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**ARTICLES**

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## **The Murky Legal Waters of Workplace Appearance Codes, Part One**

By Rita B. Trivedi

In recent years, there has been much discussion concerning the reach of appearance codes in the workplace. Particularly because those policies frequently go beyond a simple statement of appropriate shoes or sleeve length in the workplace, it becomes even more important to understand the reasoning and position of the courts as they grapple with this issue in the face of religious and sexual expression by employees.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., prohibits various forms of discrimination in employment, proclaiming:

[I]t shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's race, color, religion, sex, or national origin*; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin (emphasis added).

Title VII is far from the only means by which individuals may bring claims of alleged discrimination or unlawful treatment on the basis of their religion or other protected grounds. For example, claims are frequently brought under the Free Exercise clause of the First Amendment. *See, e.g., Draper v. Logan County Public Library et al.*, 403 F. Supp. 2d 608 (W.D. Ky. 2003) (concerning plaintiff's display of a cross pendant in violation of her employer's dress code); *AA v. Needville Independent Sch. Dist.*, 701 F. Supp. 2d 863 (S.D. Tx. 2009) (considering student's Native American belief regarding hair length and his school's grooming policy). However, this two-part article will limit discussion to cases under Title VII in the employment context. Employment is an area that touches most people's lives, and personal expression of religious and/or sexual identity must be addressed in that arena to understand a daily issue facing those people as they make choices affecting their lives, beliefs, conceptions of themselves, and livelihoods.



Discussion in this first part will center on an employer's ability to regulate employees' appearance in the workplace in light of specific beliefs that the employee may claim to hold. It will also consider the extent of an employer's obligation to accommodate those beliefs and where an employer may be able to invoke other countervailing considerations, such as safety or a legitimate business purpose in response to an employee's request for an accommodation.

Part two, appearing in the winter 2011 of this publication, will address appearance codes and gender identity. Going beyond cases simply involving sex-specific dress codes, the second part of this article considers recent cases involving gender presentation and gender transition as well as the application of traditional Title VII jurisprudence to these emerging issues.

### **Appearance Codes and Protected Beliefs under Title VII**

Because religious convictions often involve requirements on dress and other types of grooming, appearance codes in the workplace may run the risk of violating Title VII insofar as they restrict an individual's employment opportunities. For example, an employee who must wear a turban on his head to comply with the requirements of his Sikh religion may be told he cannot work at a customer service desk because his employer requires that no headgear be worn in front of the public other than company-issued caps with the organization's logo. Another employee might face losing her job because it would violate her Orthodox Jewish beliefs were she to wear jeans or other trousers sold at the retail clothing store where she works, as her employer requires. In some cases, the employer's dress and grooming requirements may outright violate Title VII's protection of religious beliefs. In others, they might be permitted for a legitimate business reason. In yet others, they might be valid but subject to a reasonable accommodation exception for the employee in question. These close questions are often decided on a fact-specific basis, yet some general guidelines have emerged.

To succeed on a claim of religious discrimination, an employee must first prove a prima facie case showing that (1) he has a bona fide, sincerely held religious practice that conflicts with an employment requirement; (2) he brought that conflict to the attention of his employer; and (3) the religious practice was the basis for the adverse employment action. If the prima facie case is made, the burden shifts to the employer to show that it offered a reasonable accommodation to the employee or that offering such an accommodation would constitute an undue hardship. *See, e.g., Harrell v. Donahue*, 638 F.3d 975, 979 (8th Cir. 2011); *EEOC v. Geo Group, Inc.*, 616 F.3d 265, 271 (3d Cir. 2010); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008). The plaintiff then has the chance to show that the employer's argument is mere pretext for discrimination.

#### *Sincerely Held Beliefs*

In many cases, courts have been willing to interpret the notion of sincerely held beliefs fairly broadly. This practice is consistent with federal regulations that instruct that "[i]n most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which



the issue does exist, the [Equal Employment Opportunity] Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.” 29 C.F.R. 1605.1.

Nevertheless, limits do exist. For example, a plaintiff-employee could not establish that his “uniform belief system” required him to wear various kinds of attire, including symbols, such as a kaffiyeh, anarchy symbol, peace symbol key, dragon icon, chains with crosses, a priest’s shirt, and a crucifix necklace. Nothing in the purported universal belief system required any particular form of attire or jewelry; instead, the individual was urged to express his beliefs as he chose and the plaintiff did not wear the attire at all times. As a result, the employer could lawfully terminate the employee for wearing the attire in violation of the company’s appearance policy. *Lorenz v. Wal-Mart Stores, Inc.*, 2006 U.S. Dist. LEXIS 36145, 10, 33-36 (W.D. Tx., May 24, 2006), *aff’d* at 2007 U.S. App. LEXIS 9359 (5th Cir. Apr. 24, 2007). Inconsistent manifestations of the purported belief system also undermine the extent of an employee’s protection. When an employee herself initially suggested that she wear a bandage over some of the piercings required by her religion to reach a compromise with her employer’s appearance policy, but then retracted her offer and claimed that her religion would not permit her to cover any piercings, the court found her latter argument unconvincing and noted that she also regularly covered piercings by wearing a blouse. *Cloutier v. Costco Wholesale, Inc.*, 311 F. Supp. 2d 190, 198–99 (D. Mass. 2004), *aff’d* at 390 F.3d 126 (1st Cir. 2004).

### *Undue Hardship and the Reasonable Accommodation Requirement*

In trying to balance an employer’s legitimate business need for dress and grooming guidelines in the workplace with the importance of the employee’s right to hold religious beliefs without repercussions, an employer must reasonably accommodate an employee’s religious beliefs unless it would be an undue hardship on the operation of the business to do so. 29 C.F.R. 1605.2 (c). Such an accommodation should strive to eliminate the conflict between the employment requirement and the religious practice to the extent reasonably possible. Yet the notion of striving to eliminate often does little to indicate how far an employer needs to go and in whose eyes a conflict would be considered mitigated.

The employee must be a participant in seeking religious accommodations. Specifically, an employee must notify the employer of the conflict between the appearance code and his or her religious beliefs. The employer and employee should then engage in a dialogue to determine what accommodation might be appropriate. Absent an undue hardship, the employer has an obligation to grant the accommodation. In some cases, more than one possible accommodation might be available; in those situations, the employer must provide that accommodation that least disadvantages the employee on the job. 29 C.F.R. 1605.2 (c) (2) (ii).

The determination of an undue hardship is made on a case-by-case basis. Under federal regulations,

[a] refusal to accommodate is justified only when an employer or labor organization can demonstrate that an undue hardship would in fact result from each available alternative method of accommodation. A mere assumption that many more people, with the same religious practices as the person being accommodated, may also need accommodation is not evidence of undue hardship.

29 C.F.R. 1605.2 (c) (1).

As one court put it, “an accommodation that results in more than a de minimis cost to the employer, such as additional costs arising from lost efficiency or higher wages, constitutes an undue hardship.” *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 U.S. Dist. LEXIS 36219, 15 (W.D. Wa. Aug. 29, 2005). Undue hardship might also occur if an accommodation would require the employer to deviate from its established seniority system. 29 C.F.R. 1605.2 (e) (2); *Harrell v. Donahue*, 638 F.3d 975, 979 (8th Cir. 2011). However, reassignments and/or job swaps may be appropriate. 29 C.F.R. 1605.2 (d) (i), (iii). Some (though not all) courts have concluded that mere speculation is generally insufficient: “Employers must support a claim of undue hardship with proof of actual imposition on coworkers or disruption of the work routine. Hypothetical hardships based on assumptions about the cost of a proposed accommodation are generally insufficient.” *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 U.S. Dist. LEXIS 36219, 15–16 (W.D. Wa. Aug. 29, 2005). Nevertheless, employers therefore seem to have a relatively low burden when determining what (and if) accommodation is required.

### *Uniformity of Appearance and Neutrality*

According to the EEOC’s compliance manual, “There may be limited situations in which the need for uniformity of appearance is so important that modifying the dress code would pose an undue hardship. However, even in these situations, a case-by-case determination is advisable.” Equal Employment Opportunity Commission, [Compliance Manual Section 12: Religious Discrimination](#), Section C(4)(a) (last visited October 19, 2011).

A police department could lawfully prohibit a Muslim female police officer from wearing a hijab in contravention of its dress code. The police commissioner offered convincing testimony that the police department’s neutrality—and clear appearance thereof—was vital when dealing with the multi-cultural public and working cohesively as a unit. The image of a disciplined and impartial police force required that officers wear a standard uniform without expressions of personal religion, opinions, or bias. The court held that police and other law-enforcement agencies have a specific interest in neutrality when protecting the citizens in its charge and that alterations or risks to that standard would be an undue hardship. Summary judgment in favor of the employer was affirmed. *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009). However, circuit courts have reached different results when analyzing religious garb worn by police officers under the First Amendment Free Exercise Clause. *See, e.g., FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

### *Public Image, Business Success, and Customer Preference*

Employees are often the voice and image of a company, particularly in cases when an employee works in a customer-contact position. Some courts recognize that an accommodation of dress and/or grooming requirements might create an undue hardship to an employer if it conflicts with the employer's desired public image. *See, e.g., Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 136 (1st Cir. 2004) ("Courts considering Title VII religious discrimination claims have also upheld dress code policies that, like Costco's, are designed to appeal to customer preference or to promote a professional public image") (citing cases). However, the contours of this argument are far from settled. The EEOC instructs that although these exceptions might exist, "an employer's reliance on the broad rubric of 'image' to deny a requested religious accommodation may in a given case be tantamount to reliance on customer religious bias (so-called "customer preference") in violation of Title VII." Equal Employment Opportunity Commission, *supra*. Some courts have also noted the risk of an overly broad reading of "public image" and the risk that employers might use that argument to discriminate against employees who openly display religious affiliations. *See, e.g., Brown v. F.L. Roberts & Co., Inc. d/b/a Jiffy Lube*, 419 F. Supp. 2d 7, 17–19 (D. Mass. 2006). For those courts, something beyond speculation as to the effect of the display might be necessary.

An employee's termination after he repeatedly violated his employer's dress code and harassment policy was lawful, particularly since the employer received several complaints from customers as well as other employees that the employee's clothing was offensive. The employee wore various attire including a kaffiyeh, anarchy symbol, chains with crosses, a priest's shirt, and a necklace with a crucifix. However, he did not adhere to any of the belief systems associated with those items; he professed a universal belief system practiced only by himself and his mother. The employee's proposed accommodation that he should be allowed to work in the backroom (as opposed to in his existing customer-contact position) would present an undue hardship because it would require the employer to create a new position and would not address the offensiveness to other employees. *Lorenz v. Wal-Mart Stores, Inc.*, 2006 U.S. Dist. LEXIS 36145 (W.D. Tx., May 24, 2006), *aff'd at* 2007 U.S. App. LEXIS 9359 (5th Cir. Apr. 24, 2007).

An employer could not justify the termination of an employee who displayed wrist tattoos on the basis that an accommodation would be an undue hardship because it would undermine the company's image as a family-friendly restaurant with customers. The employer's appearance policy stated "Body piercings and tattoos must not be visible." However, the employee practiced Kemeticism, a religion with roots in ancient Egypt that required that he display wrist tattoos less than one-fourth of an inch wide with language professing his religious faith. When asked to cover the tattoos, the employee maintained that his religion would not allow him to do so and asked for an exemption from the appearance policy. By contrast, the employer characterized the religious belief as an unprotected personal preference and offered no alternatives to a full exemption. In such circumstances, a genuine issue of material fact existed as to whether an accommodation was an undue hardship, particularly as the employer offered no evidence that the



small tattoos would actually conflict with a family-friendly image or that complaints were made. The employer was therefore denied summary judgment. *EEOC v. Red Robin Gourmet Burgers, Inc.*, 2005 U.S. Dist. LEXIS 36219, 14–20 (W.D. Wa. Aug. 29, 2005).

Summary judgment was granted to an employer who refused to allow an employee to display numerous body piercings at work pursuant to its appearance policy banning all facial jewelry. The employer had a legitimate interest in presenting a professional appearance to its customers, and the employee’s claim that she should be allowed to display all of her piercings at all times without limitation because of her membership in the Church of Body Modification was unsupported. The employee’s refusal to consider accommodations short of a blanket exemption from the policy to display her piercings undermined her claim since the interactive dialogue surrounding accommodations must be a mutual one, and the employer’s offer that she wear a clear plastic retainer while at work was reasonable. *Cloutier v. Costco Wholesale, Inc.*, 311 F. Supp. 2d 190, 195, 198–200 (D. Mass. 2004), *aff’d* at 390 F.3d 126 (1st Cir. 2004).

A car lube technician who serviced vehicles and dealt with customers could not claim a blanket exemption from his employer’s personal appearance policy, which required employees with customer contact to be clean-shaven; such an exemption would be an undue hardship. When the employer retained an outside consultant to improve sales, the consultant presented data showing that businesses with a clean-shaven policy tended to be more successful. In response, the employer instituted such a policy. The plaintiff was a Rastafarian whose religious beliefs prohibited him from shaving or cutting his hair. When he told his managers that he could not adhere to the policy because of his religious practices but wanted to maintain customer contact, he was told he could not do so. Instead, he was moved to work in the lower bay, an allegedly less desirable work area. The plaintiff continued working there at the same rate because he needed to keep working. The court rejected the plaintiff’s argument that unless his accommodation was an actual deviation from the existing policy, it would not be a satisfactory accommodation at all. Noting that “the employer’s proffered accommodation need not be either the best alternative, or the employee’s preferred choice,” the court held that “granting an outright exemption from a neutral dress code would be an undue hardship because it would adversely affect the employer’s public image.” *Brown v. F.L. Roberts & Co. d/b/a Jiffy Lube*, 419 F. Supp. 2d 7, 14–15 (D. Mass. 2006). It therefore granted the employer’s motion for summary judgment. However, the court voiced grave concern as to the harm in reading the notion of “public image” too broadly, including the risk that such language could improperly be used by employers to restrict or terminate employees wearing a veil, ashes on the forehead, a yarmulke, or other outward religious indicators. *Brown*, 17–19.

### *Safety Concerns*

In general, safety is given a high degree of deference when considering whether a requested accommodation to an employer’s appearance code constitutes an undue hardship. However, to



succeed on a safety justification, it may (but perhaps need not) be necessary to demonstrate an objective risk of harm.

A private prison operator could lawfully maintain a no-headwear policy that prohibited female Muslim employees from wearing head coverings, because to allow such coverings would undermine its interest in maintaining security and safety in the facility. Head coverings such as veils or khimars could be used to hide a prisoner's face and facilitate an escape; to conceal weapons or other banned objects; or be used as a strangulation device against prison employees. Because the employees worked in nursing, intake, and other positions requiring considerable physical contact with prisoners, wearing khimars posed a legitimate safety hazard. Notably, the employer presented evidence that its ban also encompassed other coverings (such as hats), that it had conducted assessments of security protocol showing the risk of head coverings, and that the policy was instituted in part as a response to incidents of contraband and drug smuggling within the prison. While a close question, accommodation presented an undue hardship since "the prison has an overriding responsibility to ensure the safety of its prisoners, its staff, and the visitors." *EEOC v. The GEO Group, Inc.*, 616 F.3d 265, 275 (3d Cir. 2010). *See also Givens v. Chambers*, 548 F. Supp. 2d 1259, 1274 (M.D. Ala. 2008) (enhanced dress code for female employees at an all-male prison campus was not discriminatory when it was created to promote institutional security").

No undue hardship existed when a sandwich shop claimed it could not accommodate a female employee's Nuwaubian religious belief that involved wearing a nose ring on the basis of safety concerns and unlawfully terminated her employment when she continued to wear the ring in violation of the employer's policy. The employer's undue hardship argument based on its interest in food safety was rejected, particularly because one of the accommodations initially suggested by the store manager was to have the employee leave the premises when compliance auditors visited once a month but wear the ring when auditors were not present. Moreover, the employer's argument was inconsistent with the fact that it regularly allowed employees to wear wristwatches and wedding bands, both of which might conflict with its alleged food safety concerns. *EEOC v. Papin Enterp., Inc.*, 2009 U.S. Dist. LEXIS 30391, 21-23 (M.D. Fla., Apr. 7, 2009).

### **Conclusion**

While it is difficult to make generalizations with respect to when an employer may be required to accommodate an employee who asks for an exemption or variance to a workplace appearance code—and when there truly is an undue hardship involved in doing so—some (admittedly rough) guidelines seem to emerge. Safety is a powerful driving factor for employers who take the position that an exemption is unavailable; however, consistency in application of those safety concerns and guidelines is critical.



Likewise, employees may be better served by considering if a modification rather than a blanket exemption from an appearance policy would satisfy the strictures of their beliefs. Again, consistency appears to be key. If what an employee does outside the workplace with respect to dress or appearance conflicts with the requests made inside the workplace, it may be more difficult to convince a court that an accommodation is reasonable. Perhaps the murkiest part of the accommodation analysis lies in the “public image” or “face” of the business: While employees who have customer contact are the face of the business, simply stating that a particular variance from the appearance code might make customers unhappy is unlikely to be enough, particularly in light of EEOC and other case-law guidance emphasizing the obligation to protect the expression of individual beliefs and the risk of the slippery slope with respect to customer preference. At the same time, courts do seem to recognize that there is some legitimate business interest in maintaining, for example, a professional appearance and consistent image among employees. Employers and employees may want to tread carefully in this area and work in a productive dialogue to see how an employee’s belief may be accommodated.

In part two of this article, the discussion will turn from accommodation due to an employee’s beliefs towards Title VII and gender identity as they impact appearance codes in the workplace. This developing area of the law is of growing concern, and it will be interesting to see how courts grapple with applying established doctrine to new claims and challenges.

**Keywords:** Title VII, accommodation, Civil Rights Act of 1964, appearance codes

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## Increase, Decrease, or Revolutionize: Proposals to Reform Federal Taxation

By Peter Wesley Nye

The United States has \$1.2 trillion—9 percent of the gross domestic product—in government budget deficit. To some, this is a crisis. “Wall Street Protests,” *Huffington Post* 10/7/11. Others—optimists—predict that an economic boom will reduce the deficit to 1 percent of the GDP by 2015. “Congress must take care to fix the deficit,” *Financial Times* 10/9/11. Influential policymakers and presidential hopefuls from many parts of the political spectrum are proposing tax reform to reduce the deficit. Some propose raising taxes within the current tax system, some propose lowering taxes—to stimulate economic growth—within the current system, and some propose transforming the federal tax system.

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Most democrats, including President Barack Obama and key congressional leaders, want to raise taxes. A rule that democrats try to follow is the Buffet rule, which its namesake Warren Buffet stated as the opinion that “no household making \$1 million or more should pay a smaller share of its income in taxes than a middle-class family.” “Taxes, the Deficit and the Economy,” *New York Times* 9/22/11. President Obama wants to close many loopholes—including those for coal companies and oil companies—and eliminate many tax expenditures. “Obama’s Tax Morass,” *Wall Street Journal* 9/22/11. Democrats have defined “tax expenditure” as a situation where the tax codes, for reasons other than feasibility, forgo tax revenue. Tax expenditure can be a deduction, an exemption, a deferral of taxation, or a lower tax rate. “For reasons other than feasibility” means declining to tax a certain thing because it is difficult to tax. For example, economic appreciation, because it is difficult to tax, is generally not considered to be a tax expenditure. Eliminating loopholes and tax expenditures would increase the revenue that taxes produce at a given rate in a given economy.

One such expenditure President Obama wants to decrease is deductions for wealthy families: He wants wealthy families to receive 28 percent of the value of the deductions that they claim as opposed to the current 35 percent. President Obama’s Bowles-Simpson commission’s tax proposal wants to lower corporate and individual income tax rates so that the highest marginal rate—now 35 percent—would be 23 percent. “Taxes, the Deficit and the Economy.” On the other hand, President Obama has stated that he wants to increase tax rates by letting former President George W. Bush’s tax cuts for “individuals earning more than \$200,000 a year and households earning more than \$250,000 expire.” Letting those cuts expire would raise the highest rate from 36 percent to 39.6 percent, and raise the second-highest rate from 33 percent to 35 percent. President Obama also wants to reinstate the estate tax. “Taxes, the Deficit and the Economy,” *New York Times* 9/22/11. In addition to President Obama’s proposal for taxes to solve the deficit crisis, he intends to drastically raise taxes to pay for Obamacare. “Taxes Upon Taxes Upon . . .,” *Wall Street Journal*.

A congressional supercommittee has been established in an effort to solve the deficit crisis. This bipartisan committee has clashed extensively over how to reduce the deficit. Democratic members insist on raising taxes. “U.S. 'super committee' eyes taxes amid differences,” *Reuters* 9/22/11. Conversely, many Republican members staunchly oppose raising taxes, claiming that tax increases would stifle economic growth. “Obama’s deficit-reduction plan: Reactions from Capitol Hill,” *Washington Post* blog 9/19/11. How this conflict will be resolved will become clearer in the coming months.

Charles Schumer (Democrat), the senior senator from New York, has recently led Congress on tax issues. A tax increase that he supports is a 5 percent income-surtax on people who earn more than \$1 million in a year. Most congressional Democrats who significantly influence the issue, including Senate Majority Leader Harry Reid (D-Nevada) and Senate Finance Committee Chairman Max Baucus (D-Montana), are cooperating with Schumer, mostly due to Schumer’s



months of working to persuade other Democrats. “Schumer Takes Reins Of Tax Policy Debate,” *Huffington Post* 10/7/11. Baucus also supports closing loopholes for corporations and lowering tax rates. “‘Supercommittee’ sounds note of unity, urgency” *USA Today* 9/22/11.

The Republican presidential hopefuls support lowering taxes. The candidates all claim that cutting taxes will stimulate economic growth. Former Massachusetts Governor Mitt Romney wants to reduce the corporate tax rate from 35 percent to 25 percent. He also wants to eliminate taxes on savings of people who earn less than \$200,000 a year. He speaks about taxation bluntly and forcefully: “I am not going to raise taxes. And if you want someone who's going to raise taxes, you can vote for Barack Obama.”

Former Texas Governor Rick Perry and former corporate executive Herman Cain have expressed intent to transform the tax code. Cain’s proposal, memorably named the “9-9-9 Plan” would impose a 9 percent income tax, 9 percent corporate income tax, and 9 percent national sales tax increase. “US tax system: A return to reform,” *Financial Times* 10/4/11. Cain calls this transformation a reduction in taxes; analysts find this transformation regressive and opine that the rates that Cain has proposed would generate less revenue than the current tax system. Jackie Kucinich, “Is Herman Cain's 9-9-9 tax plan fair?” *USA TODAY* 10/11/11.

Perry’s stance on taxes is hard to determine. He has stated that he wants to eliminate the corporate tax on manufacturers and taxes “on funds stashed overseas and later invested in the U.S.” “GOP Campaigns Court ‘Values Voters’ At D.C. Summit,” *Huffington Post* 10/9/11. Perry has also expressed intent to transform the tax system, either by establishing a flat tax—that is, the same rate, like 9 percent, on all parties who pay income tax—or replacing income taxation with a national sales tax that Perry calls a “fair tax.” Such a national sales tax would be approximately 30 percent—which is significantly higher than most sales taxes in the United States—and would tax items that the government buys, which current sales taxes do not. The fair tax would be much more regressive than the current tax system. “The trouble with the ‘fair tax’,” posted by Dylan Matthews, *Washington Post* 8/24/11.

Representative Paul Ryan (R-Wisconsin), a visionary on economic issues, proposes drastically simplifying federal taxation. Ryan wants only two income-tax brackets, which the government would tax at the arithmetically simple rates of 10 percent and 25 percent. Ryan’s proposal would replace the corporate income tax with a flat corporate-consumption tax, and he would eliminate capital-gains taxation and the alternative minimum tax (AMT). “[A Roadmap for America’s Future](#).” The AMT is a mandatory tax for taxpayers who have many deductions and credits; the AMT ensures that these taxpayers all pay at least a certain amount of taxes. IRS Topic 556 - Alternative Minimum Tax. Eliminating the AMT would, therefore, decrease taxation on the highest-earning taxpayers. Commentators have praised Ryan for his willingness to propose drastically, unconventionally revolutionizing the tax code. “Ryan to the Rescue? | A Roadmap for America's Future | The Budget Committee Republicans” *The Economist* 2/11/10.



The supercommittee will almost certainly reform the tax code to address the deficit crisis. Tax reform will play an important role in the 2012 presidential election. One way or another, federal taxation will metamorphose in the near future. Citizens must educate themselves about tax policy, evaluate the potential impact of those policies on their lives and businesses, and then prudently decide what reforms to support.

**Keywords:** tax reform, 2012 presidential election, tax policy, supercommittee, Barack Obama, Mitt Romney, Herman Cain

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## Influence Your Verdict by Changing Jurors' Perceptions of Expert Witnesses, Part Two

By Joseph M. Hanna

Part One of "[Influence Your Verdict by Changing Jurors' Perceptions of Expert Witnesses](#)" appeared in the [summer 2011 issue](#) of *Minority Trial Lawyer*.

### Expert Characteristics: Credibility, Credentials and Motives

The "Jurors' Evaluations of Expert Testimony" study reported that jurors' comments about experts' credibility could be classified into two major types: comments about personal characteristics of the expert and comments about the testimony. Sanja Kutnjak Ivkovic & Valerie P. Hans, "Jurors' Evaluations of Expert Testimony: Judging the Messenger and the Message," 28 *Law & Soc. Inquiry* 457–58 (2003). In terms of personal characteristics, jurors' comments were categorized as relating to the expert's credentials, motives, or general impressions. *Id.* at 458. As for testimony, the jurors' comments were categorized as those pertaining to the expert's content and style.

The jurors' associated the following characteristics with credible testimony: good credentials; lack of bias; a pleasant personality; a clear, objective, focused, not overly long presentation that utilizes diagrams and models; use of lay terms; a presentation that is complete, consistent, and not too complex; knowledgeable in the area of expertise; and familiarity with the case.

Jurors can be influenced by experts' credentials, such as professional activity (e.g., presenting papers at conferences and seminars), their formal education, and their research activity. *Id.* at 461. Typically, the jurors who used credentials as the basis for their judgment of the experts'

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credibility thought that the experts with good credentials were credible witnesses. Having an expert witness with a long list of credentials, however, is not an automatic guarantee of credibility. The jurors mostly mentioned credentials and used this as a factor when jurors compared the credibility of experts from the same field. *Id.*

Jurors can be influenced by perceived motives. Many jurors attempt to determine the motives that an expert may bring to the witness stand. *Id.* at 464. The jurors in the study focused primarily on characteristics that reduced an expert's credibility, such as an expert's potential motive for bias, the magnitude of his fees, the frequency with which he testified, and the expert's relationship to a party.

### **Jurors' General Impression of Expert Witnesses**

Also instructive were jurors' comments about expert witnesses that were outside the categories of credibility, credentials, and motive. *Id.* at 468. The authors called this category "general impressions of expert witnesses," and it included comments about age ("He was an older doctor."), gender ("the lady doctor"), nationality ("I believe he was the Irishman."), physical appearance ("He's a tall man with blonde hair."), and dress of expert witnesses ("One of them wore bow ties. Which one was that?"). Other factors that were included in the general category by the authors included the expert's personality and attitude, as well as any personal acquaintance with the expert, and jurors' judgments about these factors did appear to influence their assessment of expert credibility. *Id.* at 469.

The jurors surveyed not only judged the experts as individuals but also the presentation of technical material during testimony. Jurors clearly preferred live testimony by experts over the reading of depositions. Moreover, jurors' assessments appeared to be influenced by how experts presented their information. *Id.* at 470. It was noted that the jurors appreciated the use of some forms of technical aid as part of the expert's presentation, whether it was a model, a chart, a diagram, or an x-ray. Finally, jurors found it challenging where the pace was tedious or the presentation too long. *Id.* at 471. The authors concluded that jurors noticed the way the testimony was given and the facts presented, and they preferred clear presentation in lay terms, paced well, not too long, given enthusiastically, and supported with technical aids. *Id.* at 472.

Ivkovic and Hans concluded their study by looking at how jurors remarked about the content of the testimony of the expert witness. When the jurors examined the content of the testimony, they considered many factors, such as completeness, consistency, and complexity. *Id.* at 477. The jurors concluded that with everything else being equal, the clearer the presentation, the better they understood the evidence.

One study noted that "when there are competent experts on both sides, and they offer contradictory or confusing opinions, jurors may resolve the differences by relying on general



impressions of character and veracity.” Dennis J. Devine, “Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups,” 7 *Psychol. Pub. Pol’y & L.* 622, 624 (2001).

### **The Education Factor**

Saks and Wissler found that as a juror’s educational level rose, he or she was less likely to believe expert witnesses. Michael J. Saks and Roselle L. Wissler, “Legal and Psychological Bases of Expert Testimony: Surveys of the Law and Jurors,” 2 *Behavioral Sci. & L.* 361, 435 (1984). The authors attributed their test findings to the fact that a more educated juror was more likely to have a critical appraisal of an expert’s competence. *Id.* at 445.

A different study found that the more educated a mock juror is, the more likely the juror is to participate actively in deliberations and to recall evidence accurately. Reid Hastie, *Inside the Jury*, 137–38 (1983).

### **The Gender Factor**

Saks and Wissler reached no clear conclusion about the relationship between juror perceptions of expert testimony and gender. *See* Saks and Wissler at 446. Ivkovic and Hans’s study concluded that 82 percent of male jurors compared to 64 percent of female jurors agreed that lawyers could always find a compliant expert. *See* Ivkovic and Hans at 453.

Other research on the juror thought process found that in solving problems, males tended to “refer to abstract and rational concepts of fairness, whereas [females] tended to refer to relationships and principles of affiliation and responsibility.” Anne Bowen Poulin. “The Jury: The Criminal Justice System’s Different Voice.” 62 *U. Cin. L. Rev.* 1377, 1395 (1994).

It has been reported that male jurors approach decision making with a win-lose attitude not present in female decision-making. *See* Hastie at 142. It was found that male jurors were more vocal about factual and legal issues, while female jurors focused more on the verdict. This same study also concluded that women were more defense-orientated than men. *Id.* at 128.

### **The Age Factor**

One study did not find a strong correlation between age of the prospective juror and a tendency to believe or disbelieve expert testimony. *See* Saks & Wissler at 448. However, the authors observed that younger prospective jurors tended to find psychologists and psychiatrists more credible than older jurors did, while older jurors tended to believe expert witnesses more than younger jurors did.

Another study indicated that mock jurors between the ages of 34 and 57 took a more active role in the decision-making process. Jurors who were older than 57 tended to take the legal process more seriously than younger jurors did; however, they failed to recall the information as accurately. *See* Hastie at 142.

## The Occupation Factor

In the late 1970s and early 1980s, Arthur D. Austin analyzed the role of two juries that heard complex expert evidence and arguments in the same Cleveland antitrust suit. Arthur D. Austin, “Jury Perceptions on Advocacy, a Case Study,” 8 *Litigation* 15 (1982). The first trial ended in a hung jury, and the second trial ended in a verdict for the defendant. Austin had attended both trials, and, at the end of each, interviewed the jurors. After interviewing the jurors and analyzing their comments, Austin’s premise was that both juries were rather skeptical of the experts from both trials. The jurors from the first trial, comprised of primarily blue-collar individuals, were quite suspicious of management. Moreover, the jurors felt that the experts were “talking down to them” and the fact that the experts’ qualifications were repeated over and over again to them was “needless and tasteless self-praise.” *Id.* at 16.

The members of the second jury were also “blue-collar” employees; however, this group was employed in supervisory jobs. *Id.* at 15. The members of this jury showed more of an inclination to support a more “management-oriented perspective.” It is important to note that although Austin’s conclusions about the impact of jurors’ occupations is interesting, it relates only to the analysis of the jury and the experts from only one case.

An unrelated juror study compared and contrasted the ratings given by jurors to assess different classes of witnesses and different categories of jurors in 50 trials. David Linz and Steven Penrod, “The Use of Experts in the Courtroom” (1982) (paper presented at the annual meeting of the Academy of Criminal Justice Sciences). The jurors reported that policemen and women appearing as witnesses were the most believable, honest, likeable, confident and understandable. The study went on to note that these experts were the least likely to be discredited as opposed to the other types of witnesses.

Interestingly, another study of potential jurors’ opinions of expert witnesses found that the respondents ranked physicians, chemists, and firearms experts as the most believable, honest, and experienced type of experts, followed by accountants, psychiatrists, psychologists, and eyewitnesses. Saks and Wissler, *supra*. Police officers, handwriting experts, and polygraph experts were ranked the lowest. *Id.* at 442. It is important to note that the respondents answered hypothetical questions and did not view any of the experts on the witness stand.

## An Expert’s Independent Involvement

In 1989, the American Bar Association Special Committee of Jury Comprehension conducted an in-depth study of jury decisions involving four highly complex cases—three of which included expert evidence. ABA Special Committee on Jury Comprehension, “Jury Comprehension in Complex Cases” 40, 42 (1989). The ABA committee concluded that the most believable experts had an “independent involvement” with the issue on which they were testifying. However, the jurors rejected experts who seemed to be “hired guns.” Thirty-five percent of the juror



respondents stated that payment of the expert by the lawyers meant that the expert could not be trusted to be unbiased. *Id.*

One study explored the importance of testimony's complexity by varying the testimony's actual content and the strength of the experts' credentials. Joel Cooper, Elizabeth Bennett, and Holly Sukel, "Complex Scientific Testimony: How Do Jurors Make Decisions?," *Law and Human Behavior* 20: 379–94 (1996). Interestingly, the study found that the personal characteristics of the experts, such as their credentials, played an important role only when the evidence was complex and the mock jurors had a difficult time evaluating it.

These studies confirm what the authors have learned during the course of their trial careers. A skillful cross-examination coupled with exposing an expert's bias, weak credentials, and inconsistencies in his testimony is the recipe to successfully debunking the plaintiff's expert witness. It is well known that jurors tend to decide for the plaintiff or the defense early in the trial, with a majority of jurors making up their minds after the opening statements. With the exception of the opening statement, the cross-examination of plaintiff's expert witness is often the first instance that the defense has to challenge the expert's opinion.

### **The Decision-Making Process for Jurors**

"[T]he most widely adopted approach to juror decision making process is the 'story' model, wherein jurors attempt to assemble the evidence into a coherent whole that is consistent with the facts of the case and makes sense given their existing knowledge." *See Devine* at 624. In other words, members of the jury are more apt to gather as much information as possible from the facts of the case, the parties, and expert-witness testimony and will create a story that provides them with an understanding of what happened and why.

"Storytelling is one of the most powerful ways of communicating with other people. . . . [S]ince the time we were babies, storytelling has been the fundamental way for us to learn about life." Richard C. Waites, "Courtroom Psychology and Trial Advocacy," 535–37, 535 (2003). Every story is composed of facts. Therefore, undermining the plaintiff's "story" can be critically important for success at trial.

The story model asserts that jurors do not approach the trial with a blank slate. Rather, they utilize their past experiences to filter and understand the various pieces of evidence as the evidence is presented and to develop alternative interpretations, or "stories," about the events that led to the dispute now on trial. Nancy Pennington and Reid Hastie, "A Cognitive Theory on Juror Decision Making: The Story Model," 13 *Cardozo L. Rev.* 519, 523–24 (1991). These alternative stories are then weighed against one another to determine which one is most consistent and logical. The preferred story is then considered under the instructions about the law provided by the trial judge. *Id.* at 530–31.

## **Pulling It All Together**

The story model is widely accepted as a general description of how jurors process information and reach their decisions. It has many implications that bear on juror decision making. It is important to note that the various parts of trial evidence, including the testimony of experts, are not viewed in isolation. Instead, they are integrated into “stories” derived from preexisting cognitive frameworks and from the other trial evidence, including the testimony of plaintiffs, defendants, and other witnesses.

Experts who are willing to reach a firm conclusion about the issue on which they are testifying are deemed more readily believable and add credibility to the story. However, the expert’s lack of independence in the discipline in which he or she is involved, for example, performing independent research, can raise significant credibility issues. It is important to undermine the appearance that plaintiff’s expert has the expertise and objectivity to justify the jurors’ trust. Finally, establishing that the expert’s methodology/opinions are not generally accepted in the discipline involved can be decisive at the trial level and/or appeal. The cross-examination of plaintiff’s experts should seek to capitalize on this body of information concerning jurors’ decision making and receptivity to expert testimony.

## **Attacking Witness’s Credentials**

As noted earlier, one of the primary methods of impeaching an expert witness is to cast doubt on his or her qualifications. Demonstrating that the expert is a professional witness or potentially biased will undoubtedly cause the jury to wonder whether the witness is a “gun for hire.”

It is possible to shatter the expert’s facade by raising the inference during the cross-examination that the expert is:

- testifying outside the scope of his or her qualifications
- using methodology that is not generally accepted
- giving opinions that are generally not accepted
- giving opinions that lack independent research

## **Conclusion**

There is no room for speculation or conjecture in connection with expert testimony under *Frye*. Indeed, speculation, surmise, and conjecture are the logical antitheses of reliable and valid premises. The “average juror” may not be able to fully appreciate subtle cross-examination concerning complex scientific principles; the juror will, however, be able to recall a concession from an expert witness that his testimony is speculative. The buzz words here are surmise, conjecture, and speculation. It should, therefore, be a primary goal of the cross-examiner to elicit from the witness that at least some component of his testimony is speculative, conjectural, uncertain, or unreliable. Whether the defense is trying the case to a jury or attempting to



convince a trial court or appellate court that the expert's testimony fails to meet *Frye*, simple admissions elicited from plaintiff's experts may irrevocably debunk his testimony.

**Keywords:** juror perception, expert witness, expert credibility, credible testimony

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## Deposition and Witness Preparation Tips Learned from *The Office*

By Kenneth Sharperson

Depositions are far more common than trials, because a majority of cases settle out of court or are subjected to court-imposed alternative dispute resolution processes. Most people, however, have never appeared as a witness in a deposition, and most of what is learned about the legal process is from film or television. The layperson's textbook on the legal profession is composed of the many "television shows about law firms, films about trials, and jokes about attorneys." Kimberlianne Podlas, "Guilty On All Accounts: Law & Order's Impact on Public Perception of Law and Order," 18 *Seton Hall J. Sports & Ent. L.* 1, 47 (2008). Thus, "[f]or good or for ill, trial lawyers will have to work with, or around, the images that circulate within the popular imagination." Richard K. Sherwin, "Law and Popular Culture: Nomos and Cinema," 48 *UCLA L. Rev.* 1519, 1521 (2001) (positing that television communicates a great deal of information about the legal system).

While many legal dramas focus on trials, there have not been many television shows that have focused entire episodes on the deposition process. Thus, a witness who has never been deposed probably does not have a baseline idea to prepare for the process as she would for a trial. It is your responsibility to properly prepare a witness who probably has no idea how the process works for a deposition.

One major exception to TV's "deposition deficit" occurred in 2007 when the critically acclaimed comedy *The Office* focused an entire episode on a deposition. *The Office: "The Deposition"* (NBC television broadcast November 15, 2007). In "The Deposition," the main character, Michael Scott, is convinced by his coworker girlfriend, Jan, to serve as a witness in her wrongful termination case against the fictional company Dundler Mifflin. The deposition starts well but quickly turns when Scott finds out that Jan gave him a poor review after they started dating, which ruined his chances for a promotion at the company's corporate office. While the episode is



very entertaining, it highlighted for me some important lessons about what not to do while preparing for or taking a deposition. Hence, the four tips below.

### **Don't Coach Your Witness**

*Lawyer:* Are you telling me that your relationship began two years ago and not in February as you previously testified to here?

*Michael Scott:* Line.

*Lawyer:* I'm sorry, what?

*Executive:* He asked for a line, like in a play.

While it is your responsibility to thoroughly prepare your client for deposition, you must not go so far as to “coach” the client. It may be prudent to go over the basic testimony to make sure that it is consistent. The witness will be more credible if he answers questions with ease based on what he knows. If, however, the witness is asked a tough question and “forgets” how to answer, it will show as he attempts to remember his “line.”

### **Stay Within the Limits of the Question**

*Jan's Lawyer:* How long have you known the plaintiff?

*Michael Scott:* I haven't actually seen it. But I have seen *The Firm* and I am planning on renting *The Pelican Brief*.

A witness who has never been deposed and is nervous is likely to extend her responses to questions. This is problematic because it may lead the deposing attorney to a relevant area of inquiry that she had not thought to pursue, which can weaken your case. Prepare the witness to understand that volunteering information is not necessary. Your witness should keep responses short and to the point.

Likewise, make sure your witness understands that he should listen to the question, understand it prior to responding, and provide a responsive answer. Teach the witness to answer directly, that is, address the specific question asked. If the witness does not respond to the question asked, the deposition transcript will be more lengthy and expensive as the deposing attorney keeps questioning the witness on the same issue in an attempt to get a responsive answer.

### **Should the Witness Be Deposed?**

*Jan:* If I may, he was just telling a joke before, so can we move on to a different question?

*Jan's Lawyer:* Are you sure?

*Jan:* Uh, yes.



*Jan's Lawyer:* Can you go back to where this digression began?

*Court Reporter:* [reading] Mr. Schneider. And you were directly under her the entire time? Mr. Scott. That's what she said.

*Michael Scott:* Well. Delivery's all wrong. She's butchering it.

In "The Deposition," the basis for deposing Michael Scott because he is in a relationship with Jan is unclear. However, one of the most important decisions that an attorney must make is the selection of a witness for deposition. Taking a deposition of a particular witness is often a tactical error, and much thought should go into whether a given witness should be deposed. Prior to noticing any witness, you should ask yourself whether the information you need from the particular witness can be obtained in some other manner. Once a decision is made to depose a particular witness, you should determine your goals for the deposition. I recommend having at least five specific reasons for taking deposition and framing your deposition and selection of witnesses around your designated reasons:

- Learn new facts essential to further discovery.
- Set up a motion for summary judgment.
- Preserve the testimony of the witness in the event the witness is unavailable for trial.
- Narrow the expert's opinion or pin the fact witness down to a specific version of the facts.
- Evaluate the adversary and the witness.

As you ask questions at the deposition, you should keep these reasons in mind. If the question you think to ask does not serve one of those purposes, then the question need not be asked. And if the witness you are deposing to support your case has been passed over for a promotion because of comments that your client made, perhaps that witness should not be deposed.

### **Do Not Answer Questions When You Are Tired**

*Court Reporter:* [reading transcript] Mr. Scott, do you realize that you just contradicted yourself.

*Michael Scott:* I did?

*Court Reporter:* Yes, you did.

*Michael Scott:* Can I go to the bathroom?

*Court Reporter:* No.

*Michael Scott:* I really have to. I've been drinking lots of water.

*Court Reporter:* You went five minutes ago.

*Michael Scott:* That wasn't to go to the bathroom. That was to get out of a question.

*Court Reporter:* You still have to answer it.

*Michael Scott:* First, can I go to the bathroom?

*Court Reporter:* No.



See [video clip](#), last visited November 21, 2011.

You should advise your client that she should not be afraid to ask to take a break. On the other hand, if you are the deposing attorney, you need not suggest that the opposing party's witness tell you when she wants to take a break. A fatigued witness favors the questioner because the answers may become sloppy. Conversely, if you are the defending attorney, be aware that the opposing attorney may be operating on this principle, so take it upon yourself to ensure that your client remains comfortable. In addition, you should advise your client that he can stop the deposition to speak to you. Typically, however, the client must answer the question pending prior to conferring with her attorney, and, depending on the jurisdiction, the conversation with you during a break may be discoverable. Make sure to check your local rules on this issue.

### Conclusion

Although there are no absolute rules for preparing for or taking a deposition, the tips above should be helpful. And by all means, recommend that your client watch "The Deposition." It will make your job a lot easier, because the witness will see a clear example of what not to do in a deposition.

**Keywords:** deposition, witness preparation, The Office, legal television

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## NEWS & DEVELOPMENTS

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### Are Corporations Liable under the Alien Tort and Torture Victim Protection Acts?

The U.S. Supreme Court has granted certiorari in two cases involving the Alien Tort Statute and the Torture Victim Protection Act. Enacted as part of the Judiciary Act of 1789, the Alien Tort Statute (ATS) confers on federal district courts' "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. section 1350. Over two centuries later, Congress enacted the Torture Victim Protection Act (TVPA) and codified it as a note to 28 U.S.C. section 1350. The TVPA creates a private right of action against individuals who engage in torture or extrajudicial killing.

The issue before the Supreme Court is whether corporations can be liable under the ATS and the TVPA. In the summer and fall of 2011, the D.C. and Ninth Circuits concluded that corporations are liable under the TCA. These decisions, however, conflict with the Second Circuit holding in

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*Kiobel v. Royal Dutch Petroleum Company et al.*, 621 F.3d 111 (2nd Cir. 2010), rehearing en banc denied, 642 F.3d 379 (2nd Cir. 2010); rehearing denied 642 F.3d 268 (2nd Cir. 2011), certiorari granted. *Kiobel* holds that there is no federal question under the ATS when claims are asserted as to corporations. *Kiobel, supra*, at 117–120.

In *Kiobel*, Nigerian citizens alleged that Dutch, British, and Nigerian corporations engaged in oil exploration and production aided and abetted the Nigerian government in committing violations of the law of nations. *Kiobel, supra*, 642 F.3d at 117. Plaintiffs sought damages under the ATS and relied on international law—but not on a treaty of the United States—as the basis for their claims.

In affirming the district court’s dismissal of some of plaintiffs’ claims and reversing as to those claims that were not dismissed, the Second Circuit concluded that the ATS confers subject-matter jurisdiction over a limited number of offenses that are defined by “customary international law.” The court of appeal characterized such law as “those standards, rules or customs” that affect the “relationship between states or between an individual and a foreign state” and that are “used by those states for their common good and/or in dealings” among or between themselves. *Kiobel, supra*, at 117–118 (citation omitted). The limited subject matter of the ATS therefore requires federal courts to “examine the specific and universally accepted rules that the nations of the world treat as binding in their dealings with one another.” *Id.* at 118.

In holding that corporations are not subject to the ATS, *Kiobel* determined that “the principle of individual liability for violations of international law has been limited to natural persons . . . because the moral responsibility for a crime so heinous and unbounded as to rise to the level of an ‘international crime’ has rested solely with the individual men and women who have perpetrated it.” *Kiobel, supra*, at 119. As a result, because “customary international law imposed individual liability for a limited number of international crimes” the “ATS provides jurisdiction over claims in tort against individuals who are alleged to have committed such crimes.” *Id.* at 120.

*Kiobel*, however, conflicts with decisions from other circuits, including *John Doe VII et al. v. Exxon Mobile Corporation et al.*, 654 F.3d 11 (D.C. Circuit 2011), holding that a corporation may be liable under the ATS. Moreover, in late October 2011, the Ninth Circuit concluded in a splintered en banc decision that the ATS extends to the conduct of corporations abroad. *Sarei et al v. Rio Tinto, PLC et al.*, 2011 U.S. App. Lexis 21515.

*Kiobel* will be argued in tandem with a decision from the D.C. Circuit involving the TVPA. *Mohamad et al. v. Rajoub*, 634 F.3d 604 (D.C. Circuit 2011). In *Mohamad*, the sons and widow of a decedent sued the Palestinian Authority and the Palestine Liberation Organization for damages after the defendants allegedly tortured and killed the decedent in violation of both the TVPA and federal common law. The district court dismissed the action, concluding that only a



natural person can be sued under the TVPA and that plaintiffs had no claim under federal common law. In affirming, the D.C. Circuit held that the term “individual” as used in the TVPA was intended to denote only natural persons.

**Keywords:** ATS, TVPA, Alien Tort Statute, Torture Victim Protection Act

—[Ed Romero](#), *Greenan, Peffer, Sallander & Lally, San Ramon, CA*

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## Truth in Savings Act Bars Claims under California Law

A California state appellate court has concluded that the 1996 amendments to the federal Truth in Savings Act (TISA), 12 U.S.C. section 4301 et seq., bar private rights of action under the state’s broad Unfair Competition Law (UCL). *Rose v. Bank of America, N.A.*, 11 California Daily Opinion Services (C.D.O.S.) 14134.

The plaintiffs in *Rose* were deposit account holders who alleged in a putative state class action that the Bank of America failed to properly notify them of fee increases in violation of TISA. Enacted in 1991, TISA requires banks and other depository institutions to provide, inter alia, “clear and uniform disclosure” of “the fees that are assessable against deposit accounts.” 12 U.S.C. section 4301(b). The purpose is to allow consumers to “make a meaningful comparison between the competing claims of depository institutions with regard to deposit accounts.” Section 4310 of title 12 contained a private attorney general provision that provided a private right of action against depository institutions that failed to comply with either TISA or the regulation promulgated pursuant to the statute known as Regulation DD.

The private attorney provision of TISA, however, was repealed by Congress in 1996 through enactment of a sunset provision that became effective September 30, 2001. *Schall v. Amboy National Bank*, 279 F.3d 205, 209, note 2 (3rd Cir. 2002). The repeal of section 4310 “entirely eliminated the [private] cause of action, thereby releasing banks from future claims of private parties.” *Rose v. Bank of America, supra*, quoting *Schnall v. Amboy National Bank, supra*, 279 F.3d at 209. Federal agencies, however, may enforce compliance with TISA. *Schnall v. Amboy, supra*, at 209 n.2.

The UCL prohibits “any unlawful, unfair or fraudulent business act or practice.” *Rose, supra*. The scope of the statute is broad and encompasses “anything that can properly be called a business practice and that at the same time is forbidden by law.” *Id.* Moreover, the UCL borrows violations from other laws, making them independently actionable. *See Korea Supply Co. v.*



*Lockheed Martin Corporation*, 29 Cal. 4th 1134, 1143 (2009). Notwithstanding its scope, the UCL cannot borrow violations from others laws that bar the action.

In holding that TISA bars claims under the UCL, the *Rose* court noted that Congress not only rejected a private right of action under TISA but also rebuffed legislation proposed in 2001 to reinstate civil liability. As such, the court concluded that “[a]llowing private plaintiffs to recover on a UCL claim based solely on TISA violations would constitute an ‘end run’ around the limits of enforcement set by Congress.” *Id.* (citing *Gunther v. Capital One, N. A.*, 703 F.Supp. 2d 264, 270–271 (E.D. N.Y 2010)).

**Keywords:** Truth in Savings Act, Unfair Competition Law, Bank of America, Rose

—[Ed Romero](#), *Greenan, Peffer, Sallander & Lally, San Ramon, CA*

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## Ninth Circuit Grants Qualified Immunity to Officers Using Tasers

The Ninth Circuit recently issued an opinion holding that the use of Tasers by law enforcement officers to subdue individuals suspected of committing minor offenses is subject to constitutional limits on the use of excessive force.

Two cases, [Mattos v. Agarano and Brooks v. City of Seattle](#), were heard together en banc consolidated for disposition. Both dealt with plaintiffs-appellees who were tased by law enforcement after encounters surrounding minor offenses.

Malaika Brooks was pulled over for speeding. When she refused to sign the ticket or exit her vehicle, the officers tased her even though she had informed them that she was pregnant and “less than 60 days from having [her] baby.” After being tased multiple times, Brooks was detained and ultimately taken into custody.

Jayzel Mattos was tased when the police responded to a domestic dispute after Jayzel and her husband, Troy, had an argument. When Mattos stepped in between one of the officers and her husband to try to diffuse the situation, the officer tased her. Mattos and her husband were then arrested.

After their respective incidents, Brooks and Mattos both filed lawsuits under 42 U.S.C. § 1983, seeking damages for alleged Fourth Amendment violations. The officers claimed they were



entitled to qualified immunity, but the lower court in both cases disagreed. The officers then appealed to the Ninth Circuit.

For qualified immunity to apply, it must be shown that (1) the facts shown must make out a clear violation of a constitutional right, and (2) that constitutional right must have been “clearly established” at the time of the violation.

Relying on *Bryan v. MacPherson*, 630 F.3d 805 (9th Cir. 2010), the Ninth Circuit found that although both Brooks and Mattos had alleged constitutional violations surrounding excessive force, the officers who tased them were entitled to qualified immunity, because at the time that each woman was tased, “there was no Supreme Court decision or decision of [the Ninth Circuit] addressing’ the use of a taser in dart mode.” Because of the lack of authority, the court concluded that reasonable officers “could have made a reasonable mistake of law regarding the constitutionality of the taser use in the circumstances” at hand and that the contours of the constitutional right alleged were not clearly established at the time of the violations.

**Keywords:** Ninth Circuit, tasers, law enforcement

—[Bobbie K. Ross](#), *Michel & Associates, P.C., Long Beach, CA*

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## Minority Teachers Are on the Rise, but Retention Is a Problem

A [recent study](#) by two researchers from The University of Pennsylvania shows that the efforts of government agencies and nonprofit organizations to recruit minority teachers has largely worked. Researchers Richard Ingersoll and Henry May found that the teaching field is much more diverse today than it was 20 years ago. While there was a 41 percent growth rate of white teachers, the growth rate of minority teachers was 96 percent. Since the late 1800s, the number of minority teachers increased from 325,000 to 642,000.

However, while these numbers indicate that recruitment strategies are working, research shows that these efforts have not been enough to bridge the gap between the number of minority students and minority teachers. For example, in the 2008–09 academic year, 41 percent of students in elementary and secondary schools were minority, yet only 16 percent of their teachers were of color.

A major contributing factor to this problem was a high turnover rate of minority teachers. In the 2003–04 academic year, 47,600 teachers of color entered the field, and by 2004–05, 56,000

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minority teachers had left. The problem of turnover can be attributed to the poor working conditions of these teachers who are often found in public schools that educate mostly poor students. Ingersoll and May proposed that improving the working conditions for these teachers and in turn increasing the retention rate of minority teachers does not have to be an expensive endeavor. At the end of the day, it is more important to these minority teachers to feel valued as professionals.

**Keywords:** University of Pennsylvania, minority teacher, minority turnover

—[Dorcas Adekunle](#), *Drexel University Earle Mack School of Law Student, Philadelphia, PA*

**ASK A MENTOR**

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## What Can Be Done When Partners Play Favorites?

Dear Ask a Mentor,

What should I do if I feel like partners at my firm are favoring certain associates who are not minorities in the distribution of assignments and work?

—Slighted Associate

Dear Associate:

Relationships are a critical part of a lawyer’s success in practicing law. Your relationships with the partners in your law firm and prospective clients will hinge in some respect upon your ability to cultivate important relationships. Virtually every relationship with the partners in your firm could be an important one. So, don’t blow your top or burn any bridges if at all possible.

Undoubtedly, if you are a diverse attorney, a woman, youthful-looking, or if you have some other visible characteristic that makes you different, chances are you have encountered situations where you may have perceived a slight of some kind. Hopefully, you have used those perceived slights to fuel your goals. That is the right approach. Many times, partners and potential clients assign work to people who did good work for them previously as well as people they like and have a natural connection with. So, if you are outside of that loop, it is very possible that you may not be getting the plum assignments you seek. Be proactive about it; seek out your immediate supervising attorney, practice group leader or department head and ask for the work



you would like to have. Additionally, seek out a mentor or champion at work that can help you get access to the new assignments you want.

Discrimination in the workplace based on your race, gender, sexual orientation, or other protected characteristic is obviously prohibited. It is difficult to prove that discrimination exists, and evidence beyond the lack of preferential assignments is necessary. You may have additional facts that lead you to believe that discrimination exists. If you are in a situation where you believe that discrimination exists, speak with your firm's human resources director and the head of your department and document the conversation. Whether actionable discrimination exists or not, however, your firm's lawyers may benefit from training on issues concerning diversity and inclusion. Seek out your firm's diversity partner, human resources director, or the head of your department and let them know your concerns about the need for training in these areas.

Also, don't forget to seek and develop your own new clients. Stay connected with the clients you currently work with, and work on developing a marketing plan to help cultivate new business. In this way, every assignment will be yours—plum and otherwise.

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Dear Associate,

I assume that we are not discussing a situation in which you have experienced overt discrimination, in which case the situation must be brought to the attention of your human resources department immediately so that your firm's policies can be implemented. Rather, I assume your question goes to the not so uncommon situation in which you may feel that your race, national origin, gender, or sexual orientation is in one way or another subtly interfering with your ability to obtain the types of assignments that might provide an opportunity to advance in your firm.

It also seems clear from your question that you want to remain with your firm and wish to take steps to counteract the bias and position yourself at the front of the line for the types of assignments you want and need to succeed.

Now, I have to admit, there will always be favoritism at your firm. The real question is whether that favoritism is based strictly on merit, ability, and results. Partners and others in a position to assign work will generally tend to assign important work based upon familiarity and confidence—familiarity with the person and with the person's work and confidence in the associate's ability to produce good work product within a reasonable time with minimum headaches to the supervisor.

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If you want choice assignments, you have to lay the groundwork. Most individuals when directly accused of being a bigot will deny the accusation and become indignant. This is to be expected because most people genuinely believe that they are committed to a meritocratic system. (There are many fascinating articles on implicit bias that discuss these issues in depth.) If you do not suspect the person of having an intentionally discriminatory agenda, the best counteractive measure is to establish the familiarity and confidence that person needs to consider you a candidate for the choice assignments. This will take some work and will not happen overnight.

Establishing familiarity and confidence both require a multi-level approach. If you peek your head into someone's office who you have never worked for and ask for a choice assignment, the person might ask himself "who are you?" and "why should I give this important assignment to you?" Remember, if the assignment is important, there is greater risk to the partner if anything should go wrong.

Seek to establish familiarity with the partner both on a social level and on a professional level. It is important to develop the relationship. Get to know more about that person than what she does and who she is at work. On the flip side, make sure that person gets to know more about you as a person. Find out if you have similar interests, which might form the foundation for the relationship. People tend to be comfortable with others that they perceive have something in common with them, be it a love for historical fiction or a passion for animal activism.

In addition to becoming more familiar on a personal level, it is important that the person become familiar with your work. If you have done good work for another partner, ask that partner to put in a good word or to share your successes. I'm a huge believer in going the extra mile. If you overhear the partner discussing a subject or an assignment, volunteer to help out. This is not to say you should demand to be lead on the assignment, but simply say "What an interesting issue. I'd enjoy taking a look at it and sharing what I find with so and so." Or go ahead and do a little work on your own time and bring it in as a "freebie" just to get your work in front of that person. Having said that, I will caution you that when you do get the opportunity to do any work with that person, you must give it your best.

Do not complain that it is a mundane or an insignificant task or fail to put in your best effort because you perceive the task to be unimportant or below you. I want to give work to a person who I know will roll up his sleeves and do whatever it takes, regardless of the task. Doing a good job on less important assignments builds confidence in your ability to handle the more important work. (This is why we often agree to take on smaller projects for a client in the hopes that they will be impressed and assign more significant work to the firm.) When I give an important assignment, I have to have confidence that the work will be done on deadline, thoroughly, and correctly; that the work product will be impeccable (no typos!) with minimum aggravation to me. I need to have confidence in the accuracy of your work. If I find mistakes, such as cases



## Minority Trial Lawyer

FROM THE SECTION OF LITIGATION MINORITY TRIAL LAWYER COMMITTEE

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improperly cited or factual errors, I will lose confidence in your ability to give me accurate work, and you are not likely to get more important assignments if your work must be double-checked.

Do not waste any opportunity—no matter how small—to build confidence in your ability to handle more and more important work. By establishing both familiarity and confidence, you will soon be at the front of the line for those choice assignments you are looking for.

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