AHLA WEEKLY
2/23/2018

Intro

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.

Create Your Own Brand

"Build Your Own Brand!" "How to Create a Brand!" "Strengthen Your Brand!" The nonfiction best-seller lists are full of books with just that business advice.

Maybe Englishman Simon Bramhall (BRAMHALL) misunderstood. He created his own brand: *SB*, for Simon Bramhall. And he put that brand on his handiwork.

Did it bring him more business? More success? Quite the opposite. It got him a criminal conviction for assault, a year's probation, and a 10,000 pound fine.

You see, Simon is a *liver transplant surgeon*. And that brand—*SB*? Well, he put that brand on at least two of his livers. That's right. Simon branded the livers with his own initials. He did it with an argon beam coagulator, a device typically used for sealing blood vessels.

You can't make this stuff up.

If the Shoe Fits

Jim Kommer sued Dr. Scholl's, of Dr. Scholl's Foot Pad fame.

Why was Jim so angry at Dr. Scholl's? Well, in a nutshell, Jim walked—or maybe limped—into a retail store and bought a pair of Dr. Scholl's Orthotic Inserts. He bought them off-the-shelf, over-the-counter, and they turned out to be, well, off-the-shelf, over-the-counter rather than individually fitted to Jim's feet by a doctor.

You're wondering, "If Jim bought them off the shelf, over the counter, with no doctor in sight, why did he expect them to be custom-fitted to his feet by a doctor?" Well, Jim cited two reasons. First, the label on the inserts and the advertising said, quote, "Custom Fit."

Second, the store had a Dr. Scholl's Custom Fit Orthotics Foot Mapping Kiosk. Jim put his feet in the kiosk and bought the size it recommended, off the shelf and over the counter. He says he believed the inserts had been individually fitted to his feet by a doctor, even though, of course, the inserts had already been made and there was no doctor in sight.

He he sued not just for himself, but for every New Yorker who bought off-the-shelf, over-the-counter inserts with no doctor in sight, thinking that the inserts had been individually fitted to their feet by a doctor. And in addition to money, he asked for an injunction.

Well, the court dismissed Jim's case for failure to state a claim. The judge said, quote, "Plaintiff need only to look at what he was buying to see that it was 'standardized,' 'mass produced,' and 'over-the-counter.'"

As for Jim's request for an injunction, the court dismissed it for—guess what—lack of standing. The Second Circuit affirmed.

You can't make this stuff up.

The case is *Kommer v. Bayer Consumer Health,* in the Second Circuit.

It Could Have Been Life

Remember the old Kingston Trio song *Bad Man's Blunder*? A prisoner relates his crime—"I was feelin' kinda mean. I shot the deputy down"—and his punishment—"They gave me 99 years on the hard rock pile."

But being a glass-half-full kind of guy, the prisoner sees the bright side of the 99-year sentence, observing "It could have been life."

The song comes to mind when reading about the sentence of Ebong Tilong (that's T-I-L-O-N-G) and his wife, Marie, for a home health care scam that cheated Medicare out of $13 million.

Thirteen million dollars is serious money, so observers expected serious punishment. But Judge Melinda Harmon still managed to surprise just about everybody. Fifty-three-year-old Marie was sentenced to—are you sitting down?—*75 years*. Marie will be 128 when her term is up.

But even when Marie's term ends, *Mr*. Tilong will still have another five years to serve, because he got *80*-years.

Well, a term of 75 or 80 years is a long time, but as the Kingston Trio reminded us, *it could have been life.*

The case is *United States v. Tilong* (S.D.Tex.).

Too Good to Be True … or Legal

It was music to the ears of Floridians who want to use marijuana. Attorney Ian Christensen would issue a, quote, "Official Legal Certification" and a patient identification card advising law enforcement that the bearer has a marijuana prescription and has the legal right to possess and use marijuana.

Want to *grow* marijuana? No problem. For a fee, Ian issues a, quote, "grow sign" authorizing you to grow marijuana on the premises.

Ian fails to mention that medical necessity is an affirmative defense that can only be raised after you've been arrested and are being prosecuted. And good luck with that defense, since the doctor who wrote the prescription is unlicensed.

When people see your grow sign, they call 9-1-1. The police arrive. You ask Ian if you should dismantle the operation. He says no, he'll call the police and educate them. But he doesn't. A SWAT team in full tactical gear storms your home and arrests you as a drug trafficker.

Ian's advice: report the SWAT team members to internal affairs for damaging your home.

You fire Ian and hire another attorney, who negotiates three years' probation, a $15,000 fine, and 100 hours of community service. You're now a convicted criminal and lose your nursing license. You also owe your landlord $25,000 for damage and lost rent.

Not surprisingly, Ian is reported to the Florida bar, which recommends Ian's law license be suspended for two years. The Florida Supreme Court rejects the recommendation, finding Ian so hopelessly incompetent that the only remedy is permanent disbarment.

The case is *Florida Bar v. Christensen*, January 2018.

Maybe It Was the Ditto Marks

Late last year the Disciplinary Council of the Ohio Bar ruled that Scott Smith, formerly his firm's managing partner, had engaged in fraudulent billing of nursing home clients. He was suspended from law practice and ordered to pay $20,000 in restitution.

Here are some of the billing practices. Sometimes when an associate turned in time, Smith crossed out the associate's initials, replaced them with his own, and increased the hourly rate accordingly. Sometimes he merely entered more time than was actually spent. Sometimes his description of work was pure fiction.

But it was the *ditto marks* that clinched his fate. That's right: ditto marks. He would write a description of work performed for a client and then use ditto marks to indicate that he'd done precisely the same work on other cases and for other clients. One problem with the approach is that the description he dittoed in no way matched any service the clients wanted or received.

How did it all come to light? Remember that associate whose initials Smith crossed out? Well, he's a partner now and when he got wind of Smith's scheme, he launched an internal investigation. The firm reported its findings to the Disciplinary Council.

The case provides two lessons: First, the associate whose work you take credit for may grow up to be a partner. Second, if you enter false billing descriptions, you probably should write them out in full.

The case is *Disciplinary Council versus Smith*, Ohio, December 2017.

Grumpiest Man of the Year

We've received a truly outstanding nominee for Grumpiest Man of the Year: a man who filed a federal class action against a health system for the heinous crime of *sending him a flu shot reminder*. That's right: for sending him a flu shot reminder.

Daniel Latner's primary care provider was a group in the Mt. Sinai Health System.

At the start of flu season an automated dialing service sent flu-shot reminder text messages to Mt. Sinai patients. Daniel got one.

In response, he did what only a truly grumpy man would do. He sued Mt. Sinai and his primary provider group, not just for himself but for everybody who got a Mt. Sinai flu-shot reminder.

Daniel's theory? Well, the text was sent by an automated-dialing system, and the Telephone Consumer Protection Act generally prohibits auto-dialed telemarketing messages to cell phones without prior written consent. Why would a flu shot reminder be telemarketing? Well, as Daniel saw it, Mt. Sinai was *selling* flu shots, and trying to sell something is telemarketing.

But, as the trial judge noted in throwing out Daniel's case, the statute exempts health care messages, and a flu shot reminder is clearly a health care message.

Still grumpy, Daniel appealed to the Second Circuit. That court affirmed the trial court and added a second reason for throwing out Daniel's case: among the patient intake forms he signed was a consent to receive texts from Mt. Sinai.

No word on whether Daniel came down with the flu.

The case is *Latner v. Mt. Sinai*, in the Second Circuit.

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*.