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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.

The Imaginative Defense Award

From time to time we come across a legal defense that's so darn imaginative, it merits an award. This month's winner is all the more impressive because he's not a lawyer. He's a layman, and a young one at that.

Standing outside a St. Petersburg, Florida, resort, twenty-eight-year-old Levi Miles spotted young Chloe Rimmer admiring a $300,000 yellow Ferrari Spider. Naturally, Levi told Chloe the Spider was his.

When Levi asked for the keys, the parking attendant asked for the claim ticket. Levi said it was in the car, and he'd bring it over on his way out. The attendant gave him the keys, and Levi and Chloe drove away without giving the attendant the claim ticket … or a tip.

Well, as you've guessed by now. The Spider did *not* belong to Levi. It belonged to Orlando attorney Skip Fowler. Skip is suing the resort for what might be called *parking attendant malpractice*.

Meanwhile, the police pulled Levi over—not for driving a stolen car, but because the taillights weren't working and he clearly didn't know how to drive it.

Levi has been charged with grand theft auto. And this is where the imaginative defense comes in. Levi's position is that he did not *steal* the car: the attendant *gave* it to him.

You can't make this stuff up.

The Five Million Dollar Comma

Punctuation nerds love to argue over the *serial comma*—the comma you may or may not insert before the last item in a list.

Leaving the comma out saves space and avoids looking prissy. But it can lead to ambiguity. Say, an article reads, quote, "the winner thanked her parents COMMA State Sen. June Smith and Rep. Sam Jones." Are Smith and Jones her parents? A comma after "Smith" would have told us they are *not*. Without it, we're unsure.

In Maine the overtime statute had a perishable food exemption covering activities such as canning, processing, and preserving—all separated by commas. The end of the list read, quote, "COMMA packing for shipment or distribution."

Oakhurst Dairy said those last five words are two different activities—one is "packing for shipment," the other is "distribution." There's no comma because the legislative drafting manual says not to use the serial comma.

The delivery drivers countered, “It’s just one activity: packing for shipment or distribution. We don’t do any packing. All our distribution is nonexempt. So we get overtime.”

When the drivers sued, everyone agreed that if there had been a comma after “packing for shipment,” the dairy would win.

The District Court sided with the dairy, but on appeal the First Circuit reversed, holding that the missing comma made the statute *ambiguous,* and under Maine law an ambiguity in that statute is resolved in favor of the workers.

In February the two sides settled the dispute for $5 million. Meanwhile, Maine rewrote the statute to reflect the dairy’s position. If you’re wondering whether they inserted as serial comma, the answer is *no*. They avoided the problem by omitting commas altogether, using semi-colons instead.

The case is *O’Connor v. Oakhurst Dairy*, First Circuit.

Don’t Make Me Stop This Car

Remember when you were a kid, riding with your obnoxious brother in the back seat on a long family trip? And you and your brother started arguing, then yelling, and then fighting? And finally your dad had had enough and he thundered, like the voice of doom, “Don’t make me stop this car!”

Dad never actually stopped the car because you and your brother were so terrified of what would happen if he did, you behaved yourself.

The First Circuit recently issued its own don’t-make-me-stop-this-car warning. It happened after the defendant, a medical laser firm, appealed the same issue for the fifth time, always making essentially the same argument. And that’s not even counting the petitions for rehearing and for *certiorari*.

The court once again rejected the defendant’s argument—the same once it had been rejecting for years. In a separate opinion issued the same day, the court reluctantly decided not to impose sanctions on the defendant’s lawyers, but it issued a don’t-make-me-stop-this-car-type warning.

Noting, quote, “defendant’s briefing … recycles … briefing from their previous appeal,” the court thundered in its best dad-like voice, “This case is at an end … we will not be … charitable … to any additional attempts at prolonging it.”

Dad couldn’t have said it better himself.

The case is *Angiodynamics v. Biolitec,* in the First Circuit.

The Steve Martin Defense

Those of a certain age will remember the all-purpose excuse provided by Steve Martin in his old stand-up routines: the “I forgot” excuse. When the IRS asks why you didn’t pay taxes, you simply say, “I forgot.”

Well, proving again that truth is stranger than fiction, the United States government tried the I-forgot defense in explaining its failure to turn over notes prepared by its star witness in the False Claims case against ManorCare nursing homes.

ManorCare, preparing to depose the government’s star witness, Dr. Clearwater, subpoenaed quote, “all notes prepared by or for her.” Dr. Clearwater produced *no* notes and said she didn’t remember *making* any notes.

But an employee testified that there *were* notes—131 pages of them. When the government belatedly turned them over—well after Dr. Clearwater's deposition--ManorCare moved for sanctions.

What was the government's response? Quote, "*Dr. Clearwater forgot*." Steve couldn't have said it better himself.

The court barred Dr. Clearwater from testifying and ordered the government to pay ManorCare's legal costs of pursing the motion for sanctions. With its star witness excluded, the government dismissed the case—after eight years of litigation.

The case is *US ex rel. Ribik v. ManorCare*, in the Eastern District of Virginia.

Maybe the Yacht Was the Tip-Off

If you're a surgical device distributor and you want to reward a surgeon for using your products on Medicare and Medicaid patients, you may want to choose a reward that's less conspicuous than a yacht. That's one lesson in the recent decision in *US ex rel. Cairns v. D.S. Med.*

In denying defendants' summary judgment motion, the court recited relator's allegations: Neurosurgeon Dr. Sonjay Fonn used devices provided by his fiancée's distributorship, D.S. Medical, based in part on the fact that she and her distributorship provided him with in-kind kickbacks in the form of a home at below-market rent and use of a yacht and other properties she bought through a company funded by her distributorship. The arrangement, they say, caused the device manufacturers to pay inflated commissions to the distributorship.

The Anti-Kickback Statute and the False Claims Act come into play because Dr. Fonn allegedly used the devices provided by his fiancée's distributorship when he performed surgeries at St. Francis Med. Center, and St. Francis purportedly billed Medicare and Medicaid.

The defense argued for the "primary-purpose" standard of intent under the Anti-Kickback Statute: that there was no violation unless the *primary* purpose of providing benefits was inducement. But the court ruled in favor of the "one-purpose" standard: that there was a violation if *even one* purpose was inducement.

The court also rejected the defense argument that the defendants couldn't be liable under the False Claims Act for claims submitted by St. Francis rather than themselves. The court ruled that "any person … who knowingly assisted in causing the government to pay claims which were grounded in fraud" can be liable (citing *US ex rel. Hutcheson v. Blackstone Med*., 647 F.3d 377 (1st Cir. 2011)).

The case is *US ex rel. Cairns v. D.S. Med*., No. 1:12CV00004 AGF (E.D. Mo., Aug. 31, 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* and *Connections* magazine for the next edition of *Speaking of Health Law*.