Preparing for Litigation

Joi Singh, Esq. – Federal Highway Authority
Andy M. Frohardt, Esq. – Colorado Attorney General’s Office
Trial Experience

• Hearing or trial (OARC or other area)?
• Administrative Law Judge or Hearing Officer?
2) 4 Core Strategies for Preparing for Litigation (Andy).
3) Discussion & Closing (Joi).
The Litigation Process

- **Goal** → Truth-Finding
  - **Discovery.**
    - Ex. Disclosures, declarations, interrogatories.
  - **Trial/Hearing.**
    - Evidence admitted
    - Testimony of witnesses
    - Exhibits (documents, letters, maps, agreements)
  - **Decision-maker** (Judge, Administrative Law Judge, Hearing Officer) makes a decision.
The Litigation Process

- U.S. Supreme Court
- State Supreme Court
- Court of Appeals
- State District Court (Common Pleas)
- Agency Decision/Hearing
- Administrative Hearing/Decision
The Litigation Process

- Judiciary’s role:
  - Check on Executive Branch
- Judges safeguard citizens from improper government interference
  - Hate overzealous government actors
  - Hate liars
The Litigation Process

- Cases are often won or lost before you enter the courtroom.
- Lawyering matters . . .
  - But less than you may think.
  - Who your lawyer is and what they do is out of your control.
  - What is in your control is what you do.
5 Core Strategies for Success
Strategy #1

Remember: Appearances Matter
Remember: Appearances Matter
Remember:Appearances Matter

- 1992 in Albuquerque, NM, Stella Liebeck drove through the McDonald’s drive-thru and purchased a cup of coffee.
- Stella, 79 years old, put the coffee between her legs to add sugar when the coffee spilled.
- Stella sued McDonald’s.
- What happened?

Source: The New York Times via YouTube.com
Remember: Appearances Matter

Remember: Appearances Matter

A woman who was scalded when her McDonald’s coffee spilled was awarded nearly $2.9 million in punitive and compensatory damages by a New Mexico state district court jury. Lawyers for Stella Liebeck, who suffered third-degree burns in the 1992 incident, contended that McDonald’s coffee was too hot.

Source: The New York Times via YouTube.com
Remember: Appearances Matter

What the Jurors saw.

Source: The New York Times via YouTube.com
Remember: Appearances Matter

Source: The New York Times via YouTube.com
Mr. Paul Saber  
McDonald Restaurants PTS Inc.  
4501 Indian School Road NE  
Albuquerque, NM 87108  

Dear Sir:

On Thursday morning February 27 about 8:15 AM, my college graduate grandson, who is an assistant golf pro, and I stopped for breakfast for him and coffee for me at your 5001 Gibson store. We used the drive through. After receipt of the order and change, he parked the car in the lot so that I could mix sugar and cream with the coffee safely. I placed the coffee on the seat between my legs. The coffee spilled and saturated my sweat suit pants and severely burned my thighs and buttocks. This occurred about four minutes after I purchased it. I jumped out of the car and worked to remove the wet clothes. My grandson found a sheet in the back of the car in which I was wrapped. I felt nauseous and faint and was shaking and cold. We drove first to the downtown Presbyterian hospital which unfortunately had a multi-car accident to deal with. So we drove to the Northside Presbyterian hospital and were seen by the emergency staff about 45 minutes after the accident. The doctor in charge stated that this was bad and that he had better call in a burn doctor. A burn

Source: The New York Times via YouTube.com
1. The coffee machine and coffee making process at that store needs to be checked to see if the machine is giving improperly heated coffee. If it is faulty, it needs to be fixed.

2. If the coffee was by your standards, I suggest you reevaluate the temperature of the coffee you provide to your customers. I could not be the only one to spill the liquid in a way to cause severe injury.

3. Please pay my medical and recuperation bills plus recompense in order for me to get back on my feet. I give you or your agent permission to see the medical records to confirm the extent of my injuries. I do not know the exact cost of the emergency room, hospital room, medications, doctors, nurses, nor incidental costs. Nor do I know what the outpatient and possible skin graft costs are going to be. I am sure the medical agents will work with your agent to clear this up.

Source: The New York Times via YouTube.com
Remember: Appearances Matter

What the Jurors saw.

Source: The New York Times via YouTube.com
Remember: Appearances Matter

What the Jurors heard.

McDonalds employees testified:

• They have a policy to keep their coffee at between 180 and 190 degrees.
• Testimony this was about 30 degrees warmer than coffee brewed at home because it “tastes better.”
• Admitted coffee this hot was a “hazard.”

Source: By Frankieleon via Flickr
McDonalds employees testified:

- The number of spills is “statistically insignificant” given the amount of coffee sold.
- McDonalds had no intention of lowering the temperature of its coffee, saying there are more serious dangers in restaurants.
Remember: Appearances Matter

What the Jurors said.

$160,000 to cover expenses + $2.7 million in punitive damages (2 days worth of profits from coffee sales)

Source: The New York Times via YouTube.com
Remember: Appearances Matter

• Jurors disliked the callous disregard for people.
  ▪ A juror noted each number had a person behind it.
Remember: Appearances Matter

• End result:
  - Judge reduced the punitive damages to $480,000, leaving Liebek with $640,000.
  - The parties settled before appeals followed.
Remember: Appearances Matter

• What does this mean for OARC?
  ▪ Appearances matter.
    ✤ Realize you already have one strike against you → you work for a Gov’t agency that is interfering with a citizen’s property interests.
  ▪ Matters both in trial and before trial.
Remember: Appearances Matter

- You want the judge to think you are credible; you want the judge to think:
  - 1. You are the expert;
  - 2. You have no dog in this fight; you have no vendetta; and
  - 3. You’re just doing your job.
Remember: Appearances Matter

• Tip #1: Make Sure You Treat Sign Owners with Respect and Empathy – Always.
  ▪ Judges are not just evaluating the law, they’re evaluating your agency and its decision-making.
  ▪ Judges know little to nothing about OARC!
Remember: Appearances Matter

• Compare two OARC statements at trial:

“It doesn’t matter what they think. The law is the law. My job is to enforce the law and that sign is illegal.”

“When we first learned of their argument, we conducted a thorough analysis. I discussed it with my manager in detail. We also took it to our attorneys. After a thorough review, we determined it did not change our position.”
Remember: Appearances Matter

• Tip #2: Treat Sign Owners with Respect and Empathy – Always.
  ▪ Judges are not just evaluating the law, they’re evaluating your agency and its decision-making.
  ▪ Judges know little to nothing about OARC!
Remember: Appearances Matter

• Judges are not just evaluating the law, they’re evaluating your agency.
  ▪ Judges know little to nothing about OARC!
• As the face of the agency, they’re evaluating you!
Remember: Appearances Matter

• Judges are asking themselves:
  ▪ Is this person credible?
    ❖ i.e., is this person competent, honest, trustworthy, and an expert in outdoor advertising?
    ❖ And do they have a motive or bias?
  ▪ Your credibility begins the instance a problem arises (and way before litigation starts).
Strategy #2

Leave No Stone Unturned
Leave No Stone Unturned

- **State v. OJ Simpson**
  - 1994 OJ Simpson was put on trial for the murder of Nicole Brown Simpson and her friend, Ron Goldman
Leave No Stone Unturned

- Key piece of evidence: two gloves
- One found at crime scene
- One found at Nicole’s house
Leave No Stone Unturned

Source: Investigation Discovery via YouTube
Leave No Stone Unturned

Source: Investigation Discovery via YouTube
Leave No Stone Unturned

- Why did gloves not fit (according to guilt-proponents)?
  - Latex gloves underneath?
  - Arthritic medication?
  - Glove shrinkage due to elements/blood soakage/DNA testing?
- Had prosecution known, could have introduced evidence to explain why.
Leave No Stone Unturned

What is the lesson for OARC?
- Leave no stone unturned with your cases.
- Investigate, investigate, investigate!!!
- Leave nothing to chance or surprise -- investigate everything.
Leave No Stone Unturned

- Specific Investigation tips for OARC:
  Tip #3. **Ask the opposing side about their claims/arguments.**
  - Express your position and request a response on specific points.
  - Get as specific as possible concerning their position!
Leave No Stone Unturned

• Why?
  ▪ Allows you to evaluate their position early
    ❖ Allows you to assess for weaknesses in your position
    ❖ Can lead towards settlement of some kind
  ▪ Can discredit dishonest persons “just trying to get/keep their sign”
Leave No Stone Unturned

• Specific Investigation tips for OARC:

Tip #4. Investigate each of their claims and arguments.
Leave No Stone Unturned

**Commercial/Industrial Zoning Dispute?**
- Review local zoning
- Read the local zoning code
- Read the local master plan
- Talk to the local officials
- Seek out and review any ordinances or resolutions concerning the property or any site plans for the property
Leave No Stone Unturned

- **Sign Violates Spacing Restriction?**
  - Take measurements multiple ways
    - Google Earth?
    - GPS coordinates?
    - Measuring wheel?
    - Surveyor?
    - Other electronic methods?
  - Take from multiple potential beginning and ending points
Leave No Stone Unturned

• Non-Conforming Sign Illegally Changed?
  ▪ Ask sign owner what changes have been made.
    ❖ Ask for all invoices, scopes of work, and billing documentation.
  ▪ Compile all available photographs of the sign
  ▪ Are the publicly-available resources that will allow aerial comparisons of the sign location?
Leave No Stone Unturned

- **Sign Brightness at-Issue?**
  - Have a reliable way of measuring brightness?
    - Nit gun? Light meter?
  - Demand documentation showing brightness from sign.
    - And document brightness before and after your demand!
  - Hire a third-party expert to evaluate the brightness?
Leave No Stone Unturned

- On-Premise v. Off-Premise Advertising in Dispute?
  - Does the sign have traditional billboard advertising copy?
  - Does the sign owner or the company market the sign for advertising?
  - What does the company website say about its products?
Strategy #3

Document, Document, Document
Document, Document, Document

- Document *everything* you do.
- Why?
  - Creates clear, favorable records.
    - Helps opposing parties honest.
  - Transparency.
  - Remember what you did.
Document, Document, Document

• Collect as much information about their position
• Collect it in writing from the opposing party, if you can . . .
  ▪ . . . . . .And if you can’t, document it yourself.
Tip #6: Have a System for Documenting Non-Recorded Events

- E-mail to opposing party
- Memo’s to File
- E-mails to Self
- Consider Looking at DOT ROW Forms for guidance
MEMORANDUM

TO: File
FROM: Alan Clubb
DATE: July 28, 2017
RE: Illegal Sign Located at 1234 Fake Street, Denver, CO 80211 – Telephone Call

On July 21, 2017, I issued a Notice of Violation to Debra Olson. Ms. Olsen was issued the Notice because she is listed as the owner of property known as 1234 Fake Street, Denver, CO 80211. The property had a non-permitted advertising device that advertised Bob’s Diner, a business not located on the property. A picture of the Sign I took on July 19, 2017, can be found in the Case File.

On July 28, 2017, Ms. Olsen called me. She said she had no idea the sign violated the act. She agreed to remove the sign. We agreed she would remove the sign within the next two weeks.
Tip #7: Take Photographs and Video Whenever Possible

- “A picture is worth a thousand words.”
- Necessary for telling a story.
- But also great as evidence.
  - Signs in disrepair?
  - Signs clearly destroying scenic beauty?
  - Digital sign advertising off-premise?
• Contextual photos.
   View from the ROW.
   What would someone new to this issue want to see?
• Date, time and GPS.
• Change to Sign?
   → Before and After Photos
Tip #8: Obtain Letters and Certifications from Local Govt’s

- Zoning dispute?
  - Certified copies of relevant zoning pages.
  - If local gov’t determines whether zoning qualifies for OA, get written letter, on letterhead, signed by the official.
  - Get them to commit early.
Strategy #4

But Be Careful What You Write
But Be Careful What You Write

• Tip #9: Understand the Sign Owner will Have Access to Everything You Create
EX-CLIENT SUES LAWYER CHAD HEMMAT OVER "TOOTHLESS COOTIES" CASE

$2 MILLION JURY VERDICT

Hemmat hadn't even met the Goffs in person, yet that morning when he fired off a message to McQuinn about the case: "I don't think it's going to settle. But, my clients, I understand, are toothless cooties [h] so, not sure how much an Appaloosa of Marilyn McQuinn's [or a robot] will want to give them. Deplorable, I recall, is a robot."

McQuinn echoed the phrase in a response: "I don't have enough trial experience to know if her explanation that all money went to Vernon [Goff] would sell. They are toothless cooties though so I'm not hopeful."

Source: Westword, Aug. 21, 2012
Goff v. Hemmat, Chad, ESQ, et al, 2011CV003853
But Be Careful What You Write

- Discovery
  - Exchange of documents and information
- Open Records requests
  - Everything can be day-lighted
- Result?
  - Assume everything you write will be discoverable
But Be Careful What You Write

- Attorney-Client Privilege:
  - Protects communications to and from counsel for purposes of obtaining/giving legal advice.
    - Limited to this.
  - Cannot have third-parties on the e-mail chain or in the meeting.
  - Cannot be used to hide facts.
But Be Careful What You Write

• Attorney-Client Privilege
  ▪ You’re going to have doubts in your case; you’re going to have details you want to discuss concerns and questions
    ❖ Advice: Attempt to preserve attorney-client privilege during such discussions

• Tip #10: Do Your Part to Preserve the Privilege
But Be Careful What You Write

• To (try to) preserve attorney-client privilege:
  1. Send e-mails to attorney(s) with attorney in the “To” line and everyone else “CC’d”
  2. Label e-mails “confidential” or “privileged”
  3. Avoid including any third parties on e-mails
  4. Make sure your e-mail contains a request for legal advice
Strategy #5

Work Closely With Your Lawyer
Work Closely With Your Lawyer

• **Tip #11: Connect with your lawyer early**
  - Discuss the case with them.
  - Discuss what may be needed.
  - **Ask questions** – even if you think you know the answer.
Work Closely With Your Lawyer

- Tip #12: Ask your Attorney for Informal Opinions / Legal Memo’s
  - Is there legal uncertainty concerning your case? (Or, at least, does a sign owner or applicant think there is uncertainty?)
  - Request your attorney draft an informal legal analysis.
Work Closely With Your Lawyer

Why?

- Gets attorney’s attention early.
- Allows you to advise upper management.
- Allows you and your attorney to better assess and address weaknesses in case.
Work Closely With Your Lawyer

• **Tip #13. Ask that they Submit a Discovery Demand**
  - Demand all e-mails, correspondence, and documentation related to the sign or proposed sign site from the opposing party
  - Except for attorney communications, virtually everything is discoverable.
Work Closely With Your Lawyer

- Why?
  - Can see if sign owner is acting in bad faith or knowingly trying to push the law.
  - Keeps the sign owner honest.
Work Closely With Your Lawyer

- Tip #14. Consider Filing a Verified Motion/Notice or Affidavit
  - Allows you to submit testimony, under oath, before you enter the courtroom
Work Closely With Your Lawyer

STATE OF COLORADO
OFFICE OF ADMINISTRATIVE COURTS

Case No. HW 2014-0002

VERIFIED NOTICE OF HEARING

IN THE MATTER OF THE HEARING REQUEST OF CBS OUTDOOR, LLC, ON THE DECISION OF THE ROADSIDE BEAUTIFICATION SECTION OF THE DEPARTMENT OF TRANSPORTATION:

CBS OUTDOOR, LLC, t/a OUTFRONT MEDIA, LLC, and AURARIA HIGHER EDUCATION CENTER,

Petitioners,

v.

DEPARTMENT OF TRANSPORTATION, STATE OF COLORADO,

Respondent.

TAKE NOTICE that a two-day hearing in the above-captioned matter will be held on June 16 and 17, 2016, and will commence at 9:00 a.m. in the Office of Administrative Courts, 1525 Sherman Street, 4th Floor, Denver, CO, 80203. Pursuant to § 24-105(2)(a), C.R.S., the Department of Transportation, State of Colorado (“CDOT”) states as follows:
Work Closely With Your Lawyer

1. This proceeding examines whether it was lawful for CDOT to change the status of a billboard owned by CBS Outdoor, LLC, n/k/a OUTFRONT Media, LLC (“CBS”), from “conforming” to “nonconforming.”

2. CDOT has authority to regulate advertising devices pursuant to the Outdoor Advertising Act, § 43-1-401, et seq., C.R.S. (the “Colorado Act”) and the Rules Governing Outdoor Advertising in Colorado, 2 CCR 601-3 (the “Colorado Code”).

3. The hearing will be conducted under the provisions of the Colorado Administrative Procedure Act, § 24-4-105, C.R.S., and the Rules of Procedure of the Division of Administrative Hearings (1 CCR 104-1).
Work Closely With Your Lawyer

Matters of Fact Asserted

4. The billboard at issue is located near the intersection of Colfax Avenue (a/k/a U.S. 40) and Interstate 25, and is permitted by CDOT as Control Permit No. 10605 (the “Billboard”).

5. The Billboard and its advertising display are visible from both Colfax Avenue and Interstate 25, and are within 660 feet of the nearest edge of the right-of-way of Colfax Avenue.

6. The portion of Colfax Avenue adjacent to the Billboard is a part of the Federal-aid Primary System as well as the National Highway System. Interstate 25 is a part of the National Highway System. Both roads are a part of the State Highway System.

7. Because the Billboard is an advertising device visible from Interstate 25 and Colfax Avenue, and those roads qualify as roadways subject to outdoor advertising control, the Billboard is subject to state and federal laws and rules governing outdoor advertising.

8. The Billboard is located within the boundaries of the City & County of Denver.

9. The Billboard is owned and operated by CBS.

10. Upon information and belief, the Billboard is located on property owned by the Board of Directors of the Auraria Higher Education Center, a body corporate and agency of the State of Colorado (the “AHEC”). Specifically, the Billboard is located west of the intersection of Curtis Street and 5th Street in a parking lot (the “Property”).

11. Upon information and belief, the portion of the Property upon which the Billboard resides is leased to CBS.
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11. Upon information and belief, the portion of the Property upon which the Billboard resides is leased to CBS.
18. On September 4, 2015, Neil Lacey, Project Development Manager for CDOT, issued a letter informing CBS that the Billboard’s status was changed from “conforming” to “nonconforming” because in 2010 the City & County of Denver changed the zoning of the Property so that the Billboard no longer qualifies as an “area zoned for industrial or commercial uses.”

19. The 2010 zoning change made the Property CMP-El zoning, a type of zoning which does not qualify as either a “commercial” or an “industrial” zone for purposes of outdoor advertising control.

20. Because the Property is no longer in an area zoned “commercial” or “industrial,” the Billboard is nonconforming.

21. As a nonconforming sign, the Billboard may be maintained, but it cannot be converted to CEVMS, or substantially changed in any other way.
Work Closely With Your Lawyer

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Work Closely With Your Lawyer

Matters of Law Asserted – Specific to this Proceeding

32. 23 C.F.R. § 750.704(a)(4) outlines the general prohibition of signs adjacent to the Interstate and Federal-aid Primary Systems, but permits signs be erected in “areas adjacent to the Interstate and Federal-aid Primary Systems which are zoned industrial or commercial under authority of [s]tate law.” See also § 43-1-404(1)(d), C.R.S.

33. Permitted signs are allowed in areas zoned for commercial or industrial uses as that term is defined in § 1.33 of the Colorado Rules. § 7.00(A)(1), 2 CCR 601-3; see also § 6.01(A)(2)(a), 2 CCR 601-3.

34. “Zoned for Commercial or Industrial Uses” means:

Those districts established by the zoning authorities under the authority of state law as being most appropriate for commerce, industry, or trade, regardless of how labeled. They are commonly categorized as commercial, industrial, business, manufacturing, highway service or highway business (when these latter are intended for highway-oriented business), retail, trade, warehouse, and similar classifications.

§ 1.33, 2 CCR 601-3.
State of Colorado

City & County of Denver

I, the undersigned, as representative of Respondent in this matter, being duly sworn, state that the facts set forth in the foregoing Verified Notice of Hearing are true to the best of my knowledge, and that law stated in the same is in accordance with my understanding of the law governing outdoor advertising.

[Signature]

Anthony Lovato

Subscribed and sworn to before me in the City & County of Denver, State of Colorado, this 29th day of April, 2016.

Witness my hand and official seal.

My commission expires: 2-3-18

[Notary Public Stamp]

DANICA BARAJAS
NOTARY PUBLIC
STATE OF COLORADO
NOTARY ID 20104001172
MY COMMISSION EXPIRES FEBRUARY 3, 2018

Notary Public
Work Closely With Your Lawyer

Why do this?

- Ensures all the “legal boxes” are checked
- Ensures you and your attorney understand the legal issues in the case
- Educates the judge
- Puts the sign owner in position of having to explain why you are wrong
Work Closely With Your Lawyer

Why do this?

- Allows you to frame the case the way you want to – with the assistance of your lawyers
- Gives the judge everything he/she needs to find in your favor
- Creates a great record for appeal
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Closing Thoughts
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