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Welcome to Speaking of Health Law

Hi. This is Norm Tabler, host of AHLA's new podcast series. The series is called *Speaking of Health Law*.

But the subtitle may be more descriptive. The subtitle is *The Lighter Side of Health Law*. And that *light* side is what we want to emphasize. We have a theory that while health law may generally be serious and sometimes even boring, if you pay close attention, you can often find a development that's interesting, quirky, or even downright funny.

My plan is to gather up these developments, record a podcast on each of them, and then present the podcasts on a monthly basis.

Okay, so who am I, and why am I doing this? Well, as I said at the outset, I'm Norm Tabler.

I'm a retired partner—actually, I prefer term *recovering* partner—with a large law firm, where I specialized for many years in health law. In addition, I served for a long time as in-house general counsel of a major hospital system. By the way, for a lawyer, working in a hospital is a great gig. Think of it: the ambulances come to *you*.

But I digress. As a recovering lawyer, I have a lot of time on my hands, and I like to write and talk about developments in health law—especially developments that entertain. That's what this series is intended to do. I hope you enjoy it.

You-Can't-Make-this-Up Award

From time to time a development in health law confirms the adage that truth is stranger than fiction. That's why we hand out the You-Can't-Make-this-Up Award for real life developments that seem to defy the imagination.

The 2017 award goes to the Centers for Medicare & Medicaid Services' October 3rd announcement withdrawing a proposed rule that would have required artificial limb providers and suppliers to meet accreditation requirements. According to the announcement, the rule was withdrawn because of, quote, "the cost and time burdens the rule would create for many providers and suppliers."

Yes, you heard that correctly: the artificial limb rule was withdrawn because it would have cost the artificial limb industry an arm and a leg.

If a Tree Falls in the Forest . . . .

It was the philosopher Bishop Berkeley who posed the rhetorical question, “If a tree falls in the forest and no one hears it, does it make a sound?”

The judge in *Pediatric Nephrology Assocs. v. Variety Children’s Hospital* didn’t mention either the Bishop or the tree. But he used the same approach to dispose of a case brought by a Florida nephrology partnership against a former partner and the hospital where they all worked.

The trouble began when the hospital started its own nephrology group and hired one of the partners, Dr. Ramirez, away from the partnership. When the remaining partners refused to join the hospital’s new group, the hospital, with the help of Dr. Ramirez, posted an ad to recruit nephrologists.

The partnership filed a federal lawsuit alleging, among other things, that the ad violated the Lanham Act, a federal law that prohibits false advertising.

What was the falsehood? Well, for one thing, the ad included a statement that the nephrology section had over 8,000 visits a year and over 20 dialysis patients, quote, under the direction of Dr. Ramirez, end quote. The partnership argued that those were the numbers for the *whole partnership*, not just Dr. Ramirez. So the ad was misleading.

The court said that it couldn’t decide whether the statements were true or false. But what it *could*—and did—decide was that there was no evidence that any consumers even saw the ad, let alone were deceived by it.

And just as a falling tree makes no sound if there’s no one around to hear it, a false statement doesn’t violate the Lanham Act if there’s no consumer around to be deceived by it.

The court gave the defendants summary judgment on the Lanham claim and dismissed the remaining claims because they were state rather than federal claims.

The case is *Pediatric Nephrology Assocs. versus Variety Children’s Hospital*, Southern District of Fla., 2017.

Finally, a Definition of Love

At long last we have a definition of *love*—an official definition. And no, it did not come from Shakespeare or Kahlil Gibran or Barry Manilow. It came from a federal agency: the United States Food & Drug Administration.

How did the FDA get involved in defining *love*? Well, strangely enough, the FDA was angry with Nashoba Brook Bakery for claiming that it baked with love. The bakery was required to list the ingredients of its granola bars, and along with rolled oats and shredded coconut, it included *love*.

When the FDA read the list of ingredients, it fired off Warning Letter No. 532236 ordering the bakery to delete love from its list of ingredients within 15 days or face the consequences.

What’s wrong with listing love, you may ask. Well, the Warning Letter explained: what’s wrong is that “love is not a common or usual name of an ingredient.” So it can’t be included in a list of ingredients.

You're wondering, if it's not an ingredient, then *what is it*? Well, wonder no more. The FDA, being a full-service agency, supplied the answer in the Warning Letter: "Love is intervening material." And why is love intervening material? Why, because "it is not part of the common or usual name of the ingredient."

So there you have it: the official definition of love, certified by the FDA. And, you know what? *It really works*. Try it. Think of Whitney Houston singing, "I Will Always Intervening Material You," or the Captain & Tennille's "Intervening Material Will Keep Us Together," or the Beatles classic "Can't Buy Me Intervening Material."

Thank you, FDA.

The Unspeakable Comma

I want to do something risky here. I want to use a voice recording to explain how dangerous it can be to rely on the spoken rather than written word. Bear with me.

We all know that when it comes to *contracts*, it's safer to put it in writing. What's the cliché? "A verbal contract is not worth the paper it's written on."

But the principle isn't limited to contracts. A recent Louisiana Supreme Court opinion shows that it comes up in *criminal* law, too. And in criminal law the difference between the written and spoken word can mean the difference between freedom and prison.

Just ask Warren Demesme. That's D-E-M-E-S-M-E. Warren was being questioned by the police in connection with two assaults. He denied one of them but admitted the other. But before the admission he *said*—and the operative word is *said*—something about getting a lawyer. *Warren* says he asked for a lawyer. But according to the prosecution, Warren said something ambiguous or nonsensical or both.

So, precisely what *did* Warren say? According to the transcript, he said, quote, "Why don't you just give me a lawyer dog," end quote. Let me repeat that: "Why don't you just give me a lawyer dog."

The prosecution says that wasn't a request for an attorney. It was a request for a *lawyer-dog*, and there's no such thing as a lawyer-dog. So the police had every right to continue to question Warren and ignore his request for a lawyer-dog.

Warren, on the other hand, insists he was asking the questioner, whom he addressed as *dog*, to get him a lawyer. In other words, there's a comma between *lawyer* and *dog*. So it's not "give me a lawyer-dog"; it's "give me a lawyer, dog."

Well, Warren was in a tough spot because you can't *say* a comma. You can *write* a comma, but you can't *say* it.

And because of the unspoken comma—you might say the *unspeakable* comma—the Louisiana Supreme Court refused to hear Warren's appeal of the denial of his motion to suppress his admission of the assault. Justice Crichton [CRY-ton] said Warren's statement was ambiguous, and an ambiguous reference to an attorney doesn't require the police to stop the questioning.

The case is *Louisiana v. Demesme*, La. Sup. Ct., 2017.

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* in February for the next edition of *Speaking of Health Law.*