[Slide 1]

Good morning.

I do have a Power Point today -- actually it's WP Presentations, but "Power Point" seems to have gone the way of "Kleenex" and "Xerox" -- but I'll try to keep it moving so nobody falls asleep. And please feel free to get up and grab a new donut or cup of coffee if you need to.

A few words about me ... [17 yrs at OLLS] [escaped from private practice] [subject matter team]

Since this meeting is geared to the practical problems encountered by real-life drafters beyond the basic level, I'm going to invite your questions and comments as we go. I know misery loves company in this business. So I've included a few war stories and true confessions of my own, and I think we'd all benefit if you have some of your own to share. If you dare, that is.

Any questions so far?

OK, without further ado, here we go.

[slide 2]

I'm calling this program "The Colorado Clean Indoor Air Act .. And Other Unintended Consequences" because this bill offers many, many examples of what can go wrong in legislative drafting. But this title is sort of tongue-in-cheek because the bill did eventually pass and is actually working more or less as advertised.

In the beginning was the word, and the word was ...

[slide 3] ... chaos.

As of last month, Illinois became the 19th state to enact a statewide indoor smoking ban. But in 2004, the push for such legislation had barely got started. Colorado did have a statute on the books, but it only prohibited smoking in places where the danger of fire was the obvious hazard: elevators, hospitals with oxygen bottles all around, theaters, indoor sports arenas, places like that. For any other place it was left to city or county ordinances, resulting in a patchwork of conflicting local regulations.

In a metropolitan area like Denver, you'd have city and county boundaries running down the middle of the street. Often a bar or restaurant on one side of the street would have a smoking section, whereas a bar or restaurant on the other side couldn't have one, and usually

the one that didn't allow smoking would lose business. So in the beginning, the Colorado Restaurant Association opposed any local smoking bans because they would harm individual businesses.

There was also competition between bars and restaurants, with ordinances often applying to restaurants but exempting bars and taverns, or applying to restaurants without liquor licenses but exempting liquor-licensed restaurants. Pueblo had an ordinance that applied to bars and restaurants but exempted private clubs, like the VFW.

Then throw into the mix the fact that, at least in Colorado, we have charitable bingo, commercial bingo, and limited gaming (confined to three mountain towns) all competing for customers, which tend to have a much higher percentage of smokers to begin with, and there's quite a bit of economic pressure against any further local laws in those areas regardless of what the public health benefits may be.

Finally, about that time if you recall, we had the new governor of Kali-fonia waxing eloquent about imported cigars. High-end cigar bars had begun popping up in downtown Denver. These places had humidors that you could rent, just like a safe deposit box -- so you could keep your private stock of $50 Cuban cigars in prime condition for the next time you decided to bring a business associate in for brandy and cigars. In that case, you had people going into a place of business for the specific purpose of smoking, so an across-the-board ban on indoor smoking didn't make much sense. Denver had an ordinance that exempted cigar bars, based on an income threshold of 10% from the sale of cigars and tobacco products. But there were some "dive" bars that tried to claim that exemption using sales figures from vending machines and such, so Denver started on a redraft of their ordinance, but it became so controversial that they tabled the effort in hopes that the state legislature would step in and solve the problem for them.

[slide 4]

And so it came to pass that, late in the 2005 legislative session, a Democratic senator from Denver and a Republican representative from Cortez floated a trial balloon -- a smoke signal, as it were -- on a statewide indoor smoking ban.

As it turned out, this first bill was never actually introduced, but its key provisions were the same as what eventually did pass in 2006. It closely parallels the 2004 Delaware law, except that, unlike Delaware, Colorado chose not to have enforcement by the department of health or any other state agency. (At the time, money was very tight in state government.) So the Colorado version simply created a petty offense. The mechanism of enforcement would be for someone to complain to a police officer, who would then write out a ticket against the offender. That could be either the person lighting up, or the owner of the property who allowed people to light up.

The authors of this bill realized that they would have to deal with quite a bit of opposition from the usual suspects, so they prepared to neutralize some of that opposition by exempting certain businesses -- either in the original bill or in amendments prepared ahead of time. Interestingly, on this first go-round, the exemptions did not include cigar bars. But they did include retail tobacco businesses, limousines under private hire, and up to 25% of the rooms in a hotel or motel.

The original bill also contained some provisions that I like to call "sleeper" provisions because it looked as though they could radically extend the scope of the bill, and yet no one seemed to take much notice of them at the time. One was the optional posting provision, here in the context of the "outdoor area of any business."

Note, it's the Colorado Clean "Indoor" Air Act, yet a business owner can post an outdoor area as well. The effect of such posting is to include such area, by private action, within the areas covered by the statewide prohibition. Here's the statutory language:

[slide 5]

Now, you may ask, what's the big deal? Well, it turns out the owner of the Cloverleaf Kennel Club in Denver decided to set up a smoking area for his dog-racing fans outside, but not in the main part of the stands. The main part of the stands is posted as nonsmoking. Someone apparently had trouble following the action from there, so they threatened to sue the owner of the track. Sorry, folks, it's not a two-way street. The law doesn't say all outdoor smoking has to be allowed; it just says indoor smoking can't be allowed. The stands are still private property, and the owner can decide to make them nonsmoking.

A similar issue arises with the so-called "bubble" around building entrances. The Colorado law, as passed, prohibits smoking within 15 feet of the front door or main entrance to a business. It says nothing about the back door. So if you have a restaurant with a patio out back, you can choose to disappoint your customers or servers in one of two exciting ways: You can either not establish that 15-foot bubble, which means that smoke can come into the building from the back door, or you can make the whole patio nonsmoking even though it's entirely outside.

The devil is truly in the details with this kind of thing.

Another sleeper provision is this one:

[slide 6]

I'll let this one sink in for a moment ... Now, I'd like to ask for a show of hands. That is, if everyone isn't already asleep. (I guess I shouldn't have called these "sleepers".) Anyway,

please raise your hand if you can spot an issue here.

Yes, that's it. Suppose you're a bar owner, and you've got a patio out back where patrons can smoke, and you've taken care of the doorway issue, and you think you're home free. But now one of your servers comes to you and says, "Y'know, Boss, I really appreciate that the indoor part is nonsmoking, but you've put me out here on the patio and I really, really feel that I have a right to work in an area free of environmental tobacco smoke."

What do you do?

If you said, "Fire the whiner," you may be right. One of the provisions of this trial-balloon bill was a prohibition on retaliating against employees who invoked their rights under this legislation.

This raises an interesting question whether a specific prohibition is even necessary. That is, by declaring in statute that every employee has a right to a smoke-free workplace, has the general assembly implicitly created a public-policy exception to the employment-at-will doctrine?

Well, maybe. But putting that concept in black and white was evidently a bit too much for the first go-round.

[slide 7]

So were ...

An unfair housing piece, which would have made it illegal to kick out a tenant, for example, if they complained about smoking in the lobby of an apartment building ...

and a public accommodation piece, which applied the same rationale to hotels, buses, etc.

As I mentioned, this first effort was a collaboration between a House Republican and a Senate Democrat. It was supposed to have been started in the House. However, for whatever reason, the House sponsor withdrew his request and the bill was introduced in the Senate.

At this point, I have to give a couple of disclaimers. First of all, I wasn't the drafter of this legislation in 2005. I inherited it in 2006. Second, I am about as far from a "political animal" as you can get. I can count, but not votes. And our office is nonpartisan, so if I were to try to get too deep into the politics, it would reflect poorly on myself and my colleagues. However, I can tell you that this was the end of the legislative session, and there was an election coming up. The House had a Republican majority while the Senate was

divided 18 to 17 in favor of the Democrats.

Against this background, and with the Senate Republicans solidly against the bill, passage ultimately depended on the support of two Democrats -- both heavy smokers and one from a district with a large number of commercial bingo halls.

Therefore, it's easy to see how the "Colorado Clean Indoor Air Act" was transformed by the Senate into --

[slide 8]

Inspiring, yes? The full text of the Senate version of this bill is in one of your handouts, the only one in which the title and text are all in double underline, indicating Senate amendments.

Well, when it went over to the House, the House sponsor dutifully restored it to its original condition, but the Senate just wasn't buying. So fast-forward to 2006 and House Bill 1175, which you also should have in a handout.

This is the one that actually passed, and it will be the focus of our attention. What you have is the rerevised bill, showing both the Senate and House amendments. Those amendments are indicated by double underline and shaded type, respectively. Eventually the Senate amendments came out again, but I've included them so you can see what stuck to the wall at least temporarily.

As I mentioned, the whistleblower protections are absent from this version. In addition, there are several more exemptions that were added at various times as the price of support for the remainder of the bill.

[slide 9]

First is the cigar bar exemption. This was added during the interim as the price of support from a couple of the large downtown Denver hotels. It appeared in the original bill, and except for a small adjustment to the amount of tobacco revenues required to qualify, it attracted zero interest. But it has turned out to be a sleeper provision. We'll get back to this one.

Next is an exemption for the smoking lounge at Denver International Airport. This was to allay the fears of airport officials, who thought that if international passengers didn't have somewhere to go for a nicotine fix during a long layover, they'd have to contend with roving bands of psychotic Frenchmen setting fire to overturned luggage carts.

The small employer exemption, like the cigar bar exemption, came out of the proposed Denver city ordinance. It was added by a House committee only after it became clear that small businesses would not support the bill otherwise.

Note that it applies only to a business that is "not open to the public". That would be, for example, a small software company or wholesale warehouse. Note also that any one of those three employees could demand a smoke-free workplace, which would essentially eliminate the exemption.

Rural Colorado weighed in with this one, exempting barns and the like. To avoid creating an exception that would swallow the rule, it was limited to working farms and ranches, as defined in the tax code, and further limited by the size of the operation. Otherwise it might apply to the Greeley meatpacking plant, which is the size of a small city.

Finally, to appease the financially powerful limited-gaming industry, which constitutes basically the entire economy of the three towns of Cripple Creek, Black Hawk, and Central City, you have this.

Other than the cigar bar exemption, all of the exemptions you see here were added by amendment during a long and very contentious House committee meeting. The House sponsor of the bill -- formerly the Republican majority leader and the chief opponent of the bill in 2005, but now the minority leader -- tried his best to fend off all of them, but this was the list he ended up with.

Now, I have to take a little detour & frolic at this point.

Remember how I said this program was going to include some true confessions? Well, here's where I bare my soul and ask you all to let me into Drafter Heaven anyway.

Look at the casino exemption, notice the cross-reference. The smoking ban shall not apply to the "retail floor plan" of a licensed casino, as defined elsewhere in statute.

Can anybody tell me what the "retail floor plan" of a casino would be? If you didn't know anything else, what would you expect?

I started working at the Colorado GA on November 1, 1990. A few days after that, the voters of Colorado approved an initiative that legalized limited gaming in the three mountain towns. Whatever's good for Deadwood, S.D., is good for us, I suppose. In January 1991 one of my colleagues was saddled with the task of writing the implementing legislation. I knew that the initiative was very specific about the number of square feet you could take in one of these historic buildings and devote to gambling activity. And I knew that the concept of a "retail floor plan" appeared in the legislation.

So when I got the call, 15 minutes before the start of the House committee meeting, that someone wanted an amendment to exempt the gaming floor of a casino -- not the restaurant, mind you, not the bathrooms or the lobby -- well, I knew just the definition to cite. And here it is:

[slide 10]

Throughout the hearing, and for months afterwards, I wondered why the casino lobbyists didn't try to extend the exemption to include the entire licensed premises. Now I know. The "licensed premises" is a subset of the "retail floor plan" -- not the other way around!

In the end it didn't really matter, because the casino exemption is gone now. But imagine my surprise at receiving a call from the Senate sponsor in June -- after adjournment -- asking if it was true what people were telling him, that it was OK to smoke in the casino restaurant, and lobby, and bathrooms, because his bill had exempted the entire building. Sure is nice that we can't be sued for malpractice.

But this raises an interesting point: When you *are* so specific -- when you give a clear and unmistakable cross-reference, even if it's wrong -- is there a point at which you're absolved of blame? Aren't you allowed to rely on all players in the process to do their homework and say, "Hey, you silly goose, you just kicked the ball through the wrong goalpost"?

If not the sponsor, then certainly one of the lobbyists should have caught that before the bill was actually signed. But everyone's just very busy, I guess.

OK, now, briefly, here's a list of the other exemptions the Senate added before the bill went back to the House and the conference committee removed them.

[Slide 11]

This first one should look familiar. The proponents of this exemption liked to use the phrase "mom and pop local bar", but they never offered any definition that would limit the size of the bar. So it would've applied just as well to a Hooters or to the Grizzly Rose Saloon in Denver. If you've never been to the Grizzly Rose, just imagine a Wal-Mart that sold nothing but Bud Light.

The next one is where I redeemed myself a little. The sponsor wanted me to somehow limit it to the VFW and bona fide private membership clubs. Notice the qualifier: Membership lists can only be updated on a monthly or less frequent basis. So there's no way they could simply convert their cover charge into a "nightly membership fee".

[Slide 12]

And now the last two exemptions:

Racetracks, except for the restaurant part of the business premises. No handy definitions to lead us astray here, but on the other hand there is a slight potential for mischief. When is a restaurant not a restaurant? When it's not "identified" as a restaurant. By whom, you may ask? But that issue hasn't raised its ugly head yet.

And finally, bingo halls, while being used for bingo. Again, trying to limit the scope of these exemptions so they're as surgical as possible. Even so, the sponsors of some of these exemptions turned around and argued against the bill when it got to the Senate floor, on the basis that there were now so many holes in it that the bill was basically useless.

Interestingly, one exemption that wasn't included and probably should have been was an exemption for stage performances, where the actors are playing characters who smoke. Even clove cigarettes are covered by the law, and a Denver judge ruled in October of 2006 that smoking on stage is clearly prohibited. There was some talk of mounting a First Amendment challenge, but so far no one appears to have taken that step.

Questions so far? (Stretch / coffee break?)

At this point I'd like to take a little detour over to the enforcement issue. Remember that the 2004 Delaware bill, on which Colorado's bill was based, assigned enforcement to the state labor department for workplace issues and to the health department for all other issues. In Colorado, partly due to a budget crisis and partly due to our Wild West mentality, we chose to simply create a new petty offense. That's cheaper for the state, but it lays the burden of enforcement squarely on the shoulders of the police and prosecutors, whose case load is already high enough. So how do you persuade them to incur the additional time and expense of writing tickets?

[Slide 13]

Answer: Give the local authorities 75% of the proceeds of any fines that are collected. This language was added by a House amendment, and it's on pages 13 and 14 of your copy of the House Bill 1175.

But now, here's another issue that has just arisen in the past couple of weeks:

[Slide 14]

The penalty language here is pretty standard for health code violations, but in this context it's somewhat ambiguous. Can you spot an issue here? There are at least two.

(1. Customer vs. owner -- whose "2nd" or "subsequent" violation is it? 2. Each day separate offense -- each customer per day, or each day no matter how many customers?)

Remember earlier I asked what is the responsibility of advocates on all sides to read and understand legislation as it may pertain to them. Here it seems that the people involved either read this language in a way that suited their own needs and biases, without examining their own unspoken assumptions, or perhaps they consciously decided not to try and nail down exactly how this provision would apply because they thought they could win on the interpretation issues in court -- after the bill had safely passed -- and they didn't want to educate their opponents in the meantime. The "retail floor plan" language for casinos probably falls into that category.

My colleague Jery Payne has suggested that there's a natural law, the law of "conservation of ambiguity," that says that the harder you try to eliminate ambiguity in one statute, the more it squirts out in another one. So you should go ahead and leave a little ambiguity here and there just to relieve the pressure. That may be true.

OK, now we get to the Mother of All Sleeper Issues, the cigar bar exemption. This provision generated exactly zero controversy during the debates on this bill, yet it has turned out to be the biggest headache for those charged with enforcing it.

[Slide 15]

Let's do some more issue-spotting here. Can anybody predict, based on this text, where the troublesome issues are going to be?

(1. Any "tobacco" or only "*cigar* tobacco"? What does the hyphen do? 2. "*and* ... humidors" 3. Define "humidor"? 4. New bars? Hookah bars? 5. Who does the audit?)

Now, for comparison, let's look at the Denver ordinance on which this definition was based.

[Slide 16]

Do you think this is better, worse, or about the same?

[Slide 17]

[Discussion of Orio's case -- handout]

- "and/or" issue
- purported "certification" to DA
- Rep. Larson's testimony

Interestingly enough, the DA chose not to appeal this decision. Instead, Rep. Larson's successor from the same district introduced a cleanup bill during the 2007 session. It's House Bill 07-1108, and you should have a copy in your handouts. The key provisions are:

[Slide 18]

Addition of the word "both" ... duh! ...

"Cigar tobacco" for "tobacco products" ...

And a certification process. This turned out to be something of a sticking point for the Colorado Municipal League. Some of their members wanted the prerogative of adopting their own local certification process. So the bill strikes a compromise: If the locals want to adopt their own process, they have to do so within a specified time; otherwise, it's up to the revenue department to take applications and decide who qualifies. If they qualify, they have to post a copy of their certificate on the premises. If they don't post it, there's a conclusive presumption that they never qualified.

Now, I've subtitled this slide "A Nice Try Falls Short" because H.B. 1108 didn't actually pass, although it was supposed to. Apparently after it got all the way through the House, one member of the Senate committee either left the room or accidentally voted the wrong way or something, and the bill was killed. The Senate sponsor was *not* pleased, let me tell you. But as they say in the world of politics, there's always a banana peel out there somewhere. So this issue of cigar bars is going to smolder for at least another session, I think.

Along with the legislative followup, there's also been some judicial followup. Even before the law took effect last year, a group of business owners went to federal court for an injunction on constitutional grounds. Their main contention was that there was no rational basis for exempting the casinos and the airport smoking lounge, and therefore the act violated equal protection. The federal district court didn't agree with that. However, the case is now on appeal to the 10th Circuit, and last I heard it was being scheduled for oral argument. So stay tuned on this one. Here's the cite:

[Slide 19]

There was also one county court case in Adams County in which the judge dismissed charges against a bar owner for similar reasons. That ruling was overturned by the Adams County district court, and I'm not aware of any further developments since then. Chances are that whatever the 10th Circuit has to say will end up being the last word.

To the extent that these challenges rely on the casino exemption, that argument is about to go away. House Bill 07-1269 repeals the casino exemption as of -- get this! -- 8:00 a.m.

January 1, 2008. So book your New Year's trip to Central City now, while you can still get a seat. Should be quite a party.

I'd like to conclude with a prediction of what may be the last sleeper issue of the "Colorado Clean Indoor Air Act." As you may have noticed, our office prints the drafter's name in the upper left-hand corner of the front page of every bill. Mine's on most of the ones in your handouts. This is intended to help the members of the general assembly know who to call if they need an amendment. Unfortunately, with copies of the bills posted on the Web, it also gives members of the public a name of someone they can call to complain, or to solicit free legal advice.

[Slide 20]

Based on the volume of calls I've received since this bill went into effect, I predict that the big issue next year won't be cigar bars, but hookah bars. Remember there's that exemption for a "retail tobacco business"? Well, here's the definition of a "tobacco business." Notice no revenue threshold, no requirement that you were in business previously, and nothing that says those products you sell "incidentally" can't include alcohol.

So, as you take your leave of this place, wish me luck, and always be on the lookout for those unintended consequences.