Knoxville Bar Association

THE CONSIGLIERE

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"No man is above the law and no man is below it; nor do we ask any man's permission when we ask him to obey it."
-- Theodore D. Roosevelt (1858 - 1919)

Let us know your ideas and suggestions for *THE CONSIGLIORE:*

- Call or e-mail Nick McCall at 632-4161 or jhmccall@tva.gov, or Marsha Wilson at 522-6522 or mwilson@knoxbar.org.
- Submit an article for consideration.
- Give us your feedback on this newsletter.
- Tell us about CLE topics or networking events you would like the Section to sponsor.

FROM THE CO-CHAIRS

Happy New Year to all! The holiday season is over, and now it is time to tackle the "To Do" list that steadily grew longer over the holidays. First on the list, my Co-Chair Marcia Kilby and I would like to thank the fine work done by the Co-Chairs for the past two years, Leslie Beale and John Arnold.

We've come a long way, baby! While the Corporate Counsel Section has been in existence for some time, the current resurgence began in 2003 when Tracy Edmundson summoned all those interested in things corporate counsel to U.T.'s University Club. To those who attended, it was evident that this meeting was long overdue. An excited buzz filled the room. The questions for that day were more related to who we were going to be than what we were going to do.

I am proud to say that 2010 will mark yet another successive year of the Section's resurgence. Throughout this time, our group has developed into a well-oiled machine. For starters, our quarterly meetings have provided ample opportunity for our membership to convene, discuss events in the corporate community, and imbibe cocktails. This year's Social Committee Chair, Leo Beale, has come up with a plan for four more such quarterly gatherings in 2010. Additionally, our annual CLE has become our signature event for corporate counsel in the area. We have come to rely on the fact that the CLE is well run and well attended, thanks especially this past year to the hard work put in by Marcia Kilby and the Section's CLE Committee. We are currently developing ideas (any input is appreciated), but hopefully, the mood will be brighter than 2009's CLE, entitled *It's the Economy, Stupid*.

Despite the tradition of excellence we have come to get used to, the true value of this section for me can be summed up in one word: relationships. Few groups include such a disparate array of members and interests. Over the years, my leadership duties in this section have allowed me to gain what are now old friends and form new and dynamic acquaintances. I encourage you to become involved in this section, so that you will get to experience this energy.

I would also like to encourage you to appreciate this publication, *The Consigliere*, as the resource that it has become. Through the tireless efforts of Nick McCall, the newsletters from the last few years have come with a quality normally reserved for a state or nationwide publications. Without fail, an article in each issue will be particularly applicable to my practice and will get saved onto our network for future reference. I hope you will find the same and share this publication with your colleagues.

What will 2010 bring for the Knoxville Bar Association's Corporate Counsel Section? Rest assured, quality people will be delivering excellent events and publications. I hope to see you at a Section event soon.--*David W. Headrick*

UPCOMING SECTION EVENTS

Your KBA Corporate Counsel Section has set its quarterly meeting dates for 2010. The quarterly meetings usually serve one of two purposes. Sometimes, our meetings are more formal, with a speaker(s) addressing topics relevant to most corporate counsel. But, because the offices of corporate counsel are spread throughout the greater Knoxville area and beyond, at other times the quarterly meetings are simply social gatherings which bring together members and guests in an informal setting.

Upcoming Section Meetings and Schedule for 2010

Thursday, February 11, 2010

Sobu (*Informal/social meeting beginning at 6 p.m.)*
6213 Kingston Pike Southwest
Knoxville, TN 37919
(865) 588-3746

Future dates (*locations to be announced*):
Thursday, May 6
Tuesday, August 31
Tuesday, November 9

If you have specific questions about any of these meetings, feel free to contact Membership Chair Leo Beale at 988-6063.

For more information in general about the Section, please contact co-chairs Marcia Kilby at 362-1391 or David Headrick at 531-6440.

TAX TIDBIT

Congress Extends COBRA Premium Subsidy Through February 28, 2010

By Bradley C. Sagraves, Woolf, McClane, Bright, Allen & Carpenter, PLLC

On December 19, 2009, President Obama signed the Department of Defense Appropriations Act of 2010 ("DODAA"), which included a provision that changed the previously passed COBRA subsidy under the American Recovery and Reinvestment Act ("ARRA"). Under ARRA, Congress created a subsidy to help those recently unemployed pay for the health insurance through their previous employer. The recently passed DODAA extends the COBRA subsidy for eligible individuals.

ARRA provided a 65% subsidy to "eligible individuals" for COBRA premiums as long as the individual paid the remaining 35% of the premium. The employer was actually responsible to pay the 65% subsidy, but was allowed to claim a credit for this premium payment on their federal payroll taxes. ARRA defined an "eligible individual" as someone who was involuntarily terminated by the employer between September 1, 2008 and December 31, 2009.

TAX TIDBIT:

The Congressional Extension of COBRA Premium Subsidy

The period for qualifying for the COBRA credit and receiving the COBRA credit are both extended under DODAA. Eligible individuals that are terminated up and through February 28, 2010, will still be eligible for the COBRA credit and will still only have to pay the 35% share of the COBRA payment. DODAA also extends the COBRA credit from nine months to fifteen months and allows eligible individuals whose subsidy expired to pay the COBRA premiums retroactively and retain their COBRA coverage. The grace period for making retroactive payments extends until February 17, 2010, or thirty days after the plan administrator provides notice to the individual, whichever is later. Individuals who paid the full, unsubsidized COBRA premiums can take a credit against future COBRA payments or obtain a reimbursement for the overpayment.

As a result of these changes, plan administrators must provide additional notices to eligible individuals. Under COBRA and ERISA law, plan administrators were required to provide the eligible individuals with notice that explained the eligible individual's right to elect the COBRA coverage, how the coverage may be elected, how long the coverage will last, how much the COBRA coverage costs, and how and when the COBRA payments must be paid. ARRA required plan administrators to provide an additional notice to eligible individuals that a premium reduction subsidy was available for the COBRA coverage.

Under DODAA, plan administrators must now send a notice to any eligible individual who qualified for the COBRA credit on or after October 31, 2009, detailing the changes made under DODAA. This additional notification must be sent no later than February 17, 2010, or in the case of an employee terminated after December 19, 2009, within 60 days of their termination as required under ARRA and ERISA. DODAA also requires plan administrators to send notifications to eligible individuals whose nine month COBRA coverage period expired prior to the passage of DODAA.

OUR FEATURE ARTICLES

Federal Employment Law Changes Have Grabbed The Headlines--But States Made Changes Too in 2009

By Kelli L. Thompson, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

We have all seen the headlines. One of President Obama's first acts after taking office was to sign into law the Lily Ledbetter Act, which effectively reversed a United States Supreme Court decision involving the timing of lawsuits under the Equal Pay Act. Employers also know that unions are trying to flex their muscles after years of support of Democratic candidates and unprecedented support of President Obama's campaign for President. The unions' goal is the passage of the Employee Free Choice Act, otherwise more accurately characterized as the "card check" legislation because it eliminates secret ballot elections now required to unionize an employer. With the election of Scott Brown to the Senate for Massachusetts, many union officials

FEATURE ARTICLE

Employment Law: Changes Taking Place at the States' Level in 2009

candidly acknowledge that "card check" is likely dead in the water, but they may continue to push for other parts of the Employee Free Choice Act.

With the changes on the federal level, many states made significant changes in legislation in 2009 as well, so it is important for employers to keep abreast of state employment law developments, especially if the employer operates facilities in multiple locations.

Health care and health insurance legislation is not only a hot topic at the federal level. Five states, Delaware, Illinois, Missouri, New York and North Carolina, all adopted changes which impacted health insurance benefits coverage. Therefore, these changes, in turn, impact employer sponsored employee benefit plans as well. Delaware required insurers to cover screenings for developmental delays in infants and toddlers. Illinois adopted changes to group or individual health insurance policies and managed care plans that offer reasonably designed wellness programs. The legislation provides discounts and premium reductions for plans that offer wellness coverage, which provides employers an incentive to offer wellness programs as part of their benefits package. The Illinois legislation also adopted changes that impact coverage for prescription drugs used to treat cancer, allowing coverage even if a particular drug, although FDA approved for the treatment of cancer, is not FDA approved for treatment of some specific forms of cancer. Illinois also limited the substitution of certain immunosuppressant medications by health insurance providers unless specifically approved by the physician and the patient. In Missouri, health insurance providers or health benefit plans were given specific directives on coverage for prosthetic devices, chiropractic services and mental health coverage. In New York, health insurance providers are required to provide coverage for both the seasonal flu and the H1N1 vaccinations for all covered children 19 years or younger, and the costs for the vaccines are not subject to co-payments or deductibles. In North Carolina, the legislature authorized an insurance pilot project to pool costs for both large and small employers with an aim to reduce the number of uninsured North Carolinians and to decrease health insurance costs.

Illinois, Iowa and New York all addressed the issue of fair employment practices with Illinois' changes being the most comprehensive. The Illinois legislation made it much easier for an employee to bring claims for perceived violations of the Equal Pay Act, significantly expanded the time for filing such claims, and adopted a Ledbetter "paycheck standard" for calculating the statute of limitations. In Iowa, the Iowa Supreme Court found that a marketing director was entitled to a new trial on her pregnancy discrimination claim after she was discharged because she "could not catch up fast enough" after she returned from maternity leave. The Court found that not only did the Pregnancy Discrimination Act apply, but so did the Iowa Civil Rights Act, expanding protection for women returning from maternity leave. New York amended its fair employment practices law to allow for the assessment of additional penalties in the event an employer is found to have paid an employee less than the wage to which he or she was entitled. The employer can be assessed an additional amount as liquidated damages equal to 25% of the total wages due, unless the employer proves a good faith basis for believing that its underpayment of wages was in compliance with the law.

Illinois and Washington both made changes to their respective Family, Medical and Parental Leave laws. Illinois amended its statute to provide protection for victims of domestic or sexual violence so that they are allowed up to a total of eight work weeks of unpaid leave during any 12 month period to address domestic or sexual violence issues. The legislation also addresses whether the employer can demonstrate an undue hardship as well as reasonable

accommodations by the employer. Washington's family leave law is generally similar to and runs concurrently with the FMLA. However, Washington's law allows leave to be taken for the care of an employee's registered domestic partner with a serious health condition. Because the FMLA does not cover care for a domestic partner with a serious health condition, the statute also addressed the calculation of leave under the state statute as well as the FMLA and whether the leave runs concurrently or not.

In addition to these significant developments, six states – Hawaii, Iowa, Maine, Montana, Nebraska, and Vermont – adopted legislation that made changes to existing laws on smoking in the workplace and public places. Arizona, Arkansas, Connecticut, Illinois and Oregon all adopted changes for recordkeeping and requirements for posters and employee notices to be displayed in the workplace. Florida, Illinois, Indiana, Iowa, Kentucky, North Carolina, Rhode Island, South Carolina, Tennessee, West Virginia, and Wyoming all adopted changes to their respective state's unemployment insurance laws, primarily addressing benefit changes and/or increases in benefits. California, Delaware, Montana, Oregon, and Washington all adopted changes to their current minimum wage laws. In particular, Delaware adopted changes which prohibit an employer from mis-classifying employees as independent contractors and subjecting employers who work on public works projects to potential debarment.

Employment laws are certainly changing on the federal level, but it is equally important for employers to keep up to date and in tune with changes happening on the state level as well. If you, as General Counsel, oversee legal issues for a company that operates multiple facilities in numerous states, it is extremely important that you keep abreast of changes in the various state locations as well.

Health Care Law: How Healing the Disabled May Distress Health Care Providers

By Connie S. Ditto, London & Amburn, P.C.

The Executive Branch attitude and the history of legislation and enforcement of the Americans with Disabilities Act (ADA) compound the legal implications of providing health care in East Tennessee. Along with preparing for Recovery Audit Contractor (RAC) Audits, revamping Health Insurance Portability and Accountability Act (HIPAA) policies and procedures, preparing for electronic health records (EHR), establishing identify theft policies and procedures, and complying with the new increased requirements for patient confidentiality imposed by the American Recovery and Reinvestment Act of 2009 (ARRA), health care providers also need to examine their compliance with the ADA.

Executive Attitude

President Barack Obama has broadly stated that he is committed to alleviating the burdens on the disabled, and has taken steps to achieve that goal. His official agenda states:

> The Americans with Disabilities Act (ADA) is a landmark law that has done much to protect people with disabilities from discrimination. However, President Obama will push for more consistent and effective enforcement of ADA, which can do more

to prevent discrimination in employment, public services, public accommodations and telecommunications.

"Protect Civil Rights," *available at*: http://www. whitehouse.gov/ issues/ disabilities/, *last accessed* Jan. 26, 2010.

On September 25, 2009, President Obama appointed the first Special Assistant to the President for Disability Policy, Mr. Kareem Dale. News Release, The White House, Office of the Vice President, February 12, 2009 *available at:* http://www.whitehouse.gov/ the press office/Vice-President-Joe-Biden-Announces-Kareem-Dale-As-Special-Assistant-to-the-President, *last accessed* Jan. 26, 2010.

Shortly after the appointment of Mr. Dale to head up the nation's disability policies, the National Council on Disability published "The Current State of Health Care for People with Disabilities" on September 30, 2009. The Council found that disabled individuals were being denied equal health care treatment. Specifically, the Council found:

- people with disabilities experience significant health disparities and barriers to health care, as compared with people who do not have disabilities;
- the absence of professional training on disability competency issues for health care practitioners is one of the most significant barriers preventing people with disabilities from receiving appropriate and effective health care; and
- the ADA has had limited impact on how health care is delivered for people with disabilities. Significant architectural and programmatic accessibility barriers still remain, and health care providers continue to lack awareness about steps they are required to take to ensure that patients with disabilities have access to appropriate, culturally competent care.

National Council on Disability, *The Current State of Health Care for People with Disabilities*, 1 (September 23, 2009) *available at* www.ncd.gov, *last accessed* Jan. 26, 2010.

A Brief History of the ADA

The ADA was enacted nearly twenty years ago on July 26, 1990. The ADA's five titles each targeted a different area to decrease discrimination. Title I prohibited all government employers and all private employers with fifteen or more employees from discriminating against disabled employees. Title II required public services, such as state and local government (including public school districts and public transportation) to make their services available and accommodating to persons with disabilities. Title III required that public accommodations render their facilities accessible to the disabled. Title IV required modifications to television and public service announcements for the hearing-impaired. Title V, among other things, defined the relationship of the ADA with other federal laws. *See generally* 42 U.S.C.A. 12101 *et. seq*.

Recently, on September 25, 2008, the Americans with Disabilities Act Amendments Act of 2008 was passed. Public Law 110-325. The ADA Amendments Act ("ADAAA"), which expands the definition of "disability," became effective on January 1, 2009. *Id*. As amended, the ADA defines a disabled person broadly, as an individual who has either: (a) a physical or mental impairment that substantially limits one or more major life activities of such individual; (b) a record of such an impairment; or (C) is regarded as

having such an impairment. 42 U.S.C.A. § 12102(1). A "major life activity" includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C.A. § 12102(2) (A). A major life activity further "includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." 42 U.S.C.A. § 12102(2) (B). Additionally, an individual meets the requirement of "being regarded as having such an impairment" (and is therefore disabled) "if the individual establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C.A. §12102(3) (A). The Equal Employment Opportunity Commission promulgated proposed rules on September 23, 2009 and the comment period ended on November 23, 2009. The final rule is forthcoming, and once published, should be examined for compliance in a provider's hiring, firing, and other employment-related policies.

Implications for Health Care Providers

The broad definition of disability, however, has implications for health care providers beyond an examination of the provider's employment practices. In addition to ensuring compliance with Title III (i.e., removing architectural barriers, such as widening doorways to permit wheelchairs to pass through) and revising policies to permit the disabled to enter and utilize the facility (such as by permitting service animals in the establishment), by participating in Medicare and Medicaid, health care providers subject themselves to the requirements (and penalties) of Section 504 of the Rehabilitation Act of 1973. 29 U.S.C.A. § 794. The Rehabilitation Act requires that providers offer disabled individuals services that are equal or "as effective" to those offered to non-disabled individuals. 45 C.F.R. §84.4(b).

In the health care context, these requirements have peculiar implications. For example, the confidential nature of health care treatment implicates privacy considerations under HIPAA. Recent changes to HIPAA reaffirm the country's policy of keeping medical information confidential. For example, in addition to the breach notification requirements, ARRA increased the civil monetary penalties for breach as well as increased the duties of business associates. (See ARRA at Section 13410). Further, while health care providers must enter into business associate agreements with the personnel it contracts to comply with the ADA, (such as sign language interpreters), those agreements will need to remain compliant with the latest regulations for business associate agreements, which are expected to be promulgated in April 2010.

Further, health care providers are required to obtain informed consent prior to providing treatment. If a provider is treating a hearing-impaired individual and does not utilize the services of a sign language translator, and instead relies upon the individual's spouse, the provider could be subject to penalties under tort law for lack of informed consent, HIPAA for breach of patient privacy, and Title III for lack of providing effective services to a disabled individual.

Recent settlements and mediations published by the Department of Justice (DOJ) indicate that health care providers have been subject to investigations by the DOJ for allegations of violating Title III. Individuals are encouraged to report complaints about Title III violations to the DOJ. U.S. Department of

Justice, Civil Rights Division, Disability Rights Section, *Enforcing the ADA: A Status Report from the Department of Justice January-March 2009*, How to File Complaints. The DOJ reported that from January – March 2009, it reached seven settlements with entities due to allegations of Title III violations. U.S. Department of Justice, Civil Rights Division, Disability Rights Section, *Enforcing the ADA: A Status Report from the Department of Justice January-March 2009*, Section C- Other Settlements, Title III. One settlement involved an allegation by a deaf individual against a Pennsylvania medical practice that refused to provide a sign language interpreter at its main office, but instead offered an interpreter at one of its satellite offices. In addition to paying the complainant $2,000, the practice agreed to adopt new policies and train its staff accordingly. *Id*.

Corporate counsel can play a key role in preventing these distressing situations for health care providers by ensuring that the entity's disability compliance program has addressed: (1) what now constitutes a disability; (2) who needs assistance or specialized adaptive devices; and (3) how to handle a request for aids or services. A comprehensive assessment of the overall implications of a health care provider's physical access, employment practices, contracts for services, and policies and procedures when rendering care and treatment to disabled individuals is required to ensure compliance not only with the ADA, but also with other federal laws and ethical requirements unique to health care.

Intellectual Property Law: Unraveling The Mysteries

Part I-An Overview

by Mark S. Graham, Luedeke, Neely & Graham, P.C.

This is the first in a series of exposés on aspects of the fascinating area of law practice known as "Intellectual Property" or "IP" law. In this first part, I will give an overview of what IP consists of as a "specialty" law practice area, and some thoughts on its general importance to businesses. In future articles, I will go into more detail on various aspects of IP law and practice. I have geared this toward business and corporate lawyers.

Most lawyers who practice IP exclusively have dual bar admissions in their home state and before the USPTO. They also have engineering or other "hard" science technical degrees, in addition to law degrees. It is difficult to practice IP exclusively in many law firms if one is not also qualified to practice before the USPTO. Most IP lawyers practice together in "boutique" or specialty firms, or in IP groups in large general firms.

As corporate or primarily business lawyers, you may not have the good fortune to be called on to deal with IP every day. I am lucky enough to do nothing but IP all day, every day. Having done this practice now for 25 years, I have picked up a few things I hope to share with you in this series of articles. But first, suspecting that many of you do not deal with IP very often, I will ask you to endure this initial discussion of some IP basics. Even if you already know the "basics," a brief review may prove helpful. I sometimes find answers to seemingly intractable IP problems by going back to the basics. So, here we go.

IP Law: Unraveling the Mysteries (Part 1)

What is IP? The Internet contains hundreds of definitions of Intellectual Property. None are absolutely right or wrong, because there is no "correct" definition. So here's mine. IP encompasses exclusive rights available for products of human intellect under the laws and practice of a jurisdiction. In most countries, IP breaks down into 5 basic forms — (1) patents, (2) trademarks, (3) copyrights, (4) trade secrets/know-how, and (5) rights of personalty or publicity.

I believe it is fair to say that a comprehensive or complete knowledge of every facet of IP law is essentially impossible. In fact, IP law is probably developing faster than it can be "learned," especially if one also spends most of one's time "practicing" in the area. So, again, we will try to stick to the basics. I hope you can come away from this at least knowing how to recognize and differentiate the various forms of IP when you encounter them in your practice.

Here are some general definitional concepts of the various forms of IP.

1. Patents – Patents are by far the most "formal" type of IP. A patent is a grant of a deed of property issued by a government to an applicant who makes a proper application for patent to the appropriate government agency for a qualified invention. In the U.S., this agency is the United States Patent and Trademark Office, or "USPTO." A patent is the only type of IP which is defined entirely by the grant of a physical printed deed from the government. A patent deed exists independent of any physical product or process that might "embody" the subject matter of the patent.

A patent deed protects the scope of an abstract technical concept as defined by "word pictures" in the patent called "claims." The claims of a patent serve two main purposes. They define subject matter that is legally presumed to be patentably different from the "prior art." They also define the "meets and bounds" of the exclusive right conferred by the patent.

Generally, speaking, the term of a new patent is 20 years from the date on which the application for the patent was filed, subject to payment of fees or taxes due periodically during the term. Patents are effective only within the jurisdiction of the granting country or region. There is no "international" patent.

Patents confer "the right to exclude others from making, using, offering for sale, or selling" the claimed invention. Patents do not provide the owner with the affirmative right to make, use, offer for sale, sell or import the patented subject matter! This may be the most misunderstood aspect of patent law. More about this next time.

2. Trademark – A trademark is a word, phrase, symbol, or device which indicates the source of particular goods or services, and distinguishes this source from other sources of goods or services. The actual source need not be known, or even a matter of conscious concern. In fact, it usually is not. The Nike "swoosh" symbol tells people the goods come from a particular source, but the precise legal identity of that source is of no conscious concern or relevance to most consumers. The swoosh is no less of a mark for this.

The terms "trademark" and "mark" are commonly used to refer to both trademarks and service marks. Generally speaking, trademarks subsist as long as they continue to be used for the goods or services, and they do not cease to be enforceable until they become "abandoned" under the law. It is also generally true that, similar to muscles, trademarks become stronger and subject to broader protection the longer they are used and promoted for the goods or services. This is an important distinction between trademarks and other forms of IP patents and copyrights, which will all eventually expire and enter the public domain. The quid pro quo for the right to exclusive use of a trademark is quite different from that of patents and copyrights.

Trademark rights may be used to prevent others from using a similar mark likely to cause confusion as to the source of goods or services. If a mark is "famous," the owner can also prevent "dilution" of the mark, even if source confusion is not shown to be likely. Enforcement of trademark rights is a primary component of the broader law governing "unfair competition."

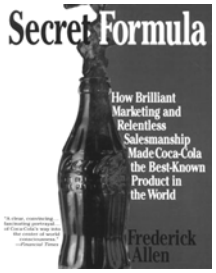
Trademarks used in commerce may be registered with the USPTO. Registration of trademarks is of the UTMOST importance in trademark law, as we will see later.

3. Copyright – Copyright protects "original works of authorship fixed in a tangible medium of expression." Copyright can be (and almost always is) embodied in literary, dramatic, musical, artistic, and other "created" works (like computer code, mask works, architectural works, etc.). The owner of copyright in a work has the exclusive right to reproduce and distribute copies of the work, make derivatives of the work, perform the work publicly, and display the work publicly during the term of copyright protection. Generally speaking, copyright for most modern works (those created since 1976) subsists for the life of the author plus 70 years; and for "works made for hire," copyright subsists for 120 years after creation or 95 years after first publication, whichever endpoint is earlier.

Copyright protects the form of expression of an idea underlying a work, but not the "idea" itself. Thus, copyright is generally a narrower or more limited right than rights under a patent or a trademark. Also, patents and trademarks can be infringed "innocently" by others who had no knowledge of their existence. But copyright only protects against copying. To prove infringement, the owner of copyright must prove the accused party actually copied substantial "protectible expression" from the work. But copying can be proven circumstantially. In many cases, copying is proven by evidence of

"access" and "substantial similarity."

Copyrights may be registered by the Copyright Office of the Library of Congress. Copyright must be registered in order to bring suit for infringement. However, unlike trademarks, registration of copyright has no major impact on one's rights or one's ability to protect the copyright, except in terms of available remedies. That is, copyright protection arises automatically, by operation of law. Unlike patents, the mere act of creating an original work of authorship fixed in a tangible medium is all that is required for the complete right of copyright to spring into existence.



4. Trade Secret, Know-How – A trade secret is any information which is not generally known to, or reasonably ascertainable by, others, and by which a business can obtain an economic advantage over others. Trade secrets also generally encompass "know-how" and "confidential information."

Tennessee and the federal Government have statutes that define trade secrets generally along the lines of the above and provide substantial remedies for trade secret misappropriation and, in some cases, "criminalize" such violations.

Unlike other forms of IP, no formal mechanism exists for publicly identifying a party's trade secrets. Cases of trade secret "misappropriation" generally focus on the misconduct of the accused rather than whether the information technically qualifies for protection. Again, this will be delved into in more detail in future articles.

5. Rights of Personalty or Publicity ("ROP") – The ROP can be defined as the right to control the unauthorized commercial use of one's identity by others. ROP is codified in Tennessee at T.C.A. § 47-25-1101 et. seq. It is also known here as the Elvis Presley Act.

The elements comprising the ROP are typically referred to as "name, image and likeness." Violations of ROP often overlap with trademark/copyright infringement claims, as can be the case with other forms of IP. We will see some interesting examples of this in future articles. ROP generally extends to every individual, not just famous people, and is also devisable to one's heirs in many states, who can enforce the ROP for a period of time after the person's death.

As a practical matter, most ROP disputes involve celebrities, since use of their names and images is a great temptation to those who wish to help hype advertisements and boost the sale of products/services.

General IP Observations – Again, I intend to cover forms of IP separately and in more detail in future issues. But, for now, suffice it to say that forms of IP are ubiquitous in our society and are essential, critical component of a free enterprise, capitalist economic/legal system such as the one we have in the United States. I believe most other major countries and regions of the world are gradually and inevitably moving toward free enterprise systems similar to that of the U.S. under a rising tide of citizen demand and pressure for a better way of life. I believe this will essentially force implementation of effective IP systems similar to that of the U.S. in such countries/regions. We see this happening now in China and, to some extent, Russia. China and others aspiring to become global trade leaders will, in my estimation, be forced to adopt systems for effectively promoting and protecting IP similar to those in America and Europe. If they don't, they will not be economically successful on the global stage. It's that simple.

It is also a proven fact that producers of goods and services will press for systems of law that promise to ensure they will be able to retain "the fruits of their labor" (including this "intellectual" labor). It is a matter of human nature. Sound and predictable systems of well-developed IP laws incentivize positively-oriented innovation activities that respond to the promise of fair and reasonable returns to those who sufficiently advance technologies that respond to human needs and wants. These systems function exceedingly well, and are the life-blood of the competition that drives the growth of our American economy and that of an increasing number of other major counties/regions. We are a shining example of what an effective (although admittedly imperfect) IP system can do. In the future, companies that fail to make meaningful and permanent commitments to development and protection of IP will find it increasingly difficult to effectively compete or maintain profitability.

We will delve into these matters more deeply in future issues, first, focusing on the marvelous world of patents. Hopefully, you will learn many new and interesting aspects of what patents are, how they are obtained, and how they can be used by your clients to fulfill their reasonable expectations for economic gain in exchange for investing in development of IP. You may also be better equipped to explain to clients how development of IP can help support enhanced profitability, proportional to the profundity and marketplace allure of their innovations and other IP, and to also advance the general health, growth, and profitability of their particular industries. Perhaps you can help them see ways to become more prosperous industry "heroes" by better utilizing available IP laws and protections.

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NEWS AND NOTES

Thanks to Our Authors!

Thanks to all those who contributed to this issue of *THE CONSIGLIERE.* A very special note of appreciation is due to our authors Brad Sagraves of Woolf, McClane, Bright, Allen & Carpenter, PLLC for his latest "Tax Tidbits" contribution; Kelli Thompson of Baker, Donelson, Bearman, Caldwell & Berkowitz, PC, for her article on states' employment law changes in 2009; Connie Ditto of London & Amburn, P.C., for her article on the effects of ADA compliance on health care providers; and Mark Graham of Luedeke, Neely & Graham, P.C., for his first article in a series on unlocking the mysteries of IP law.

CONTACT INFORMATION

See the contact information on the left-hand margin of this page. Use the hyperlinks to contact our Co-Chairs, David Headrick and Marcia Kilby; the Editor, Nick McCall; or the KBA's Executive Director, Marsha Wilson.

See the web site address at the bottom of the left-hand margin on this page to access the official Knoxville Bar Association web site by the hyperlink.

Don't forget the Corporate Counsel Section's first quarterly meeting for this year, to be held at 6:00 p.m. on Thursday, February 11, 2010 at Sobu. See you there!