



4/27/2018

## Welcome to Speaking of Health Law

Hi, I'm Norm Tabler, host of the AHLA podcast series, *Speaking of Health Law*, where we focus on the *Lighter Side of Health Law*. I hope you enjoy this month's edition.

### A Fate Worse than Death

Is there a penalty more severe than the *death penalty*? The Texas Supreme Court says *yes, there is*. The court said so in reversing what it termed a, quote, *beyond-death-penalty sanction*. The court said the term *death penalty* understated its severity.

But the case didn't involve death row or even a prisoner. After all, this *is* a health care podcast. It was a civil case concerning the sale of a home health care company.

Becky and Allen Wilson sold the company to Altesse (ALL-tis). But instead of making the contract payments, Altesse sued the Wilsons in federal court, alleging fraud. The Wilsons in turn sued Altesse in state court and got a TRO prohibiting Altesse from operating the company and requiring Altesse to return all company assets.

The Wilsons moved for a contempt citation and sanctions because Altesse had violated the TRO by, among other things, transferring company assets and patients.

The trial court granted the motion and imposed what it termed, quote, *death penalty sanctions*: namely, Altesse must pay the contract price, along with the Wilsons' attorneys' fees, and the cash Altesse had transferred out of the company. The Court of Appeals affirmed.

But the Supreme Court reversed, ruling that the penalty was not a *death penalty*: it was *worse than death*. Why? Because, in effect, the Wilsons got to keep the company and still get the purchase price. They were better off than if they had won the case on the merits. All based on a TRO issued without a hearing.

It's good to know that, at least in Texas, no matter how badly you lose a case, you won't have to face a fate worse than death.

The case is *Altesse v. Wilson*, Texas Supreme Court.

### The Imaginary Lawsuit

All of us know about imaginary friends. Some of us had them as kids. Some of us may still have them. And we can envision a lawyer making up an imaginary *client*—maybe to impress somebody.

But Illinois attorney Michael Graf went one better. He had an imaginary *lawsuit*—one that lasted five years. At least, that's what the Attorney Disciplinary Commission alleges.

Pauline Erdman hired Michael to represent her in a wrongful death action against the hospital where her husband was treated.

For five years Michael met with Pauline in person and gave her regular email updates on the progress of

the case, including settlement offers of up to \$100,000.

The only problem was that the lawsuit was *imaginary*. Michael made it up. He never filed suit. And now, five years after Pauline's husband's death, the wrongful death suit is barred.

Pauline still has a malpractice case—only it's against Michael, not the hospital.

## If It Quacks Like a Doc

Internist/dermatologist Dr. Edward Tobinik claimed he could successfully treat Alzheimer's and other brain issues with a spinal injection. Yale-based neurologist Steven Novella didn't believe it and said so in a blog post calling Tobinik's Institute of Neurological Recovery a, quote, "one-man institute" in Florida, which he called a, quote, "very *quack-friendly* state."

Tobinik sued for libel and other wrongs, including false advertising under the Lanham Act. Novella posted another blog calling Tobinik's suit an attempt to shut down free speech. Tobinik sued again, this time seeking an order shutting the blog posts down.

Over time Tobinik added various theories and defendants, including Yale University, all the while losing on all his claims. The trial court granted Novella's motion to require Tobinik to reimburse him \$269,000 in attorneys' fees, mostly relating to Tobinik's Lanham Act claims.

That act allows the award of attorneys' fees for the winning party in, quote, "exceptional cases." Tobinik appealed to the 11<sup>th</sup> Circuit, noting that the Circuit had never allowed attorneys' fees except in cases of fraud or bad faith.

But the 11<sup>th</sup> Circuit affirmed the award, ruling that it was enough that Novella had shown that the case brought by Tobinik, quote, "stands out from others," end quote, in terms of the weakness of Tobinik's case and the way he litigated it.

So Tobinik, having already lost all the claims he had asserted since Dr. Novella said he lives in a quack-friendly state, must now pay Novella's legal bills.

The case is *Tobinik v. Novella*, 11<sup>th</sup> Circuit.

## The Case of the Heartless Cardiologist

Pediatric cardiologist Eduardo Montana found a sure-fire way to get more patients and make more money. He had contacts at Aegerion [a JEER e un] Pharmaceuticals, a company that sells a cholesterol drug that can cost \$250,000 a year. He sent them *copies of his teenage patients' medical records*. And he gave them his computer password so they could log in at their leisure and view the medical records of *hundreds* of pediatric patients.

One email said, quote, "By the way, I am sending this to you from my *personal* email because of the patient info :)," followed by a smiley face.

Aegerion used the information to target children with heart conditions who did not have the ultra-rare condition the drug is approved for.

These sound like the kind of people who use the lawn sprinkler to keep trick-or-treaters away.

Eduardo was convicted of wrongful disclosure of individually identifiable health information and awaits sentencing.

The case is *U.S. v. Montana*, U.S. District of Massachusetts.

## **On the Town with Mike Anesthesia**

Mike Anesthesia lived the high life, wine and dined at dinners costing as much as \$450 per person. But Mike didn't have to pay. Heart pump maker Abiomed picked up the tab.

That's what we learned from the whistleblower case Abiomed recently settled with the Department of Justice. Mike Anesthesia didn't have to sign the settlement. That's because Mike Anesthesia is a fictitious name Abiomed made it up to avoid revealing his last name.

Why hide the last names of doctors? Maybe because the wine and dining was part of an alleged kickback scheme. In addition to hiding the doctors' names, Abiomed allegedly also inflated the number of people at a dinner. You see, if you show three times as many doctors as were actually there, then \$450 a head becomes \$150.

Why would Abiomed shell out \$450 a head to entertain doctors? Maybe because a single pump can cost over \$20,000.

It all came to light after whistleblower Max Bennett filed a False Claims action revealing the illegal kickbacks. Abiomed has to pay \$3.1 million. Max gets over half a million.

The case *U.S. ex rel. Bennett v. Abiomed*, Federal District of Massachusetts.

### **Sign-Off**

Well, that's it for this month's edition of the AHLA podcast series, Speaking of Health Law. I hope you enjoyed it. Check your AHLA Weekly and Connections magazine for the next edition of Speaking of Health Law.