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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.

Health Lawyers in the News

In general, we health lawyers are a low-profile group. We don't often make the news. But Oklahoma Department of Health general counsel Julia Ezell is an exception. She made the front page of papers throughout the state and beyond when she received a raft of threatening emails from an apparently militant pro-marijuana group. The emails started when she was about to present proposed marijuana regulations to the Department of Health.

"We will watch you," one email said. "We will stop you and you're [sic] greed," another read. And "you impose laws like a dictator and respect none of them."

Julia resigned shortly after reporting the emails to the authorities. Did she resign because she was afraid? *Not exactly*. She resigned when investigators discovered the source of the emails: *Julia herself*. That's right: Julia set up a dummy email account, sent the emails to herself, and then reported them to the authorities.

She's been charged with using computers to violate state law, falsely reporting a crime, and preparing false evidence.

The most bizarre feature of this bizarre story is that one of the emails Julia sent to Julia said, quote, "You appear distinguished in glasses. You should wear them for the camera."

You can't make this stuff up.

Something to Shoot For

Here's something to shoot for if you represent health care whistleblowers. A Florida federal court recently awarded the whistleblower's attorneys over $4 million, including costs. Not impressed? Well, consider this: the defendants settled the case for $3 million. So attorneys' fees were 133% of the damages—not a bad contingent fee.

The award is even more impressive when you compare it to what the whistleblower client took home. We don't know the exact amount, but under the statute, it couldn't have been more than 30%, or $900,000. A $4 million fee on a $900,000 recovery is like a 400% contingent fee.

One interesting feature of the case is the effect of the low-ball damages calculation by defendants' expert on the fee award. Defendants' expert put the damages at $3.3 million. The whistleblower *accepted* that figure, which meant that the eventual $3 million settlement represented a hefty 92% recovery of the stipulated damages. That was a major factor in determining attorneys' fees.

The case is *Graves v. Plaza Medical Centers*, S.D. Fla.

The Doctor's Not Talking

The Florida Department of Health filed an administrative complaint against plastic surgeon Dr. O. Omulepu after four of his liposuction patients wound up in the hospital. When Dr. Omulepu refused to testify at the hearing, the administrative law judge cited that refusal as one of the factors he considered in recommending probation.

When the recommendation went before the Board of Medicine, it *also* took Dr. Omulepu's silence into consideration. It found the recommendation too lenient and revoked his license.

Dr. Omulepu went to court, arguing that taking his refusal to testify into consideration violated his Fifth Amendment rights. The Court of Appeal, perhaps thinking Dr. Omulepu had seen too many *Law & Order* episodes, explained that the Fifth Amendment applies to *criminal* cases.

A medical licensing hearing is a *civil* case. Sure, you can refuse to testify. After all, how could they force you to talk if you didn't want to? *But* there's nothing to prevent the fact-finder from taking that refusal into consideration. The license revocation was unanimously upheld.

So the lesson is, you can refuse to testify at your licensing hearing, but your refusal comes at a cost.

The case is *Omulepu v. Dept. of Health*, Fla. Dist. Ct. of App.

But Who'll Do the Examining?

When a person does something really dumb, we say, *he should have his head examined*. But what if the person is a professional at examining heads?

Take New Jersey psychologist Dr. Barry Helfmann. Twenty-four patients of his psychology practice group didn't pay their bills, so he went to court and filed collection actions against them. And, for reasons known only to Barry, he decided that the complaints—documents on the public record--should include the *diagnosis and treatment* of each patient, including children—something that breaks more laws and ethical guidelines than you can count.

When the disclosures were reported in the press and the authorities launched an investigation, Barry began suing everyone in sight. He sued the lawyers who represented him in the debt collection cases, saying it was all their fault. The case was dismissed. He sued the State of New Jersey. He sued the Deputy Attorney General who investigated the matter.

After he settled with one of the 24 patients, he sued *that* patient--and for good measure, he sued the patient's *lawyer*, too--for talking to the press.

It's good that he has all those lawsuits to occupy his time because the State Psychology Board has suspended his license for two years.

You can't make this stuff up.

Pharmaceuticals on the Reservation

This is the story of how a Mohawk Indian tribe came to hold the patent for the dry-eye medicine Restasis.

The original owner of the Restasis patent, Allergan, was in a dispute over the patent with Mylan Pharmaceuticals. But before the hearing got under way, Allergan transferred the Restasis patent to the Saint Regis Mohawk Indian Tribe.

What would the tribe do with a patent for dry-eye treatment you're asking? Well, *nothing*--except grant an exclusive license right back to—you guessed it—*Allergan.*

Then the tribe moved to terminate the proceedings before the Patent Trial & Appeal Board on the grounds of—you guessed it again—*tribal sovereign immunity*. Mylan cried foul, calling the Allergan-Mohawk transaction a sham and an attempt to *rent out* tribal immunity.

The Board sided with Mylan and rejected the sovereign immunity argument. When Allergan and the tribe appealed, the Circuit Court affirmed, ruling among other things that Congress never intended that sovereign immunity apply to Patent Trial & Appeal Board proceedings.

The case is *Saint Regis Mohawk Tribe v. Mylan Pharmaceuticals*, Federal Circuit Court.

The I-Am-a-Moron Defense

Recently we discussed pharmaceutical executive Martin Shkreli's ill-fated I-Am-a-Jerk defense: the argument that he was targeted by the prosecution because of his well-earned reputation as a terrible person rather than because he had committed a crime.

Now comes the *I-Am-a-Moron* defense. Biotech CEO Patrick Muraca was indicted for using company assets for personal purposes, stealing from investors, and lying to the FBI. There was, for instance, the $400 he spent on dinner before a Pat Benetar concert and charged to the company.

Muraca's lawyer's response was, quote: *My client is a total moron*, end quote. He simply can't keep personal and company accounts separated.

The jury came back with good news and bad news for Muraca. The good news: they don't think he's a moron. The bad news: they think he's crook. He was convicted, and he still faces a civil suit from the SEC.

The case is *U.S. v. Muraca,* S.D.N.Y.

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.*