For Pennsylvania Young Lawyers, here's what's...

AT ISSUE

A publication by and for the Young Lawyers Division of the Pennsylvania Bar Association

Spring 2011

Trial As A Visual Medium: Why Every Trial Should Be a Visual Trial

By David W. Gross

Seeing is believing. A picture is worth a thousand words. These tired clichés exist for one very simple reason: They are based in truth. And nowhere is that truth more evident than in front of a jury.

A picture cannot truly *replace* a thousand words. When trying to convey your message to a jury, the words used – both from witnesses and counsel alike – are certainly crucial. But those words may well be wasted if they are not supported by visual aids.

Well-planned exhibits can explain and supplement testimony the jury has heard. A good use of exhibits can serve numerous important functions:

- Increase retention and understanding of evidence
- Enhance or minimize the witness
- Keep the jurors interested

Increased Retention and Comprehension

No matter how articulate the witness at hand may be, she cannot accurately nor efficiently convey the information contained in a single photograph or diagram. Imagine a friend attempting to describe the Taj Mahal to someone who has never seen it. It simply cannot be done effectively. Inevitably, they will start drawing a picture or searching for a photograph.

In a trial, consider the witness

who tries to describe the layout of a room and the placement of objects within that room. Now consider the witness who uses a diagram of that same room to instead *show* the jury what the room looked like and where the objects were. The presentation of testimony will move along at a brisker pace. More importantly, it will be clearer, and the jurors will remember it.

The truth is, human beings are visual learners. From ancient philosophers to modern researchers, the value of the visual medium is well understood.

Modern research has shown that more than 80 percent of learning occurs visually.[1] Some studies have shown that we retain as little as 15 percent of the information presented to us orally. Yet we remember up to 90 percent of what we see.[2]

> "I hear and I forget.
> I see and I remember."
> **Confucius**

These studies only demonstrate what we already know to be true: If we want our audience to walk away remembering our message, then a presentation of any kind must have a visual component.

Enhance Or Minimize A Witness

For better or worse, evidence requires witnesses – to tell the tale of the case, to authenticate physical evidence, to explain complicated material and hopefully to impress the jury. Sadly, witnesses are not pulled straight out of central casting. Their significance to a case is wholly unrelated to their likeability or quality as a witness.

There will be situations where you would prefer not to call on a particular witness at all. However, his or her testimony is necessary, and no other witness can provide anything similar. Use of visuals may enhance the quality of his/her testimony and may, at the same time, focus the jury's attention on the exhibit rather than the witness.

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Message from the YLD chair

By Lisa M. Benzie-Woodburn

Young lawyers across Pennsylvania are not only providing valuable services to their clients but also performing valuable pro bono services and community service. It is always amazing to hear the activities and events going on across the state that are organized by young lawyers.

In January 2011, at the Pennsylvania Bar Association Midyear Meeting in Key West, Fla., the Young Lawyers Division held a Business Meeting and a dinner. The Midyear Meeting always provides a chance for young lawyers to get to know one another in a social and warm-weather environment as well as interact with PBA leadership and judges and legislators.

More recently, the Young Lawyers Division met at the Conference of County Bar Leaders Seminar held at the Nittany Lion Inn in State College. Forty-two lawyers from across Pennsylvania, representing multiple counties, attended the YLD Business Meeting. Most of the young lawyers in attendance are active members in their local bar association as well as the Pennsylvania Bar Association. Many were leaders of their local bar associations. The Young Lawyers Division also participated in a CLE by providing speakers for "The Future of Electronic Filing." The panelists were all young lawyers, and the CLE was well attended.

At the PBA Board of Governors Meeting, held in conjunction with CCBL, the Board approved the PBA's new Bar Mentoring Program. This pilot program, which will be overseen by the YLD, will be limited to two law schools in Central Pennsylvania and 25 students. The purpose of this program is to provide one-on-one support to law students taking the bar exam, particularly second time test-takers, focusing on the essay portion of the exam. We hope the program will be a success and look forward to your cooperation!

In addition to the new Bar Mentoring Program, the YLD has a very active Mock Trial Program, in which most counties participate, as well as Project Kid Care and Wills for Heroes. Please view our website, www.pabar.org/public/yld/, to learn more about these programs and contact me, personally, if you would like to become more involved or bring a program to your area.

On March 31, the young lawyers held a Business Meeting in conjunction with PBA's Committee/Section Day. Information about the Bar Leadership Institute was provided, as well as information about the upcoming election of Young Lawyers Division officers. The YLD looks forward to its next business meeting on May 4 at the PBA Annual Meeting in Philadelphia, where the Young Lawyers Division will change leadership and hand out its Michael K. Smith Award.

The Michael K. Smith Award is given to a Pennsylvania Young Lawyer who through his or her exemplary personal and professional conduct reminded lawyers of their professional responsibilities.

Additionally, the Young Lawyers Division will be joined at its business meeting by Chief Judge of the Superior Court, President Judge Correale F. Stevens. I look forward to seeing you then! ■

Lisa M. Benzie-Woodburn of the Harrisburg law firm of Angino & Rovner is the chair of the PBA Young Lawyers Division.

At Issue

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Save the dates for upcoming 2011 PBA events

PBA Annual Meeting
May 4-6
Sheraton Philadelphia City Center Hotel, Philadelphia

PBA House of Delegates Meeting
May 6
Sheraton Philadelphia City Center Hotel, Philadelphia

PBA YLD Summer Meeting/New Admittee Conference
July 28-30
Rocky Gap Lodge & Golf Resort, Flintstone, Md.

Trial As A Visual Medium

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Have a dramatic picture of the crime scene? Consider admitting it through this witness, then putting a blow-up of it in front of the jury while questioning continues. Diligent jurors will surely listen, but their attention will go back to the picture time and again.

On the other hand, some witnesses are lovable or have unimpeachable credibility. Smart use of exhibits with these witnesses can extend their time on the stand, help them convey their message to the jury, and can emphasize their testimony in a way that cannot otherwise be done.

For example, your star witness can go through his or her testimony orally to the jury. Then, a demonstrative exhibit can be admitted, and now he or she can *show* the jury what he or she has been talking about. Further, having a witness step down from the stand to point out locations on an exhibit will truly emphasize that witness. You are putting the witness center stage. Better yet, for simpler exhibits, hand a marker to him or her and allow the witness to draw the diagram right in front of the jury.

For those witnesses you would prefer to avoid but simply cannot, consider keeping them seated in the witness stand. If they must indicate positions or identify items, have them do so from the chair.

The Modern Juror and Holding His/Her Interest

Baby boomers (born 1946–1964) grew up watching television and learning about the world from Walter Cronkite. They got nightly updates on Vietnam, watched as Elvis joined the Army and lived through the assassination of JFK.

Generation X (born 1965–1976) saw the birth of MTV, the shooting of Ronald Reagan and the introduction of the video game.

Generation Y – also known as Millennials – (born 1977–1998) text, tweet and publish their lives on Internet social media outlets.

These are your jurors. They are the sound-bite generations, and they are increasingly accustomed to communicating in short bursts – and doing so in a visual manner.

Standing in stark contrast to this, trials can take days, weeks or even months. Some of the information provided can be foreign or hyper-technical. Detail is the rule, not the exception, even if it means that a number of the witnesses will be repetitive to some degree.

As a trial lawyer, there is no choice but to embrace the reality of the modern juror. It is your responsibility to capture a juror's attention and keep it.

Pictures, diagrams, flow charts, etc., will help immensely. They will also break up any monotony that may exist, and the exhibits themselves will live on in the jury room. They will serve as visual reminders of the testimony that was given.

Every Trial Should Be A Visual Trial

One of my mentors once told me that every single trial should at least have a picture of the crime scene – no matter what the offense. I couldn't agree more. But if you stop there, you do so at your own peril.

Communication is perception. That is, your message is only as good as the information received by the audience. Considering that we are all visual creatures, the only way to effectively ensure your message is carried – and perceived – the way you want is through the use of well-planned exhibits.

Never just tell when you can show and tell. ■

[1] Occupational Safety & Health Administration, *Presenting Effective Presentations with Visual Aids* (May, 1996; accessed February 13, 2011) <http://www.osha.gov/doc/outreachtraining/htmlfiles/traintec.html>.

[2] Sonya Hamlin *What Makes Juries Listen* (Glasser Legal Works, 1998)

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Ethical Considerations for Pennsylvania Attorneys Using Covert Advertising on Social Networking Sites

By Drew Gray Miller

Editor's note: This is the first in a three-part series.

Introduction

Law schools still advise students not to join social networking sites like Facebook, because employers have been using these sites to try and find unflattering or incriminating evidence on potential employees, which could prevent law students from starting or advancing in their careers. Conversely, a lack of an online presence is just as detrimental. In the movie "The Social Network," Napster founder Sean Parker quipped to Facebook co-founder Eduardo Saverin: "I also did a search on you and you know what I found? Nothing." In the Information Era, it is important to market yourself via the Internet. Unlike expensive traditional advertising, the Internet has provided young lawyers with an effective and low-cost way to market themselves. In fact, tech-savvy attorneys have been using social networking websites like Facebook, Twitter, LinkedIn and YouTube to their lucrative advantage. This three-part series will offer a cursory explanation of how to utilize social networks to create your personal brand, while also addressing potential ethical considerations that may arise.

Covert Advertising

The comedian Stephen Wright once said, "Ninety-nine percent of lawyers give the rest a bad name." Like it or not, we are members of the most reviled profession in America. Commercials that begin, "Have you been hurt in an accident?" are most certainly causing society to view attorneys as *ambulance chasers* and this type of advertising is ruining the dignity of our profession. Now, with the advent of online social networks, a new type of advertising has emerged that could be even more devastating to the legal profession than traditional advertising, because it is not as heavily regulated and has the potential to mislead many consumers.

Covert advertising has traditionally been seen as a type of subliminal advertising occurring as product placement within visual media such as movies or television. It is a way to advertise without appearing to "sell" the consumer on a particular product. Recently, covert advertising has morphed into inexpensive and effective direct marketing through online social networking sites in the form of Facebook pages, Twitter updates, LinkedIn recommendations and YouTube videos. In fact, Old Spice recently used YouTube and Twitter to conduct a massive social media ad campaign that went on to become one of the most successful in history. Social media marketing is starting to catch on, and this new phenomenon has left bar associations asking: "Is *this* advertising – and if so, is it ethical?"

Ethics in Legal Advertising: Pennsylvania vs. Florida

The Pennsylvania and Florida Bar Associations have both addressed the issue of attorney advertising, but each has come to different conclusions in regards to what is considered unethical.

The legal profession has always had concerns about attorney advertising. In fact, in 2006, Pennsylvania Bar Association then-President Kenneth Horoho said in his inaugural speech to the House of Delegates that "some of the advertising being conducted by lawyers throughout our state is hurting the profession and affecting the public's perception of us." To address this problem, he created the Task Force on Lawyer Advertising in order to make recommendations to the Supreme Court of Pennsylvania. The report was finished in May of 2007 and addressed several topics, including "misleading and deceptive websites" and "comparative and superlative advertising." Unfortunately, the task force noted that some of the rules concerning advertising were inadequate: "Pennsylvania's Rule of Professional Conduct 7.1

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Covert Advertising on Social Networking Sites

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(Communications Concerning a Lawyer's Service), may have been rendered too vague and fails to provide meaningful guidance beyond the fundamental prohibition against false or misleading advertising." The task force also implied that testimonials from a former client were acceptable as long as they do not involve matters still pending. In addition, the task force warned against "comparative" or "superlative" advertising, which usually "consists of ratings and quasi-awards" from peer review publications such as *The Best Lawyers in America* and *Super Lawyers*, but concluded by saying that such comparative advertising is acceptable as long as it is not "contingent, in whole or in part, upon financial contributions or other illegitimate means."

The Florida Bar Association was one of the first to recognize the ethical concerns regarding the use of social networking sites to advertise. In 2009, the Florida Bar petitioned the Florida Supreme Court to consider the issue of attorney websites as they relate to advertising. The court addressed the issue in its recent decision, *In Re: Amendments to the Rules Regulating the Florida Bar – Rule 4-7.6, Computer Accessed Communications*, 34 Fla. L. Weekly S627 (Fla. Nov. 19, 2009), Case No. SC08-1181. One issue over which the Florida Supreme Court expressed concern was the topic of testimonials on a website. Unlike Pennsylvania, the Florida Bar considers testimonials by former clients to be a violation of Rule 4-7.2(c)(1)(J) of their Rules of Professional Conduct. The comment to this particular provision states that endorsements or testimonials are prohibited, "whether from clients or anyone else, because they are inherently misleading to a person untrained in the law. Potential clients are likely to infer from the testimonial that the lawyer will reach similar results in future cases. Because the lawyer cannot directly make this assertion, the lawyer is not permitted to indirectly make that assertion through the use of testimonials." Interestingly, the Florida Supreme Court still had questions concerning "testimonials" and in a letter dated Nov. 19, 2009, to Jack Harkness, the executive director of the Florida Bar Association, the court asked that the Florida Bar "study and define the term 'testimonial' [because] … the Bar recently informed the Court at oral argument that the term is undefined."

In response to this case, the Standing Committee on Advertising approved guidelines for: 1. social networking sites 2. video sharing sites and 3. lawyer and law firm websites. It concluded that "pages of individual lawyers on social networking sites that are used solely for social purposes, to maintain social contact with family and close friends, are not subject to the lawyer advertising rules." The committee went on to note that "pages appearing on networking sites that are used to promote the lawyer or law firm's practice are subject to the lawyer advertising rules." Thus, Florida lawyers cannot post on websites or social networking sites information such as, "references to past results, promises of results, testimonials, statements characterizing the quality of legal services, and visual or verbal portrayals that are false, misleading, manipulative, or confusing." For the past eight years, the committee has been publishing an annual comprehensive (102-page) manual titled *Handbook on Lawyer Advertising and Solicitation* to help guide attorneys.

Pennsylvania has not yet addressed these issues, and so some Pennsylvania law firms who deal with class action cases involving people from multiple states – such as asbestos/mesothelioma suits – could obtain a competitive edge over similarly situated Florida firms that are also vying to represent these plaintiffs. Faced with the fact that Florida law firms will now be banned from referring to past results, using testimonials or characterizing the quality of their legal services on their websites, eight prominent Florida law firms have protested the Florida Supreme Court's proposed rules for Web advertising in a 66-page comment that was recently submitted to the court.

Compared to Florida, the Pennsylvania Bar appears to have taken a *laissez-faire* approach when considering the issue of online advertising. Pennsylvania simply has not addressed issues such as the implications and ethical considerations of article marketing and covert social network advertising on websites like Facebook, Twitter, LinkedIn and YouTube – which many young and tech-savvy attorneys have been using to their lucrative advantage.

The second and third parts of this article will describe how to use Article Marketing, Facebook, LinkedIn, Twitter and YouTube to your lucrative advantage by acquiring clients and creating a powerful online presence for yourself and why it is important to utilize these techniques before they are deemed unethical. ■

Drew Gray Miller is an attorney licensed to practice law in Pennsylvania, Florida and the District of Columbia. He received a B.S. in broadcast journalism from the S.I. Newhouse School of Public Communications at Syracuse University and a J.D. from the Widener University School of Law in Harrisburg. He is also a former Realtor who gained nearly a decade of real estate experience working for his family's construction company. Miller is currently employed as Legal Counsel for the Senate of Pennsylvania and volunteers pro bono as a Director for Community Human Services, which helps the homeless population of Allegheny County. His future plans include practicing real estate law in Florida.

New Column Debuts

Career Corner

David E. Behrend

Starting with this Spring 2011 issue, *At Issue* will introduce a "Career Corner" column to help answer questions that many Pennsylvania lawyers have concerning their career expectations. Change in the practice of law since the recession started in 2007 may have impacted on one's career, directly or indirectly – for the recent graduate, associate or partner. I have been fortunate to counsel lawyers at all levels over the past 17 years who have gone through career and or employment changes.

This column will raise questions to be answered for the general Young Lawyers Division readership, whether the practice is with a firm, in-house, government or non-for-profit organizations. It is anticipated that the answer to a question will be of significant value to your career thinking.

Please submit a question or questions that you believe would be worthwhile for a seasoned legal career counselor to answer. E-mail your submission to yld@pabar.org with the subject line "Career Corner."

Below is an example of a serious "Career Corner" question that many in the Pennsylvania Bar Association's YLD may ponder.

Q: *I am with a large law firm, well compensated as a fourth-year associate, but putting in long hours, including weekends, to make my 2,200 billable hours. Fortunately, I shall be able to pay off my educational loans sooner, and then may want to move on. Does this make sense, leaving the firm and all that goes with it?*

A: The benefits of working with a large firm are well known: serious and very talented attorneys, excellent compensation, corporate or business clientele, excellent research facilities, and many times, solid mentoring program in ones practice area(s). The price to be paid: long hours, very competitive partnership track, billable hours, expectations of building a business clientele, and in a number of situations, a life that can preclude many outside activities.

Ultimately, the decision maybe made for you – partnership or possibly staying on as a staff attorney. Beyond that, one needs to consider whether the big law firm, with its rewards and demands, is the right setting for your career future. Being with a less pressurized, smaller firm, going in-house with a client company, or taking your practice expertise to a government position are some options to consider. Finally, if the practice area you have been in since graduation is not a "good fit," exploring other areas that might be more internally rewarding to you.

David E. Behrend, M.ED., director of Career Planning Services for Lawyers in Ardmore (www.lawcareercounseling.com), serves the career needs of Pennsylvania lawyers going through career or employment transitions. To e-mail him questions for "Career Corner," e-mail him at yld@pabar.org.

Boundary Disputes: The Doctrine of Consentable Lines

By Brett M. Woodburn

Boundary disputes are among the most common disputes that arise between property owners. Even in today's world of approved and recorded subdivision plans, neighbors will fight over a few feet, or even a few inches. Historical knowledge of where property lines are (or should be) speaks with the immutable force of truth that is sometimes even supported by the actual wooden stakes or iron pins that purportedly mark the boundaries. Despite the conviction with which this institutional knowledge is spoken, regardless of where wooden stakes – or even capped rebar pins – may be located, the most reliable method for determining boundaries is a survey.

In Pennsylvania, unlike in other states, surveying property prior to acquiring title – especially in residential transactions – is *not* the norm. Does that mean that we, as property owners who have not surveyed our land, cannot rely on the fence, the driveway or the hedge row that has been accepted as the boundary line for time inmemoriam? Of course not. Equity has given rise to the doctrine of consentable lines, or boundary by acquiescence. The doctrine of consentable lines will establish a boundary either: (1) by dispute and compromise; or (2) by recognition and acquiescence. *Plauchak v. Boling, 653 A.2d 671 (Pa. Super. 1995)(citing Niles v. Fall Creek Hunting Club, Inc., 545 A.2d 926 (Pa. Super. 1988)(en banc))*. The doctrine of consentable lines is separate and distinct from adverse possession. Applying the doctrine does not create an estate and, therefore, does not fall within the scope of the statute of frauds. *Hagey v. Detweiler, 35 Pa. 409 (1860)*. Because there is no intended conveyance when neighbors agree on a boundary line, the line can be established by parol evidence, by act or by conduct, but it is not required to be in writing. *Id.*

To place a boundary by dispute and compromise, three elements must be established: "1) A dispute with regard to the location of the common boundary line, 2) the establishment of a line of compromise of the dispute; and 3) the consent of both parties to that line and the giving up of their respective claims which are inconsistent therewith." *Jedlicka v. Clemmer, 677 A.2d 1232, 1235 (Pa. Super. 1996)*. On the other hand, establishing a boundary by recognition and acquiescence requires: "1) A finding that each party has claimed the land on his side of the line as his own; and 2) a finding that this occupation has occurred for the statutory period of twenty-one years." *Id.* Importantly, one does not need to identify anything of substance to establish the boundary under this doctrine. *Id.* Of course, it is much easier to establish the "recognized" line if there is something of substance like trees, a hedge row or a fence.

"The doctrine of consentable lines is a rule of repose for the purpose of quieting title and discouraging confusing and vexatious litigation." *Corbin v. Cowan, 716 A.2d 614, 617 (Pa. Super. 1998)*. The effect of the doctrine is to create a new boundary line based upon agreement of the parties. *Beals v. Allison, 54 A.2d 84 (Pa. Super. 1947)*. When the boundary line is established by the doctrine of consentable lines, the land behind each side of the line becomes the property of that owner, regardless of what the deed specifies. *Moore v. Moore, 921 A.2d 1 (Pa. Super. 2007)*. Each owner gains marketable title to land that may not have been his under the vesting deeds. *Id. See also Soderberg v. Weisel, 687 A.2d 839 (Pa. Super. 1997*).

PRACTICE TIP: If your client establishes the boundaries of his property by the doctrine of consentable lines, consider filing a corrective deed so as to avoid title concerns when the property is eventually conveyed.

The doctrine of consentable lines is a theory separate and distinct from adverse possession. *Niles, 545 A.2d at 930*. A key distinction is actual possession is not required to establish a boundary by consent. *Sorg v. Cunningham, 687 A.2d 846 (Pa. Super. 1997)*. All that is required is that the neighbors treat the boundaries as the actual boundary line for the requisite 21 years. *Id.* Although slightly different in application, as with both adverse possession and easements by prescription, neighbors are permitted to tack onto the predecessor's period of ownership, provided the boundary line in dispute was purported to be included in the transfer. *Corbin, 716 A.2d at 617-618*. Thus, when neighbors have an agreement or understanding regarding on whose property the fence is located, or who is the owner of the decorative trees or hedge row, then we have the basis of an agreement upon which the doctrine of consentable lines can be based. ■

Brett M. Woodburn is an attorney with Caldwell & Kearns P.C., Harrisburg, and serves as general counsel to Pennsylvania Association of REALTORS (PAR). A substantial portion of his practice is dedicated to providing advice and counsel to real estate licensees and representing and defending real estate salespersons and brokers in civil lawsuits and licensing claims across the commonwealth. He routinely counsels employers on employee relations issues as one of the voices of the PAR Legal Hotline. He may be reached at www.realcompliance.com.

Cloud Computing 101 for Lawyers

By Shannon Brown

Lawyers face a growing menagerie of technology issues — the newest being "cloud computing." Marketers actively promote cloud computing as a technology solution. While cloud computing may be appropriate for personal and some business applications, cloud computing poses notable challenges. This article serves as a basic introduction to cloud computing and identifies a potential pitfall for lawyers.

What is cloud computing?

Cloud computing defies simple definition, because the marketing juggernaut driving "the cloud" labels widely-varied technologies as "cloud" solutions — many that have been around for over a decade and are now re-branded as cloud solutions. Nevertheless, a simple[1] definition is:

> *1) shared-use of and 2) remote, universal access to 3) a third-party's computer equipment, software, or services.*

Essentially, cloud solutions distribute costs by allowing entities with similar needs to share a resource (or resources). Each member of the sharing arrangement typically has a dedicated allocation of the resource — for example, disk space, server processing time, access to software or bandwidth. The allocated resource is usually accessed by a user account (log-in). Thus, cloud computing, in a nutshell, simply describes the sharing of remotely accessible computer resources.

What problem does cloud computing solve?

The ever-connected, increasingly mobile and data-centric needs of contemporary professionals pose significant challenges for traditional computing models that are based on some spatially isolated computing environment with a server and workstations. That is, the days of "waiting to get back to the office to check the computer" quickly wane. A lawyer (and probably the client) now expects ready access to e-mail, client files, billing information and web

resources from any location and from any Internet-connected device, such as a smart phone, netbook, tablet device, notebook or home computer.

Cloud computing meets this demand by facilitating ubiquitous access (via the Internet), by offering enormous data capacity ("hard drives"), by sharing computer processing time on powerful computer servers, and (depending on the service) by sharing the costs of developing the software used by the service subscribers. Cloud computing is possible due to rapid and *extraordinary* advances in Internet bandwidth, Internet accessibility, data storage capacity, server virtualization technologies and server processing power.

Is cloud computing really new? Yes and no. For decades, companies have had tools to allow access to internally-hosted company data. Virtual private networks (VPNs), modem banks, wide area networks (WANs), extranets and remote desktop access all permitted a remote device with network/telephone/Internet connectivity to access such data. However, each company (and in many cases with multiple instances within each company) needed to provide its own deployment — with significant equipment, bandwidth (external access), software, security, training, support and administration investments. Cloud computing allows the company, instead, to piggy-back on the Internet for network access and share powerful servers rather than buying racks of its own servers.

Thus, a convergence of capabilities (powerful mobile devices, near ubiquitous Internet connectivity and massive computer data storage), rising expectations (immediate access and ability to change data), and avoidance of costly system investments generate the demand for cloud computing.

Acronyms, Acronyms, Acronyms[2]

When researching cloud computing, confusingly similar acronyms abound. The acronyms describe the general classes of cloud computing. In other words, cloud computing describes the overall concept, and the acronyms define more specific classes of cloud computing. The major classes are:

- SaaS — software as a service,
- STaaS — storage as a service,
- IaaS — infrastructure as a service, and
- PaaS — platform as a service.

Individuals, solo practitioners

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and small- to medium-sized practices will probably encounter the first two types; medium and larger firms may encounter the latter two types.[3] To add additional confusion, single vendors may offer multiple classes of service or may offer hybrid solutions — e.g., SaaS plus STaaS.

STaaS — Storage as a Service

STaaS is the simplest class. STaaS basically permits a subscriber to store data online on a remote, "virtual hard drive." A web-based interface or locally installed application transfers and manages the information stored in the cloud. File backup, disaster recovery, file storage or similar uses are appropriate for STaaS accounts. Depending on the provider, additional capabilities may include automatic backups, file sharing (collaboration) and file synchronization. File synchronization typically allows access to a single user's files from multiple devices. Examples of STaaS include DropBox, JungleDisk, UbuntuOne, GoogleDocs, Windows Live!, Iron Mountain and Mozy.

SaaS — Software as a Service

SaaS is the most common class of cloud solution. SaaS allows a subscriber to use a web-based application in place of a traditional, locally-installed computer program. In other words, rather than the traditional model of downloading, installing and maintaining software locally, the software instead resides on a remote server accessible via the Internet. A common web browser (or sometimes a "thin client" application) provides access to run the SaaS application after the user logs in using a unique user account. The SaaS provider maintains the software, servers, bandwidth, separation of user data and system backups.

Today, almost every office productivity application has a SaaS analog. Examples include: web e-mail (Gmail, Hotmail, MobileMe), online document editing tools (GoogleDocs, Microsoft Office Web Apps), online accounting (QuickBooks Online, Zoho Books), customer relationship management (SalesForce.com) and law practice management (RocketMatter, Clio). While the breadth of applications may be overwhelming, the hallmark of all of these applications is remote access to the software via the Internet.

An Issue for Lawyers

Cloud computing may be an ideal solution for individuals and for some businesses. However, similar to regulated industries, lawyers need to carefully assess both the technical and non-technical aspects of cloud solutions — with particular focus on ethical obligations.[4]

A recent study by the Legal Technology Institute at the University of Florida's Levin College of Law showed that 8.3 percent of the study respondents felt that storing a client's confidential information online [in the cloud] was itself malpractice, and another 46.8 percent would not store client confidential data online (even though this group did not think such storage was malpractice).[5] For new lawyers accustomed to ready Internet use, the study provides a striking insight into peer perspectives on storing client data online.

The Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility recently addressed cloud computing in an informal opinion.[6] The author concluded that the Pennsylvania ethics rules do not preclude storing a client's confidential information in the cloud *as long as appropriate measures are taken to protect the confidentiality of the information* (emphasis added).[7] Appropriate measures, according to the informal opinion, may include backups, firewalls, encryption and limiting access to authorized persons.[8] The informal opinion specifically cites Rule 1.6 (Confidentiality of Client Information) and Rule 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers) for authority.[9]

The informal opinion emphasizes the general duty of lawyers to maintain confidentiality in all contexts rather than opining on the appropriateness of cloud computing. The author presciently comments that the duty owed when employing cloud solutions is the *same* as the duty owed when storing client information in non-online contexts.[10] This insight is consistent with some commentators who conclude that online storage, when done properly, may be just as (or more) secure than local storage.[11] Thus, the analysis (at minimum) urges caution and awareness when considering cloud solutions but does not exclude their use.

Conclusion

The take-away? Cloud computing, for lawyers, is not just about technology, convenience, cost-savings (real or purported) and functionality. The lawyer must also carefully assess the ethics issues associated with cloud computing and proceed cautiously and knowledgeably. ■

[1] The NIST released a draft version of a formal, government definition of cloud computing. See Peter Mell and Timothy Grance, *The NIST Definition of Cloud Computing (Draft)*, National Institute of Standards and Technology (January 2011), *available at* http://csrc.nist.gov/publications/drafts/800-145/Draft-SP-800-145_cloud-definition.pdf.

[2] Mention of a cloud provider is for illustration purposes only and not a recommendation.

[3] For brevity, the more common SaaS and STaaS receive the the focus of this article. PaaS essentially describes a set of application tools (a platform) that the subscriber adapts, configures and deploys. In PaaS, the cloud provider also generally maintains the equipment, overall server operating systems, platform applications and bandwidth. IaaS addresses the layer below PaaS with more emphasis on the physical equipment. IaaS,

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YLD MEMBERS IN THE NEWS

ANNOUNCEMENTS

Attorney **Tarah Toohil** (Zone 5) was elected to serve as the state representative for the 116th legislative district in a stunning upset during the November election. Toohil, a Republican, defeated incumbent Todd Eachus, who was the Democratic House Majority Leader and was campaigning for an eighth term. According to an article in *The Scranton Times-Tribune*, "Ms. Toohil's victory sent shockwaves through Hazleton and the state capital, with many observers predicting the race would be decided by 1 or 2 percentage points. She won by 1,742 votes, according to unofficial results."

BIRTHS

Alyson Oswald (Zone 9) of the U.S. Attorney's Office in Camden, N.J., and Ryan Oswald welcomed a baby girl, Evelyn Audrey, on Feb. 22. She weighed 8 pounds, 7 ounces, and measured 21.5 inches long.

Lars Anderson (Zone 5) of Hourigan, Kluger & Quinn P.C., Kingston, and Megan Anderson, of Howell, Howell & Krause of Honesdale, welcomed a baby boy, Micah Gillette Anderson, on Feb. 4. He weighed 8 pounds, 13 ounces, and measured 20 inches long.

Kevin Skjoldal (Zone 3) of Eckert Seamans Cherin & Mellott L.L.C., Harrisburg, and **Michelle Skjoldal** of Pepper Hamilton L.L.P., Harrisburg, welcomed a baby boy, Grant Olav Skjoldal, on Feb 1. He weighed 7 pounds, 9 ounces, and measured 20 inches long.

At Issue welcomes submissions from YLD members regarding firm changes or promotions. Members are also encouraged to submit announcements of weddings and births. Please send your news to Maria Engles (Maria.Engles@pabar.org).

CLOUD COMPUTING 101 FOR LAWYERS

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for example, allows the subscriber to add physical equipment as the subscriber's needs increase or decrease. The IaaS provider typically maintains the physical server equipment and bandwidth but not necessarily the server operating system or applications running on the server.

[4] This article merely identifies potential issues and is not intended as a comprehensive ethics opinion or ethics source.

[5] *2010 Case, Matter, and Practice Management System Software Study*, Legal Technology Institute, Levin College of Law, 225 (January 2010). Note, however, that the full question text resulting in the 8.3 percent response was "I think it is malpractice, nothing online is secure[.]" Thus, the response may indicate general perceptions of online security — perceptions that may or may not be accurate.

[6] Informal Opinion 2010-60 (Jan. 11, 2011).

[7] Informal Opinion 2010-60, 2 (Jan. 11, 2011).

[8] Informal Opinion 2010-60, 3–4 (Jan. 11, 2011).

[9] Informal Opinion 2010-60, 2 (Jan. 11, 2011). However, a lawyer may also want to review the Preamble [4], Rules 1.1 (Competence), 1.15 (Safekeeping Property), and 5.3 (Responsibilities Regarding Nonlawyer Assistants).

[10] "[A]n attorney using cloud computing is under the *same* obligation to maintain client confidentiality as is the attorney who uses non-online documents management." Informal Opinion 2010-60, 2 (Jan. 11, 2011)(emphasis added).

[11] The caveat, *when properly implemented,* is key. *Compare* Roger Grimes, *Cloud computing is more secure than you think*, InfoWorld (May 4, 2010), http://www.infoworld.com/d/security-central/cloud-computing-more-secure-you-think-575 (arguing that cloud computing can be secure) *with* Dan Olds, *Easier to secure the cloud than your data center–IBMer Really?*, The Register (March 2, 2011), http://www.theregister.co.uk/2011/03/02/ibm_cloud_security/print.html (arguing that proper implementation techniques must precede discussion of security).

Shannon Brown's practice emphasizes technology law, Internet law, social media law, cyber law, and business. Prior to his recent graduation from law school, his IT career spanned over 10 years with experience in hands-on Internet/mobile applications development, databases, web hosting, systems administration, general computing, and executive business management/ownership/entrepreneurship. He maintains a virtual law practice in Lancaster County and can be contacted via his website and blog at www.shannonbrownlaw.com.

The Gifts that Keep on Giving:
How Recent Developments Require a Re-Examination of the Lobbying Disclosure Act Gift and Hospitality Rules

By Michael L. Shields

Editor's note: The opinions expressed in this article do not represent the position of the Pennsylvania Bar Association.

Newspaper reports recently revealed that several elected state officials had their hospitality, transportation and lodging paid for by outside interests when they attended Super Bowl XLV this past February. Senate President Pro Tempore Joe Scarnati had his ticket, plane ride and hotel bill paid for by Consol Energy Inc. (hereinafter "Consol Energy"), one of the companies drilling for natural gas in the Marcellus Shale.[1] Consol Energy also paid for Sen. Tim Solobay's accommodations and transportation to the Super Bowl.[2] Scarnati later announced that he would reimburse Consol Energy in full for his entire Super Bowl trip,[3] and Solobay made a similar announcement, indicating he would likewise reimburse Consol Energy for his accommodations and transportation.[4]

Consol Energy indicated that it would disclose the above-referenced expenses on its next quarterly expense report,[5] which frankly, is to be expected now that these expenses have been revealed to the general public by the media. However, based on the current Lobbying Disclosure Act Regulations (hereinafter "Regulations")[6] and the Manual for Accounting and Reporting (hereinafter "Manual"),[7] principals[8] like Consol Energy are not required to disclose gifts, hospitality, transportation or lodging provided to state officials like Scarnati and Solobay, as long as such gifts, hospitality, transportation and lodging are reimbursed by these state officials within 30 days of receipt of the benefit. I refer to this policy as the "Reimbursement Loophole." The Reimbursement Loophole is legally problematic because it contravenes the express intent of the Lobbying Disclosure Act (hereinafter the "LDA"),[9] which is to publicly identify those individuals who are influencing the actions of the General Assembly and Executive Branch, and thus must be closed by either the General Assembly or the Lobbying Disclosure Regulations Committee (hereinafter the "Committee"). Language should be added to the LDA and/or its Regulations requiring principals to report reimbursed transportation, hospitality or lodging in its quarterly expense report. The language should also state that any gift, transportation,

hospitality or lodging item that is declined or any gift item that is fully paid for or returned unused to the registrant within 24 hours from the date of receipt need not be reported. Such language would be consistent with the intent of the LDA and thus would provide added transparency and accountability to the political process.

The LDA defines the term "gift" to mean "[a]nything which is received without consideration of equal or greater value"; this term does not include reportable political contributions, commercially reasonable loans made in the ordinary course of business, hospitality, transportation or lodging.[10] The LDA defines the term "hospitality" to include meals, beverages, recreation and entertainment but does not include gifts, transportation or lodging.[11] Although the terms "recreation" and "entertainment" are not defined by the LDA, tickets to concerts or sporting events have been considered "hospitality" for reporting purposes under the LDA.[12]

The LDA requires principals to report on a quarterly basis with the Pennsylvania Department of State (hereinafter the "Department") the total costs of gifts, hospitality, transportation and lodging given or provided to state officials or employees or their immediate families for the period.[13] The LDA requires principals to identify by name, position and each occurrence, any individual state official or employee that is provided a gift or gifts in the aggregate of $250 or more per calendar year, as described by Section 1105(b)(6) of the Public Official and Employee Ethics Act (hereinafter "Ethics Act"), 65 Pa. C.S. §1105(b)(6).[14] The LDA also requires principals to identify any state official or employee to whom payments or reimbursements were made for transportation, lodging or hospitality that in the aggregate exceed $650 per calendar year, as described by Section 1105(b)(7) of the Ethics Act, 65 Pa. C.S. §1105(b)(7).[15] For purposes of the LDA and the Ethics Act, gifts classified under Section 1105(b)(6) of the Ethics Act and transportation, hospitality and lodging classified under Section 1105(b)(7) of the Ethics Act constitute mutually exclusive categories and, as such, are to be reported separately.[16]

The LDA also requires that written notice[17] be given to each state official or employee who is listed in the quarterly expense report at least seven days prior to the report's

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submission to the Department.[18] For each category (gifts or transportation, hospitality and lodging), each notice is to include both the amount incurred during the quarter and the cumulative amount incurred from Jan. 1 through the end of the applicable quarter.[19]

Section 1104(a) of the Ethics Act, 65 Pa. C.S. §1104(a), requires each state official and employee to file a Statement of Financial Interests for the preceding calendar year no later than May 1 of each year that he or she holds, or is employed in, that position. A state official is required to file his or her Statement of Financial Interests with the State Ethics Commission as well as with the department, agency, body or bureau to which he or she is appointed or elected,[20] whereas a state employee is required to file his or her Statement of Financial Interests only with the department, agency, body or bureau to which he or she is employed.[21] Section 1105(b)(6) of the Ethics Act states that a Statement of Financial Interests must include the name and address of the source and the amount of any gift or gifts valued in the aggregate at $250 or more and the circumstances of each gift.[22] In addition, Section 1105(b)(7) of the Ethics Act states that a Statement of Financial Interests must also include the name and address of the source and the amount of any payment for or reimbursement of actual expenses for transportation and lodging or hospitality received in connection with public office or employment where such actual expenses for transportation, lodging and hospitality exceed $650 in an aggregate amount per year.[23] Based on the above interaction between the LDA and the Ethics Act, the information provided in a principal's quarterly expense report concerning gifts, transportation, hospitality and lodging should be consistent with the same disclosures made by a state official or employee in his or her Statement of Financial Interests. In other words, what is disclosed by a principal must also be disclosed by a state official or employee.

Unfortunately, the LDA is silent when addressing whether a principal is required to report returned or paid-for gift items or reimbursed transportation, lodging or hospitality. In an effort to provide more clarification to the regulated community, the Committee promulgated regulations addressing this issue. Section 55.1(k)(1) of the Regulations states as follows:

> Any gift, transportation, lodging or hospitality item that is returned unused, declined or is *fully reimbursed* to the registrant within 30 days of the date of receipt *need not be reported*. For a gift, the date of receipt is the date the State official or employee first has possession or control of the gift. For purposes of calculating the 30 days for fully reimbursing an item of transportation, lodging or hospitality, the date of receipt is the date the State official or employee *actually receives the benefit* of the item. 51 Pa. Code §55.1(k)(1). (Emphasis added.)

The Manual further provides the following pertinent example when addressing the ways in which a lobbyist, lobbying firm or principal may allocate and report sporting event or concert tickets given to a state official or employee:

> A lobbying firm, lobbyist or principal provides 10 tickets to a state official or employee, and the state official or employee pays for all 10 tickets within thirty days of receipt. The lobbying firm, lobbyist or principal reports *zero value*.
> Manual, Section VI.A, 40 Pa. Bull. at 386-87. (Emphasis added.)

It is clear from the plain meaning of the Regulations and Manual above, that a principal is not required to report gifts, transportation, lodging or hospitality if the state official or employee returns unused, declines or fully reimburses the principal within 30 days of receipt of such gifts, transportation, hospitality or lodging. As concluded above, Consol Energy would not be required to report the costs of Scarnati's ticket, airfare and hotel as well as the costs of Solobay's airfare and hotel during Super Bowl weekend because both senators fully reimbursed Consol Energy for these expenses within 30 days of their receipt.

The Reimbursement Loophole is legally problematic because it directly contravenes the intent of the LDA, which states in relevant part:

> The ability of the people to exercise their fundamental authority and to have confidence in the integrity of the processes by which laws are made and enforced in this Commonwealth demands that the *identity and scope of activity* of those who are paid to influence the actions of the General Assembly and the Executive Department *be publicly and regularly disclosed*. 65 Pa. C.S. §13A02(a). (Emphasis added.)

Some might argue that the Reimbursement Loophole is not inconsistent with the intent of the LDA because gift items that are paid for or returned, or transportation, hospitality or lodging items that are fully reimbursed by a state official or employee, no longer provides that state official or employee with a tangible pecuniary benefit he or she would have otherwise received if the gifts, transportation,

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hospitality or lodging had not been paid for, returned or fully reimbursed and thus those items need not be reported. This argument is valid as it applies to gifts because a paid-for or returned gift is no longer a "gift" within the meaning of the LDA as it is no longer an item "received without consideration of equal or greater value" by the state official or employee.[24]

However, this same argument is without merit as it applies to a state official's or employee's reimbursement of his or her transportation, hospitality or lodging because it fails to account for the intangible benefits bestowed upon principals and their lobbyists by these items. For instance, it is no secret that the primary reason why principals and their lobbyists pay for a state official's or employee's transportation, hospitality or lodging is to gain "access" to that state official or employee and to discuss issues of public concern on a one-to-one basis.[25] For instance, it was reported that Scarnati and Solobay flew in Consol Energy's jet to the Super Bowl along with company representatives.[26] Besides discussing the upcoming football game, it is safe to assume that issues relating to energy policy and drilling in the Marcellus Shale were also discussed as well during the plane ride. Thus, even though a state official or employee fully reimburses a principal for his or her transportation, hospitality or lodging, a principal and/or its lobbyist is still receiving the "intangible" benefit of "access" to that state official or employee, and thus, such fully reimbursed hospitality, transportation or lodging ought to be disclosed by the principal.

So now that it has been concluded that the Reimbursement Loophole is inconsistent with the intent of the LDA, what can be done to close it and who has the authority to implement this change? The General Assembly could enact legislation amending Section 1305-A of the LDA, 65 Pa. C.S. §13A05, or the Committee could amend Section 55.1(k)(1) of the Regulations, 51 Pa. Code §55.1(k)(1), to first state that any gift, transportation, lodging or hospitality item that is declined need not be reported. The language should also state that any gift item that is fully paid for or returned unused to the registrant within 24 hours of the date of receipt also need not be reported — the "date of receipt" would be the date the state official or employee first has possession or control of the gift. Last and most important, the new language should state that any transportation, lodging or hospitality item that is fully reimbursed to the registrant must be reported in accordance with the requirements of the LDA. This new language would increase transparency in the political process and thus be more consistent with the intent of the LDA, because such language will require principals, and the state officials and employees they wish to influence, to disclose more information to the public.

Unfortunately, the legislative process can be a slow, time-consuming one, and it might be some time before such revisions would be added to the LDA by the General Assembly. In addition, the Committee has not convened since December 2009, and it is uncertain whether the Committee even has the authority under the LDA to amend the Regulations now that the Regulations were finalized in April 2009.[27] In light of the foregoing, it is uncertain when and if the above changes could be made to the LDA or its Regulations. However, what is certain is that the Reimbursement Loophole is currently inconsistent with the express intent of the LDA and must be closed in order to provide increased transparency to the political process. It is the hope of the author that this article will, at a minimum, raise awareness and begin the conversation addressing this very important legal issue. ■

[1] Angela Couloumbis, Joseph Tanfani & Andrew Maykuth, *Pa. Senator's Super Bowl Trip Courtesy of Consol*, Pittsburgh Post-Gazette, Feb. 14, 2011, *at* http://www.post-gazette.com/pg/11045/1125278-454.stm.

[2] Tracie Mauriello & Angela Couloumbis, *Pressure Builds to Disclose Gifts*, Pittsburgh Post-Gazette, Feb. 17, 2011, *at* http://www.post-gazette.com/pg/11048/1126049-181.stm.

[3] Angela Couloumbis & Joseph Tanfani, *Scarnati says he'll Repay Consol Energy for Super Bowl Trip,* Pittsburgh Post-Gazette, Feb. 15, 2011, *at* http://www.post-gazette.com/pg/11046/1125499-454.stm. Senator Scarnati indicated that he would use his own money to reimburse Consol Energy for the hotel room and ticket to the game and pay the cost of his flight out of his campaign account. *Id.*

[4] Mauriello & Couloumbis, *supra*, note 2. Senator Solobay's spokesperson was uncertain whether he would use his own money or campaign funds to pay for his accommodations and transportation. *Id.*

[5] Couloumbis & Tanfani, *supra*, note 3.

[6] 51 Pa. Code §§51.1–69.1.

[7] Manual for Accounting and Reporting—How to Comply with Act 134 of 2006, 40 Pa. Bull. 383–389 (Jan. 9, 2010).

[8] A "principal" is defined by the Lobbying Disclosure Act as "[a]n individual, association, corporation, partnership, business trust or other entity: (1) on whose behalf a lobbying firm or lobbyist engages in lobbying; or (2) that engages in lobbying on the principal's own behalf. 65 Pa. C.S. §13A03.

[9] 65 Pa. C.S. §§13A01–13A10.

[10] 65 Pa. C.S. §13A03.

[11] *Id.*

[12] *See* Manual, Section VI.A., 40 Pa. Bull. at 386.

[13] 65 Pa. C.S. §13A05(b)(2)(i).

[14] 65 Pa. C.S. §13A05(b)(3)(i).

[15] *Id.*

[16] 65 Pa. C.S. §13A05(b)(3)(iv).

[17] Notice under the LDA includes that information which will enable the state official or employee to comply with Section 1105(b)(6) and (7) of the Ethics Act. *Id.*

[18] *Id.*

[19] *Id.*

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Getting 'Good Marks' for your Trademark Practices

By Daniel H. Brean

Suppose your client has just launched a new product or formed a new company. These kinds of momentous events can be very exciting for clients, but the excitement can quickly turn to bitterness if the new products or company services have not been properly branded.

At the outset of a new business venture, few things are more agitating than receiving a cease and desist letter (or worse, a Complaint) alleging trademark infringement and demanding that your client immediately stop selling its products and re-brand its entire organization. On the other hand, if one of your client's competitors begins making and selling knock-off products using your client's trademark, but your client has not selected a trademark that affords sufficiently strong rights, there may be no recourse to prevent an otherwise clear case of trademark infringement.

Considering the substantial amount of research, development and due diligence that typically precedes the launch of a new product or company, clients must be made aware that seemingly unimportant choices such as "What should we call this thing?" can have serious consequences. Litigation and re-branding can both be immensely expensive and time-consuming processes and can be easily avoided or minimized by choosing good trademarks in the first instance.

The following are some helpful practice guidelines for selecting good trademarks and limiting potential infringement exposure.

Know How To Recognize And Select Strong Trademarks

Trademarks are words or symbols used to distinguish one's goods or services in the marketplace from another's. Strong trademarks effectively signal that a product or service comes from a particular source. For example, when a person sees the words "Coca-Cola" on a beverage can or the Nike "swoosh" symbol on a tennis shoe, he or she recognizes those words or symbols as indicating that those products come from specific companies. The more that a trademark causes a product or service to stand out among its competition, the harder it is for competitors to use the same or similar marks without risking infringement.

Here are some helpful practice guidelines for selecting good trademarks and limiting potential infringement exposure.

For any kind of good or service, there exists a "spectrum of distinctiveness" for trademarks. In order of increasing distinctiveness, these are (1) generic terms; (2) descriptive marks; (3) suggestive marks; and (4) arbitrary or fanciful marks.[1]

Generic terms are the common names for goods or services and cannot be protected as trademarks. Descriptive marks describe a feature or characteristic of the goods or services and can only be protected if they have achieved "secondary meaning" whereby consumers recognize the descriptive term as source-indicating. Suggestive marks are indicative of a characteristic of the product or service but require some imagination to discern the characteristic. Lastly, arbitrary marks have some meaning unrelated to the products or services, and fanciful marks are invented or coined terms having no meaning aside from their use as marks.

For example, consider a company that sells soap. The mark SOAP is generic because it does not distinguish one company's soap from another's, and no company can have the exclusive right to call soap "soap." The mark SOFTSOAP is descriptive of the texture of the soap and would not be protectable unless and until consumers recognize SOFTSOAP as indicating a particular brand of soap (as, in fact, they now do for the Colgate-Palmolive Company's liquid hand soap SOFTSOAP®). The mark DOVE is suggestive because it evokes images of a soft, clean and white soap product. The mark DIAL is arbitrary because it has a meaning separate from the context of soap. Finally, the mark XOPAX would be fanciful as a coined or made-up term.

Suggestive, arbitrary and fanciful marks provide the strongest trademark rights, because they are inherently distinctive and are automatically protectable as soon as they are used. For descriptive marks, however, proving secondary meaning to make the mark protectable can be difficult — it can take considerable amounts of time, promotional efforts and surveys to demonstrate that consumers have come to identify an otherwise merely descriptive term as a brand name. By starting off with a stronger mark, trademark rights can be protected immediately, which makes a big difference at the outset of a new business venture.

To Avoid Liability, Clear Marks Before Adopting And Using Them

The practice of clearing trademarks usually involves a trademark attorney screening and searching various databases and sources to identify third parties using marks that are the same or similar

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Getting 'Good Marks' for your Trademark Practices

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to your client's selected mark. The search results are then analyzed to determine potential liability.

There are primarily three bases for liability that can arise from the adoption and use of a trademark: (1) trademark infringement; (2) trademark dilution; and (3) unfair competition. If found liable under any of these three causes of action, your client could be enjoined from use of its mark and/or accountable for damages.

Trademark infringement exists when one uses a mark that is likely to cause confusion as to the source of the goods or services.[2] The classic example of trademark infringement is counterfeiting or passing off: A company makes the same or a similar product as another company and labels its own product with the other company's trademark, essentially trading on the other company's goodwill or reputation.

Trademark dilution exists when one uses a mark that is sufficiently similar to a famous mark, which either harms the reputation of the famous mark owner, or diminishes the distinctiveness of the famous mark.[3] For example, because Coca-Cola is a famous mark, one cannot make and sell COCA-COLA brand cell phones without detracting from the distinctiveness of the Coca-Cola brand name. Further, if the phones are of sub-par quality, the Coca-Cola Company's reputation would be harmed.

Unfair competition is a broad catch-all cause of action with respect to trademarks. It encompasses any use of a mark that is "likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person."[4]

The costs of obtaining trademark clearances are modest, and they pale in comparison to the costs of litigation or re-branding. Before the adoption and use of a new trademark, a trademark attorney should always be consulted to screen and clear the mark. A trademark attorney can also help your client to develop and implement a broader trademark strategy, which may include applying to the United States Patent and Trademark Office to register trademarks and obtain additional federal rights. ■

[1] *Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 9-11 (2d Cir.1976).
[2] 15 U.S.C. § 1114.
[3] 15 U.S.C. § 1125(c).
[4] 15 U.S.C. § 1125(a).

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[20] 65 Pa. C.S. §1104(a).
[21] *Id.*
[22] 65 Pa. C.S. §1105(b)(6).
[23] 65 Pa. C.S. §1105(b)(7).
[24] *See* 65 Pa. C.S. §13A03.
[25] While running for president in 1999, U.S. Sen. John McCain stated that money buys access and "access is influence." Jacob Weisberg, *Inside the Bradley-McCain Handshake*, Slate.com, Dec. 16, 1999, *at* http://www.slate.com/id/1004219/.
[26] *See* Couloumbis & Tanfani, *supra*, note 3 ("Asked why Mr. Scarnati was paying for the flight with campaign funds, Mr. Crompton responded: 'Campaign issues were discussed on the flight.'"); *see also Solobay to Super Bowl on Consol*, Observer-Reporter.com, Feb. 16, 2011, *at* http://www.observer-reporter.com/OR/Print/02-16-2011-Consol-Super-Bowl ("Solobay...said he purchased the $900 game ticket through the coal giant and would reimburse the company for hotel expenses and the cost of flying to Texas on its private jet, once those costs are calculated.").
[27] Section 1310-A(d)(1) of the LDA, 65 Pa. C.S. §13A10(d)(1), states that the Committee "shall have authority to *promulgate* regulations necessary to carry out [the LDA]." (Emphasis added.) However, Section 1310-A of the LDA is silent as to whether the Committee has the authority to *amend* the Regulations.

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Part II: Developing Rule of Law and Maintaining Stability in a Fluid Environment

By Capt. Michael G. Botelho

***Editor's note: This is the second in a three-part series. Part I can be found in the Fall 2010 edition of* At Issue.**

The immediate implementation of video teleconference (VTC) testimony was not possible for two primary reasons: (1) judges expressed a general aversion to the use of technology in courtroom proceedings, so there were varying opinions on the use of the VTC; and (2) the Central Criminal Court of Iraq-Karkh (CCCI-K) judges' opined that the Iraqi criminal code and the Iraqi Law on Criminal Proceedings of 1971[20] require witnesses to appear in person. The Iraqi code does contain a requirement for witnesses to appear in front of a judge, but there was no mention of the *medium* of the testimony. The Special Operations Task Force — North (SOTF-N) legal's interpretation of the code was that it does not prevent witnesses from appearing in front of a judge in real time — testimony was live — albeit on video. This reasoning was supported by other sections of the Iraqi code that allowed judges wide latitude in deciding *how* testimony was to be heard or accepted. Even though the idea and argument for the VTC originated with the SOTF-N legal team, the CCCI-K LNO/Prosecutor was instrumental in successfully presenting the idea to the CCCI-K chief judge and convincing him that the use of VTCs satisfied legal requirements and was prudent for many reasons. The judge initially agreed to conduct VTCs as a temporary fix to their inability to travel during Ramadan. The VTC was a solution to the problem of acquiring *warrants*[21]; however, oftentimes witnesses would still be required by the Iraqi judge to provide in-person testimony at later stages of the Iraqi criminal process[22] even where they had previously testified.

Once the VTC was approved as a valid means of conducting a probable cause hearing to issue warrants, scheduling for the VTC began in October 2009 and required extensive coordination between operational detachment-alpha (ODA) teams and the legal teams at SOTF-N and CCCI-K LNO's office. Instead of judges traveling to the remote locations, teams were now responsible for facilitating witness testimony and adhering to the judge's procedural requirements including, but not limited to: (1) presentation of witness testimony; (2) protecting witness's identity from other testifying witnesses; (3) overall professional appearance of the witnesses; (4) valid forms of identification; (5) copy of the Koran in order to swear witnesses to an oath; (6) proper witness preparation as to how the VTC was going to be conducted; and (7) what type of questions may be asked by the judge. Ultimately, it was incumbent upon the SOTF-N legal team to act as liaison between the ODA and CCCI-K LNO/Prosecutor in order to ensure the judge was getting all that he required. Proactive involvement by the legal team at battalion level also kept the chain of command informed of changes and developments throughout the process as well as allowed the SOTF-N legal team to better serve Iraq's advancement of Rule of Law (ROL) and also support operations. At the conclusion of SOTF-N's first warrant VTC, over 30 national warrants were issued for the lawful arrest of insurgents by the Iraqi foreign internal defense (FID) partners with United States special forces (USSF) combat advisers in Mosul and Baqubah.

In late October 2009, due to a change in personnel within the judiciary and a change in the CSJOTF-AP LNO/Prosecutor, the VTC's utility appeared to be in jeopardy. The change in personnel required the SOTFs to re-address the validity of the VTC with the members of the judiciary as well as the newly arrived CCCI-K LNO/Prosecutor.[23] Once again, the CCCI-K LNO/Prosecutor was instrumental in advocating for the SOTFs, which resulted in the VTCs continued use; although, the VTC was supposed to be a temporary fix during the holy month due to the judges' reluctance to travel. However, due to the strong rapport between the judiciary and the CJSOTF-AP CCCI-K legal team, the VTC warrant hearing option was extended beyond Ramadan and these hearings ultimately were conducted on a monthly basis. Additionally, while coordinating for their first VTC, SOTF-N and the CCCI-K LNO/Prosecutor kept the legal teams of SOTF-West and SOTF-Central apprised of the new developments. Over time, the VTC testimony capability was extended to, and considered by, each of the SOTFs depending on its respective provincial operating environments. Ultimately, each SOTF was offered opportunity to conduct warrant VTCs to facilitate for warrant-based operations. By January 2010, SOTF-N legal had also coordinated for and extended the VTC for use by a conventional force Brigade Combat Team (BCT) based in Kirkuk. The VTC's success underscored the requirement for Judge Advocates at all levels to assess the political and legal environment in their respective areas of operation. The successful and novel use of the VTC also illustrated the need for SOTF lawyers to immediately begin coordination and networking with all units in their commander's battlespace in order to assess potential issues or conflicts at the earliest opportunity. In this instance, operational adaptability required multi-level cross-coordination[24] between Iraqi and U.S. units and the national

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Part II: Developing Rule of Law

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level courts, which lent itself to the VTC's implementation. The VTC's utility ultimately contributed to the success of the combined offensive operational capability of numerous ODA teams's partnered Iraqi units and, more importantly, mitigated provincial level ROL corruption issues. ■

[20] Law on Criminal Proceedings with Amendments, No. 23, Feb. 14, 1971 (Iraq).

[21] The VTC was a success because it offered a solution to a problem; however, because of the ever-changing environment, it was incumbent upon SOTF-N legal not to oversell it and to keep the command's expectations realistic with regard to its potentially temporary nature.

[22] The Iraqi criminal-justice system is an inquisitorial system similarly based upon the French and German civil-code, which results in the judge playing a more active role and strong emphasis is placed on witness testimony; Integrating the Rule of Law with FID in Iraq; by Lieutenant Colonel Daniel A. Tanabe and Major Joseph N. Orenstein, Special Warfare November-December 2009.

[23] CJSOTF-AP Liaison Officer to CCCI-K who replaced Kurt Gerlach was Air Force Captain Elizabeth Hernandez.

[24] Coordination at all echelons of command between both U.S. Forces and their counterparts.

Capt. Michael G. Botelho is currently serving as the 1st Battalion 5th Special Forces Group Judge Advocate. From July 2009 to January 2010, he served as the Special Operations Task Force-North Legal Adviser during the 1st Battalion's deployment to Operation Iraqi Freedom VII. He was previously assigned to the Office of the Staff Judge Advocate, Fort Huachuca, Ariz., where he served in the following duty positions: legal assistance attorney, administrative/operational law attorney, chief of administrative law and trial counsel. As trial counsel, he was responsible for advising the following Commanders: U.S. Army Garrison, MEDDAC, DENTAC and the 111th Military Intelligence Brigade. He also served five years enlisted as an Airborne Ranger assigned to 1st Battalion 75th Ranger Regiment in Savannah, Ga. He holds a bachelor's in administration of justice from Salve Regina University, Newport, R.I.; and a juris doctorate from St. Thomas University School of Law, Miami, Fla.

CALLING ALL WRITERS!

The YLD* At Issue *editors are now accepting article submissions. Criteria are as follows:

1. The subject matter should be relevant to Pennsylvania young lawyers.
2. Articles should be no longer than 1,200 words in length. Longer articles may be considered to run as a series.
3. All submissions must include a short author biography at the end of the article and must be accompanied by a digital photo (300 dpi resolution preferred) of the author for publication.
4. Electronic submissions (MS Word) are acceptable and preferred. Please transmit electronic submissions to Bill Higgins Jr. at bhiggins@bedfordcountypa.org or to Robert Datorre at rdatorre@state.pa.us.
5. If submitting by mail, a copy of the article may be sent to either of the following individuals: Bill Higgins Jr., Bedford County's District Attorneys Office, 200 S. Juliana St., Bedford, Pa., 15522-1713; Robert Datorre, Pa. Department of Health & Welfare, Health & Welfare Bldg., 625 Forster St., Room 825, Harrisburg, Pa., 17120.

Courthouse Café: Bedford County

Editor's Note: Young lawyers are often sent to the ends of the earth (or at least to Central Pennsylvania) by their firms to appear in court. It is enough worry for these young lawyers to figure out where the courthouse is located in unfamiliar counties, let alone where they are going to eat lunch after their hearings.* At Issue *is therefore reviving its "Courthouse Café" series to share tips about eateries located close to the courthouse in a featured county. Please feel free to submit your suggestions for future "Courthouse Café" features.

By Bill Higgins Jr., co-editor

The Bedford County Courthouse complex is located right in the heart of historical downtown Bedford and is within walking distance of several local eateries to satisfy a variety of palates.

Bad Boyz Bistro

From the original entrance to the Bedford County Courthouse, cross Penn Street and walk half-way down Juliana Street where you will find Bad Boyz Bistro (at the former location of the K & M restaurant). Bad Boyz provides a casual atmosphere with a theme featuring the Bad Boyz of politics, sports and movies. Think T.G.I. Friday's, with an edge! The menu includes sandwiches such as a Dirty Harry Pork BBQ, the Fight Club (grilled chicken, pepper jack cheese, and bacon), the "Slick Willie" hot dog, and a Tony Soprano-style meatball sandwich smothered in onions, peppers and provolone cheese. If you are done for the day and don't have to run back to court, Bad Boyz stocks a large selection of beers and features several food challenges to test how "bad" you really are, including a flaming hot wings challenge and a quadruple burger challenge. Lunch will run you about $10. Visit the website at www.badboyzbistro.com.

Village News

Right next to Bad Boyz Bistro is the Village News, where you can grab the local newspaper and have a relaxing lunch in a tavern atmosphere. While the menu is basic (burgers, sandwiches and salads), the Village features a daily special for under $6. My personal favorite is the Wally Burger, which includes fried onions, melted cheese and a spicy mayonnaise. The Village News is the kind of place you can hit three times in a day: stopping in the morning for coffee, returning for lunch and then unwinding with a beer at the end of the workday.

Founder's Crossing

Located on the corner of Juliana and Pitt streets, inside a three-story antique and artisan market, you will find a small eatery featuring a selection of deli sandwiches, soups and pastries. If you have an extended lunch hour, you will enjoy browsing the three stories of this former G.C. Murphy five-and-dime store, which features over 120 vendors.

Green Harvest

Continue to the corner of Juliana Street, and turn right, where you will find The Green Harvest Co., a café offering breakfast, lunch, snacks and a full-service coffee/tea bar featuring Green Mountain Coffees, Stash Teas, Oregon Chai and Jet Tea products as well as a fresh in-house bakery case. Green Harvest specializes in natural and organic foods and attracts a decent-sized lunch crowd. You can visit the café's website at www.thegreenharvestco.com.

Bread Basket Café

Two doors down from The Green Harvest Co., you will find the Bread Basket Café, where you can enjoy a reasonably priced lunch, usually featuring a daily special of half a sandwich and a cup of soup. The menu also features several Steelers-themed sandwiches, meeting the needs of most palates.

OIP (Original Italian Pizzeria)

Cross the street at the corner of Juliana and Pitt, go left, and you will find your traditional local pizzeria. OIP features familiar Italian specialties, including pizza, calzone and stromboli. OIP has daily lunch specials, and you can usually have a quick, affordable lunch for about $6.

If you end up at any of these fine eateries, mention that District Attorney Bill Higgins sent you and you might get a discount. It's certainly worth a shot! ■

Are you a young leader or do you know one?

The Bar Leadership Institute is designed to provide emerging leaders, representing a broad cross-section of the diversity of the PBA membership, with an opportunity to learn about the PBA while actively participating in key meetings. Participation in the Bar Leadership Institute provides numerous opportunities to network with PBA members and leadership and helps build lasting relationships that will serve as an invaluable resource for future success.

The Bar Leadership Institute looks to the future of the organization by developing well-informed, committed leaders who will serve the PBA for many years to come. It familiarizes participants with the day-to-day operation of the association, provides a foundation on governance and policy issues and introduces the participants to PBA staff and resources.

Both of this year's Bar Leadership Institute co-chairs, Mary E. Schellhammer and Paul C. Troy, have participated in past BLI programs; Schellhammer as a BLI member and Troy as a former BLI Co-Chair. In fact, when you look at all those serving in leadership roles within the PBA, you will find many past participants of the PBA Bar Leadership Institute. This was exactly the intent of the program when it was originally developed by then-PBA President Art Piccone during his presidency in 1995-96. The first chair of the Bar Leadership Institute was Gretchen Mundorff.

To be selected for this year's class you must be a PBA member, age 38 years or younger or have practiced law for five years or less and have demonstrated leadership ability. Those selected as part of the 10-member class are required to attend and participate in three meetings: July 28-30, Young Lawyers Division Summer Meeting, Rocky Gap Lodge and Golf Resort in Cumberland, Md.; Nov. 16-18, Board of Governors, Committee Section Day, House of Delegates Meetings, Harrisburg; and Feb. 24-25, 2012, Conference of County Bar Leaders, Lancaster. The costs of attending these three required meetings (rooms, meals provided at the events and registration fees) will be paid by the Pennsylvania Bar Association. Travel expenses to and from the meetings are not covered by the PBA.

Mundorff says, "We are going to make every effort to identify and prepare the best young lawyers, who are representative of the diversity within the PBA membership, to take leadership positions. I urge you to help us select the very best bar leadership class possible by sharing this information with worthy candidates or submitting an application if you meet the eligibility criteria."

Visit the PBA Bar Leadership Institute webpage (www.pabar.org/BLI.asp) for details and application materials. Applications are due by **May 27**. If you have questions, please contact PBA Education and Special Projects Coordinator Susan Etter at susan.etter@pabar.org or 800-832-0311, ext. 2256. ■

Zone 3 Caravan

On Jan. 15 and 22, the Young Lawyers Division Zone 3 caravan held two events at the Giant Center in Hershey to watch the defending league champion Hershey Bears as they skated their way toward the AHL playoffs. Between the two events, the YLD hosted more than 60 young lawyers and guests in the suites generously made available by the Harrisburg offices of Buchanan, Ingersoll & Rooney P.C., McNees Wallace & Nurick L.L.C., and Eckert Seaman Cherin & Mellott L.L.C. There's nothing like watching great hockey from a comfortable, luxurious suite in the Giant Center.

In conjunction with these events, the YLD collected new, clean blankets to be donated to individuals in need of assistance during Pennsylvania's cold winter months. The YLD collected more than 45 blankets that were donated to the Bethesda Mission in Harrisburg. The YLD continues to collect blankets to donate to the Bethesda Mission. If you would like to donate a blanket, please contact YLD coordinator Maria Engles at 1-800-932-0311, ext. 2223, or at Maria.Engles@pabar.org.

This is the second straight year that the YLD has been able to host this event, and it looks to continue the event in future years. YLD caravan events allow young lawyers to socialize and network in a friendly, entertaining atmosphere. YLD caravan events are held year-round throughout Pennsylvania. Check the coming events calendar in *At Issue* or on the YLD website and Facebook page to find a caravan event near you. We hope to see you at a caravan event soon! ■

YLD members display some of the blankets that were donated to the Bethesda Mission in Harrisburg.