. The State relied on numerous studies on the effects of video games on adolescents but, unfortunately, the studies did not show a causal connection between violent video games and increased adolescent hostility. In fact, many of the studies explicitly stated that "causality was not studied." The court found, further, that less restrictive means of forwarding the State's purported interests were available, "including...enhanced education campaigns, and parental controls." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009).

Prison Mail Policy

As part of its mail policy, the Pennsylvania Department of Corrections, or PDOC, classified mail to inmates as regular mail or a "Privileged Correspondence." Until 2002, a Privileged Correspondence was any mail identified by its return address as being from an attorney or a court of law. This would be separated from regular mail, send to the corrections facility, and opened and inspected by on-site housing unit officers in the addressee-inmate's presence. In 2002, the PDOC instituted a new policy that classified mail as Privileged Correspondence only if the attorney hand-delivered the sealed communications to a specific PDOC location, or the attorney obtained a unique "control number" from the PDOC and placed it on each item sent to the inmate. A control number could be obtained by a faxed letter request that included the attorney's name, address, telephone number, and state attorney identification. Further, the number could be used only for mail that was "essential confidential, attorney-client communication," containing no contraband. Several inmates filed a pro se complaint against PDOC officials, claiming that the new mail policy unconstitutionally burdened their First Amendment rights because their attorneys and the courts had not be given control numbers, despite repeated requests and, as a result, PDOC inspectors were opening and inspecting legitimate legal-related mail. The district court agreed with the inmates, finding there was no rational relationship between the mail policy and the legitimate penological interest in prison safety and security.

On appeal, the U.S. Court of Appeals for the Third Circuit reversed. In *Turner v. Safley*, 482 U.S. 78 (1987), the Supreme Court outlined a two-step test for determining whether a prison regulation was reasonably related to legitimate penological interests. A court was to first determine "whether there [was] a valid, rational connection between the prison regulation and the legitimate interest put forth to justify it." Second, three factors were to be considered – alternative means of exercising the rights available to inmates; the burden on the prison resources that would be imposed by accommodating the rights; and any alternatives to the regulation that fully accommodated the inmates' rights at *de minimis* cost to valid penological objectives. The PDOC easily met the first step by showing that the old mail policy was being abused by outsiders, who were sending contraband through mail by simply labeling it as a Privileged Communication. In addition, PDOC provided evidence that, by inspecting the mail in an off-site location, contraband was prevented from entering the corrections facility. Addressing the second part of the *Turner* analysis, the court held that control numbers were easily obtained, and, therefore, were a valid alternative means of receiving legal mail. Further, reverting back to the old policy would mean that corrections officers would have less time to deal with prison safety, causing a significant burden to corrections facilities – one that was not associated with a *de minimis* cost. *Fontroy v. Beard*, 559 F.3d 173 (3d Cir. 2009).

Employment and Personnel

Employer Health-Care Spending

Last year, the U.S. Court of Appeals for the Ninth Circuit upheld a San Francisco ordinance, the San Francisco Health Care Security Ordinance, against claims that the ordinance was preempted by the federal Employee Retirement Income Security Act of 1974 (ERISA). *See Golden Gate Restaurant Ass'n v. City and County of San Francisco,* 546 F.3d 639 (9th Cir. 2008). The ordinance required San Francisco employers to pay, to the City, either $1.17 or $1.76 per hour per employee, depending on the profit or non-profit status of the employer and the number of employees. These payments were used to help support a City-administered program (HAP) that provided health care to low- and moderate-income residents of San Francisco. The

continued on page 34

Golden Gate Restaurant Association (a group of area restauranteurs) had challenged the ordinance, arguing that ERISA preempted the employer-spending requirements, either because those requirements created a "plan" within the meaning of ERISA, or because they related to employers' ERISA plans. The district court granted the Association's motion for summary judgment and enjoined the implementation of the employer-spending provisions, but, on appeal, the Ninth Circuit had ruled that the ordinance was valid and not preempted. The ordinance did not require employers to establish their own ERISA plans or to make any changes to any existing ERISA plans. Employers could choose to make up the difference between their existing health-care expenditures and the minimum expenditures required by the ordinance either by altering existing ERISA plans or by establishing new ERISA plans. However, they could also elect a "City-payment option" that allowed them to make payments directly to the City, if they so chose, without requiring them to establish or alter ERISA plans. If employers chose the City-payment option, the employees for whom those payments were made were entitled to receive either discounted enrollment in the HAP or medical reimbursement accounts with the City. Further, the ordinance was not concerned with the nature of the health-care benefits an employer provided for its employees; it was only concerned with the dollar amount of the payments an employer made toward the provision of such benefits. The Ninth Circuit held that the City-payment option did not create an "employee welfare benefit plan" within the meaning of ERISA; that the ordinance was not preempted because of any impermissible connection with an employers' benefit plans; and that the ordinance also lacked any impermissible "reference to" employee benefit plans subject to ERISA.

Subsequently, the Association petitioned for rehearing *en banc*. On March 09, a divided Ninth Circuit denied the petition. The majority distinguished this case from *Retail Industry Leaders Ass'n v. Fielder*, 475 F.3d 180 (4th Cir. 2007), a case involving ERISA preemption of a Maryland law that required employees to spend at least eight percent of their total payrolls on employee health insurance costs, or pay the shortfall (the difference between the mandated amount and their actual spending) to the State. The court in that case had ruled that the law impermissibly "related to" an ERISA plan, as there was no real choice for employers but to meet the minimum spending threshold. Here, however, "[f]ar from imposing a de facto obligation on an employer to establish or alter an ERISA plan, the Ordinance offers an employer a meaningful choice."

The dissenting eight justices felt that the Ninth Circuit's decision had created a circuit split with the Fourth Circuit Court of Appeals, given that the "holdings of *Fielder* and *Golden Gate* stand in clear opposition." More importantly, however, they noted that this case concerned "an issue of exceptional national importance, i.e., national uniformity in the area of employer-provided health-care. The Fourth Circuit in *Fielder* and the district court here both considered the need for nationally uniform plan administration to be the central concern of the Supreme Court's ERISA preemption case law." If upheld, they felt, the San Francisco ordinance would "undoubtedly serve as a roadmap in jurisdictions across the country on how to design and enact a labyrinth of laws requiring employer compliance on health care expenditures, thereby creating the very kind of health care expenditure balkanization ERISA was intended to avoid." *Golden Gate Restaurant Ass'n v. City and County of San Francisco*, 558 F.3d 1000 (9th Cir. 2009).

Media Policy Invalid

Gonzalez was a detective employed by the Waterfront Commission of New York Harbor, a joint entity of the States of New York and New Jersey. At the time he was hired, Gonzalez was informed about the Commission's media policy, which placed the responsibility for all communications with the media with, and under the supervision of, the Office of the Executive Director. No staff member was to initiate contact with the media without the prior approval of the Executive Director. The reasons for this were to ensure that the agency spoke with "one voice," and that any information released to the media was accurate, in the public interest, and did not compromise the agency or any investigation. (The Commission's counsel testified that there were "no exceptions" to the policy, but allowed that an employee could offer a private opinion to the media regarding, say, the performance of a baseball team, without invoking discipline.) Gonzalez had concerns about an allegedly unsafe and hazardous condition at his workplace – the presence of dead rats in and around what Gonzalez believed to be a toxic, sludge-contaminated dirt pile in the Commission's parking lot. He had previously written to the Commission's Chief of Police to complain about the rats on behalf of his union members, and asked for copies of the lab reports regarding the testing that had been done. These were not forthcoming. He had also contacted the local Board of Health and the federal Occupational Safety and Health Administration (OSHA), but was told that OSHA lacked regulatory authority over bi-state agencies. Finally, Gonzalez contacted a reporter at NBC-TV and identified himself as the union representative, to complain about the dirt pile and his health concerns. As a result, Gonzalez was disciplined for violating the media policy. When he was given ten days' suspension, he appealed, claiming that the policy was overbroad and, therefore, facially unconstitutional, and violated his First Amendment rights.

The regulation was found to be overbroad and unconstitutional on its face. "It is well-established that a public employee does not relinquish his or her First Amendment right to comment on matters of public interest, otherwise available to citizens, simply as the result of the fact of public employment." Because the claim involved a facial, rather than as-applied, challenge to the policy, the Commission's burden of justifying the restraint was greater than that existing if only an isolated disciplinary action was involved. The Commission's

policy, prohibiting all employee contact with the media without the prior approval of the Executive Director, was "functionally indistinguishable" from regulations previously invalidated on First Amendment grounds: the policy acted as a prior restraint that was overbroad in its scope, "potentially acting to chill comment by Commission employees, rendered in a private capacity, about non-confidential matters of public concern." The matters upon which Gonzalez spoke were matters of public concern; thus, his speech was that of a citizen, rather than that of an employee. The agency's interests in employee security and the confidentiality of its investigations did not outweigh any interest Gonzalez may have had in expressing his concerns, because his "conduct did nothing to jeopardize" the employer's interests. *In re Disciplinary Action Against Gonzalez*, 964 A.2d 811 (N.J. Super. A.D. 2009).

Finance
Appropriations

In 2008, the Arizona Legislature passed a general appropriations bill, H.B. 2209, for the coming 2008-2009 fiscal year. Section 47 of the bill required Arizona counties, incorporated cities, and towns to pay approximately $30 million into the state general fund (the cities' and towns' share was roughly $18.3 million). The amount for each local entity would be determined by legislative budget committee staff. The League of Arizona Cities and Towns contacted the Governor's Office to express its view that forcing localities to pay into a general fund was unconstitutional under the Arizona Constitution. Meetings between the two parties failed to result in a compromise, and the League sued. The Arizona Constitution stated that, "[t]he general appropriation bill shall embrace nothing but appropriations for the different departments of the State, for State institutions, for public schools, and for interest on the public debt. . . . Any legislation in a general appropriations bill that is neither an appropriation of money for a specific purpose nor a provision necessary for the proper expenditure of that money is improper."

The primary question for the Arizona Supreme Court was whether the legislation was an "appropriation." The court referred to a prior case, *Hunt v. Callaghan*, 32 Ariz. 235 (Ariz. 1927), in which it held that an appropriation was "the setting aside from the public revenue of a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money." The "essential parts of this definition" were the "certain sum," the "specified object," and the "authority to spend." Applying this approach to the case before it, the court found the legislature "did not expressly attach the assessed amount to any public revenue that it had previously set aside for the cities and towns. Because Section 47 fails to identify any prior appropriation, it fails to meet the definition of an appropriation." Addressing the State's argument that the cities and towns had received monies from the State far exceeding the $18 million at issue and the court should "infer that these were the prior appropriations intended to be reduced by Section 47," the court declined to agree. Section 47 did not identify either the urban revenue-sharing funding, or the various discretionary grants made for the benefit of the cities and towns, as appropriations that the legislature designated for reduction. In any event, the various discretionary grants were often subject to restrictions (e.g., use or reimbursement limitations imposed by the federal government) and were not always appropriated to the cities and towns themselves, but to various executive agencies for use by the cities and towns. Because Section 47 did not reduce any identified prior appropriation, it violated the State constitution's limit on the contents of general appropriations bills and was, therefore, unconstitutional. *League of Arizona Cities and Towns v. Martin*, 219 Ariz. 556, 201 P.3d 517 (Ariz. 2009).

Land Use
Vested Rights in Zoning

In 1998, the plaintiff property owners, Alzamora, Dunn, and Creative Homes, Inc., applied for a special use permit to construct a multi-unit seniors' residential building in the Village of Chester, New York. In 2004, while the application was pending, the Village adopted amendments to its zoning law that prohibited the plaintiffs' planned construction under the permit. The plaintiffs alleged that the Village did so knowing that the plaintiffs' construction project was the only pending project in the Village to be affected by the change in law, yet it failed to provide them with actual notice of the meeting at which the proposed amendments were discussed. In 2005, the Village extended the amendment to all multiple dwelling projects, not just those for senior citizens, which meant that the plaintiffs could not use the property to operate a regular adult community to avoid the new requirements. They received no notice of the meeting at which this amendment was passed, although public notice of each hearing was given once by means of publication in the local newspaper. The plaintiffs brought suit pursuant to 42 U.S.C. § 1983, claiming that the special use permit was deemed approved by reason of the Planning Board's failure to approve or disapprove the application within 62 days of its 2002 hearing on their application; second, that the failure to notify them of the meeting was a violation of their procedural due process rights, guaranteed by the Fourteenth Amendment. The Village and its Planning Board moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6), which motion was granted. Under New York law, a property owner had no right to the existing zoning status of his land unless his right had become vested; for it to vest, the owner had to have undertaken substantial construction and must have made substantial expenditures prior to the enactment of the more restrictive zoning ordinance. The lower court held that, because the plaintiffs had not begun any construction at all, they had no vested right that allowed them to construct and operate the project despite the prohibitory changes in the zoning law; thus, they had no protected property interest as required for the due process claim to succeed.

On appeal, the U.S. Circuit Court of Appeals for the Second Circuit affirmed. It declined to address whether the plaintiffs had, in fact, obtained the special use permit by operation of the default provision in the law, as the failure to complete substantial construction meant that they had "no

continued on page 36

constitutionally protected property right in the zoning status of their land or a constitutional right to receive actual notice of the proposed change in the zoning status." The court expressly rejected the plaintiffs' additional argument – that the un-exercised right to develop land conferred a due-process right in its existing zoning status – stating "[i]f that were so, our court would effectively be transformed into a zoning board of appeals – a role we have expressly declined to assume." *Alzamora v. Village of Chester*, No. 07-2944-cv, 2009 WL 578630 (2d Cir. Mar. 06, 2009).

Practice and Procedure
Trial Questions – Prior Disciplinary Actions

Two District of Columbia Metropolitan Police Department (MPD) officers, Merritt and Hackley, were patrolling in a marked car. They stopped, and a confrontation between the officers and two men occurred, after which the men escaped into Mrs. Hudson's nearby home. The police followed, and in the scuffle, one of the men, Clayton, was struck by the officers, and Hudson (Clayton's grandmother) was knocked to the floor. Clayton and Hudson sued the District of Columbia and the officers, alleging causes of action for excessive force, assault and battery, false arrest, malicious prosecution and negligent or intentional infliction of emotional distress based on the officers' conduct. During Clayton's counsel's cross-examination of Merritt at trial, Merritt was asked about false reports, prior disciplinary actions, the improper use of force, and "conduct unbecoming" incidents. Counsel pointed out to the jury that Merritt had been suspended for a year for lying on a report and using inappropriate force on a woman, and added, "Let me tell you something. You're not a bad cop on Monday and a good cop on Tuesday. It don't work like that. If you were a bad cop on Monday, you're a bad cop on Tuesday ... And you know from Officer Merritt himself that he was a bad cop." Defense counsel had objected and asked for a curative instruction, which the court denied because it had "sustained" the defendants' objection to the "bad cop" argument. After the jury returned verdicts in favor of the plaintiffs, the defendants moved for a new trial, which was denied, and subsequently appealed the jury verdicts finding them liable, arguing that the district court abused its discretion when it denied the motion for a new trial on all of the claims, notwithstanding the plaintiff counsel's improper "prior bad acts" cross-examination and closing argument.

The U.S. Court of Appeals for the District of Columbia Circuit agreed that the trial court committed a reversible error, and remanded the matter for a new trial. It was a violation of Federal Rules of Evidence, Rule 404(b), for the trial judge to permit Clayton's counsel to elicit testimony about Merritt's purported history of anger, the use of "improper use of force," and filing "false reports." "Such testimony is evidence of prior bad acts introduced 'to show action in conformity therewith' and is therefore prohibited under Fed. R.Evid. 404(b)." The court further compounded its error when it permitted Clayton's counsel to exploit the Rule 404(b) questioning during closing to indict Merritt as a "bad cop" and when it declined to provide a curative instruction. "The cumulative effect of the inadmissible evidence and the inflammatory argument based on it is precisely what Rule 404(b) prohibits: exhorting a jury to find against a defendant because he acted 'in conformity' with his bad acts" – here, the purported history of physical violence, the improper use of force, and filing false reports. The jury "may well have been persuaded" by such testimony, and the error was not a harmless one because "the trial was hotly contested and turned largely on credibility." *Hudson v. Dist. of Columbia*, 558 F.3d 526 (D.C. Cir. 2009).

Search and Seizure
Vehicle Search and Non-Verbal Conduct

A police officer, Tran, saw Neely driving without his headlights on and stopped him. His check of Neely's documents revealed no problems and he gave Neely a verbal warning. Before he let him go, he asked if Neely had any "guns, weapons, grenades, bazookas" in the vehicle. Neely answered no, and asked Tran if he would like to check the trunk. Because it took Neely more than 30 seconds to open the trunk – a period Tran thought was excessive– he asked Neely to get out of the vehicle. Neely gave Tran the car keys, and after Tran did a pat-down search, he began to search the car's interior (but not the trunk). He found a firearm in the magazine pouch of the passenger side front seat. Neely was charged with being a felon in possession of a firearm and filed a motion to suppress, alleging that Tran's search of the passenger compartment of his vehicle violated his Fourth Amendment rights. The district court found that when Neely handed over the keys, left the door to his vehicle open, failed to object to the search of the interior of his vehicle, and carried on a "relatively friendly" conversation with another police officer while the search was being carried out, he broadened the scope of his original consent, which had been expressly limited to the trunk, to include his entire vehicle.

On appeal, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded. By asking whether Tran would like to "check" the trunk, Neely consented to a search of his trunk. While non-verbal conduct could be sufficient to establish consent, such conduct was assessed in light of an objective reasonableness standard. Neely did not offer his keys in response to an officer's request to search his car, "an action which might reasonably be viewed as non-verbal consent," or offer his keys while asking Tran whether he would like to search his vehicle. Neely surrendered his keys on being ordered out of the vehicle, and had already placed a verbal limit on the scope of his consent. His decision to give Tran his keys and leave his car door open "were the product of cooperation with a law enforcement officer, not an intentional indication of consent." Neely's actions and his failure to object did not overcome his prior verbal limitation on the scope of his consent. Further, because Tran could not have reasonably believed that Neely was dangerous, the search of the car could not be justified as a protective search *U.S. v. Neely*, No. 08-4257, 2009 WL 1142571 (4th Cir. April 29, 2009). **ML**

Nonverbal Testimony

cont. from page 17

17. C.J. Wigley, III, *Disclosiveness, willingness to communicate, and communication apprehension as predictors of jury selection in felony trials*, 43 Comm. Q. 342-51 (1995); C.J. Wigley, III, *Verbal aggressiveness and communicator style characteristics of summoned jurors as predictors of actual jury selection*, 66 Comm Monographs 266-75 (1999). ML

Federal

continued from page 18

In addition to finding no evidence of express preemption, that court refused to find field preemption, as the plaintiffs failed to show "that Congress exhibited a clear and manifest intent to render the regulation of carbon dioxide emissions from motor vehicles exclusively a federal domain."[18]

IMLA is participating as an amicus in both the *California v. EPA* case and *Central Valley Chrysler Jeep v. Goldstene*. Oral argument in front of the Second Circuit in *Goldstene* is set to begin around the time of the publication of this issue of the *Municipal Lawyer*. Whether either party will be able to deliver a knock-out punch in this round is yet to be seen, but, certainly, the parties are training for a possible bout in front of the big stage – the United States Supreme Court.

Notes

1. 42 U.S.C. §7521(a)(1) (West 2009).
2. 549 U.S. 497, 532 (2007).
3. Jennifer Parker, *Supreme Court Rejects Bush in Global Warming Debate*, ABCNews.com, Apr. 02, 2007, at http://abcnews.go.com/Politics/story?id=3000959&page=1&CMP=OTC-RSSFeeds0312.
4. The author agrees that Round Two started before Round One ended, so perhaps it should be called Round 1.75; for simplicity's sake, though, let's just call it Round Two.
5. 42 U.S.C. § 7543(b)(1) (West 2009).
6. *Id.*
7. Notice of Decision Denying a Waiver of Clear Air Act Preemption, 73 Fed. Reg. 12,156, 12,157 (Mar. 06, 2008).
8. *California et al. v. EPA, et al.* (No. 08-1178, filed May 05, 2008, D.C. Circuit).
9. Memorandum for the Administrator of the EPA, 74 Fed. Reg. 17, 4905 (Jan. 26, 2009).
10. *Obama Moves to Let States Cap Car Emissions*, MSNBC.com, Jan. 26, 2009, at http://www.msnbc.msn.com/id/28846202.
11. 529 F. Supp.2d 1151 (E.D. Calif. 2007).
12. 508 F. Supp.2d 295 (D. Vt. 2007).
13. This includes motor vehicle dealerships, manufacturers, and a manufacturers' industry association (the Alliance of Automobile Manufacturers).
14. 49 U.S.C. § 3902.
15. 71 Fed. Reg. 17,659.
16. Brief for Appellant at 22, *Central Valley Chrysler Jeep v. Goldstene*, 529 F.Supp.2d 1151 (E.D. Calif. 2007) (No. 08-17378).
17. Green Mountain Chrysler Plymouth Dodge Jeep, 508 F. Supp.2d at 354.
18. *Id.* ML

Supreme Court

continued from page 23

lawsuit brought on behalf of foster children in the custody of the Georgia Department of Human Resources (DHR). The plaintiffs sued the state, the DHR, various counties, and each county's department of family and children services and its directors, alleging systemic deficiencies in the counties' foster care systems and asserting 15 causes of action under federal and state law. The complaint sought declaratory and injunctive relief, as well as attorneys' fees and expenses. The matter was resolved by way of a settlement agreement that stated "Plaintiff Class is entitled to recover its expenses of litigation, including reasonable attorneys' fees and nontaxable costs, pursuant to 42 U.S.C. § 1988 and Fed.R.Civ.P. 23(h)." If the parties could not reach an agreement, then the amount of any award was to be determined by the court, which is what happened. Counsel sought a total of $14,342,860 in fees, about half of which was an enhancement of the fee award for a job well done. Over the defendants' objections, the district court awarded a basic ("lodestar") fee of $6,012,802.90 and allowed the enhancement, noting that "plaintiffs' counsel brought a higher degree of skill, commitment, dedication, and professionalism to this litigation than the Court has seen displayed by the attorneys in any other case during its 27 years on the bench." The defendants appealed, and the plaintiffs, "convinced that the district court was not generous enough," cross-appealed, insisting that they "deserve[d] even more" than the $10,500,000 total fees awarded to them.

The Eleventh Circuit noted that a merits-exceeding result for the plaintiffs had to be the product of one, or some combination, of "superior lawyering by plaintiffs' counsel, bad lawyering by defendants' counsel, poor decision making by the court, or dumb luck," but that Supreme Court precedent held that superior lawyering by the plaintiffs' counsel was not a proper basis for an enhancement. Further, there was a "perverse irony" in the "seven figure, court ordered gratuity in this case," in that it reduced the amount of state funds available to care for foster children, the very group in issue and described as some of Georgia's "most vulnerable citizens." Nonetheless, it declined to interfere with the award, indicating that, under the prior panel precedent rule, it was not free to decide the enhancement issue.

The matter now comes before the Supreme Court, which will decide whether a reasonable attorney's fee award under a federal fee-shifting statute can ever be enhanced based solely on the quality of performance and results obtained, when these factors already are included in the lodestar calculation, and whether an enhancement to the lodestar based on the quality of representation and results was contrary to the Court's prior rulings, particularly after the lodestar has been reduced for excessive hours billed.

IMLA will continue to update our members on these cases through our bi-weekly e-mail newsletter and this magazine. ML

Visual Presentations

continued from page 27

2003), available at http://totalcommunicator.com/vol1_4/audience_article_print.html (last visited March 25, 2009).
10. Mark Twain, Roughing It 257 (New American Library, ed. 1980) (1871).
11. Fred H. Cate & Newton N. Minow, *Communicating with Juries*, 68 Ind. L.J. 1101, 1112 (1993).
12. Federal Judicial Center 2001, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, 42 (Federal Judicial Center and National Institute for Trial Advocacy, eds., 2001).
13. United States. v. Williams, 657 F.2d 199, 203 (8th Cir. 1981).
14. Hinkle v. City of Clarksburg, 81 F.3d 416, 424 (4th Cir. 1996); Fusco v. General Motors Corp., 11 F.3d 259, 264 (1st Cir. 1993); Gilbert v. Cosco, Inc., 989 F.2d 399, 402 (10th Cir. 1993).
15. *Hinkle*, 81 F.3d at 425; Robinson v. Missouri Pac. R.R. Co., 16 F.3d 1083, 1088 (10th Cir. 1994).
16. *Hinkle*, 81 F.3d at 425.
17. Fed. R. Evid. 106.
18. Nicole J. DeSario, *Merging Technology with Justice: How Electronic Courtrooms Shape Evidentiary Concerns*, 50 Clev. St. L. Rev. 57, 66 (2003).
19. Federal Judicial Center 2001, *Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial*, 191-96 (Federal Judicial Center and National Institute for Trial Advocacy, eds., 2001).
20. Fed. R. Evid. 611(c) and 602.
21. Fed. R. Evid 402 provides, in part, that "[a]ll relevant evidence is admissible, except as otherwise provided. ... Evidence which is not relevant is not admissible."
22. Fed. R. Evid. 802, 803, 804, 901, and 902.
23. Fed. R. Evid 703.
24. United States v. Barefoot, 952 F.2d 397 (Table) (4th Cir. 1991) (per curiam); United States v. Diez, 515 F.2d 892, 905 (5th Cir. 1975), *cert.* denied, 423 U.S. 1052 (1976); United States v. Possick, 849 F.2d 332, 339 (8th Cir. 1988). ML

Inside Canada

continued from page 28

instead of s. 90(1)(c) ("labour relations or other employee relations") to close the meeting, and whether the report was distributed "as soon as practicable and possible." However, because of the deference the court was required to give to the Board in relation to its own procedure, those defects alone were "not sufficient at this stage to warrant intervention." That was not the case with the remaining procedural issues – that the matter was raised without prior notice and an opportunity to investigate and respond. The fundamental problem with the CRD's approach to disciplining its member was that he was "never given any specifics of the complaints that might permit a reasoned and structured response," and never given "any opportunity to consult counsel or even any reasonable opportunity to study and respond to the vague allegations. ... In that light, it is difficult to see how the petitioner's right to be heard was respected in any sense." The fact that other Board members and Bell had spoken to Barnett about his conduct, and Bell had cautioned him that his conduct would be raised at the next Board meeting, did not constitute notice in law. "Notice" required that the recipient be capable of appreciating that some specific conduct would be discussed and sanctions sought, and be able to come to the meeting fully prepared to answer the charges. The report at issue "contained nothing specific" and "appear[ed] to merely bandy about words like 'harassment' and 'intimidation' without more." Further, the Chair's comments indicated "not only a clear bias against" Barnett, but "also a complete disregard for any fair process." Because Barnett was denied reasonable notice and denied procedural fairness, the resolution was set aside. As this mooted his claim for a copy of the report, the court advised that he apply, as suggested, under the *Freedom of Information and Protection of Privacy Act*. The case is *Barnett v. Cariboo Regional District*, 2009 BCSC 471 (B.C.S.C. Apr. 08, 2009). ML

Ordinances

continued from page 29

interest was substantial: banning new offsite billboards promoted traffic safety and reduced blight, even if all billboards were not eliminated; further, the State had a significant financial interest in allowing grandfathered billboards to stay, as otherwise it would have to pay just compensation to the billboard owners. In any event, Maldonado purchased the property in the 1990's, so he was not similarly situated to the grandfathered landowners.

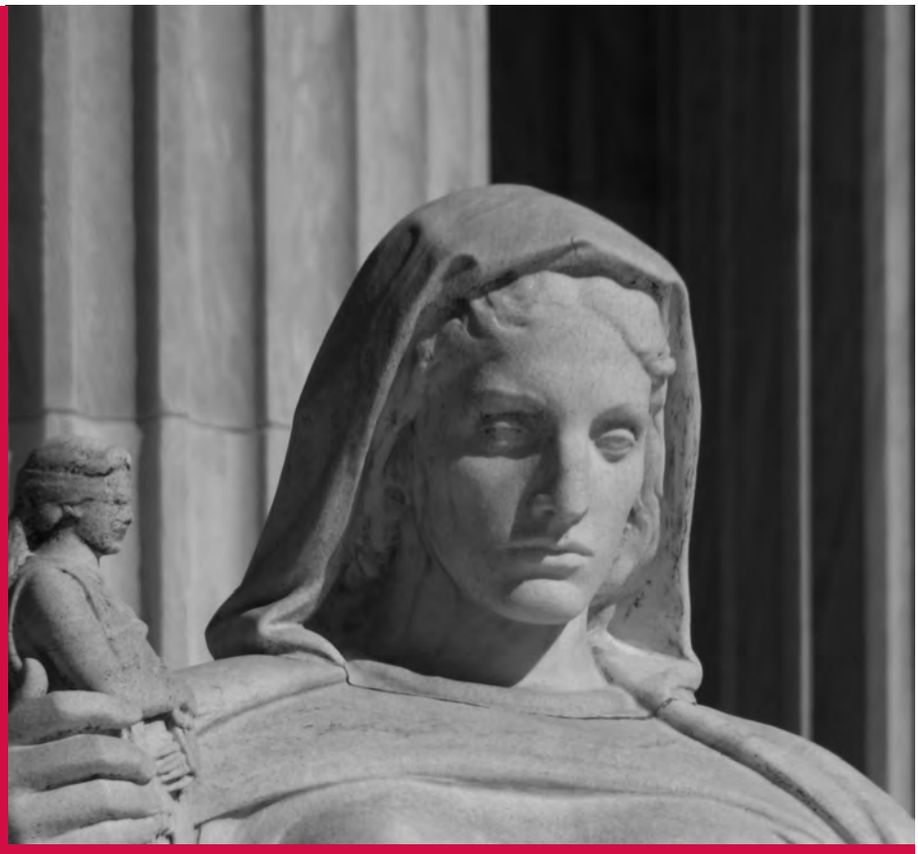
The remainder of 2009 may provide equally active for billboard litigation in the Ninth Circuit. In March, a federal judge in California found that the City of Los Angeles had violated an injunction by refusing the opportunity for a billboard company to seek permits for new "supergraphic"[13] signs. As 2009 continues, there is no doubt that cities around the country will have to continue to do battle in sign wars.

Notes

1. Clear Channel Outdoor, Inc., Q4 2008 Earnings Report (2008), at http://www.clearchanneloutdoor.com/assets/downloads/pdfs_corp/CCO_Q4_2008_Release.pdf.
2. *Id.*
3. Patrick Mcgreevy, *Schwarzenegger Considers Selling Ads on Freeway Signs*, LATimes.com, Sept. 24, 2008 at http://articles.latimes.com/2008/sep/24/local/me-signs24.
4. 551 F.3d 898 (9th Cir. 2009).
5. Los Angeles, Calif. Municipal Code, § 91.6205.11 (2004).
6. Metro Lights, L.L.C. v. City of Los Angeles, 488 F. Supp.2d 927, 947 (C.D. Cal. 2006).
7. 551 F.3d at 910.
8. *Id.*
9. *Id.* at 914.
10. 556 F.3d 1037 (9th Cir. 2009).
11. *Id.* at 1045.
12. *Id.* at 1046.
13. Phil Willon, *Judge's ruling is a setback to L.A.'s efforts to combat supergraphics*. Los Angeles Times, Mar. 16, 2009 at http://www.latimes.com/news/local/la-me-supergraphics17-2009mar17,0,3230970.story. ML

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