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Welcome to Speaking of Health Law

Hi, I'm Norm Tabler, host of *The Lighter Side of Health Law* AHLA podcast sponsored by Coker Group. I hope you enjoy this month's edition.

Motion to Have it Both Ways

Health law litigators may want to add a new motion to their form books. I came across it in a recent Medicaid fraud case. I call it the *motion to have it both ways*.

Florence and Michael Bikundi were convicted of defrauding the D.C. Medicaid program, sentenced to ten and seven years, respectively, and ordered to pay $80 million in restitution.

On appeal, their lawyer argued that the convictions should be overturned. Why? Because the government gave him an exhibit at the last minute, and he needed more time to figure out a response.

Had he asked for more time? No. Why not? Well, more time would delay the proceedings, and he didn't want to delay the proceedings.

So there you have it. If you need more time, don't ask for it. Then, if you lose the case, you can appeal because you didn't get the extra time you didn't ask for.

You can't make this stuff up

The case is *U.S. v. Bikundi*, D.C. Cir.

The $200 Million Lie

Oh, what a tangled web we weave when first we practice to deceive. Some people think Shakespeare said that. Others say Robert Burns. *Actually*, it was Sir Walter Scott, in the poem *Marmion*.

And the message of the quote is true: a single lie can spin out of control, creating a web of deceit bigger and more tangled than the liar could have imagined.

Just ask pharmaceutical giant Merck & Co. On March 17, 2014, its patent attorney Robert Durette told a lie in order to sit in on a conference call with another pharma company. He said he was part of a *firewalled* Merck contingent allowed to hear the other company's trade secrets, but he actually wasn't.

The web of deceit started with that lie. It grew when he acquired trade secrets in the call. It grew more when he used the secrets to file patent claims for Merck. It grew *even bigger* when he created a false cover story to pretend he got the secrets from public sources.

Four years later the web completely ensnarled Merck's patent infringement suit against the other company. The jury awarded Merck $200 million. But the company argued that Merck had unclean hands for its underhanded business practices and because Robert continued to lie in his testimony.

The court was so disgusted by the web of deceit that it ruled that Merck had *forfeited its right to enforce its*

infringement claim and *overturned* the $200 million award. The Federal Circuit affirmed.

And it all started with a single lie.

The case is *Gilead v. Merck*, Fed. Cir.

Custody Battles in the Twenty-First Century

It's no surprise when a divorce involves a custody fight, or when the fight gets ugly. But the post –divorce battle between Ellen Steel and former husband Tom Smith is noteworthy because it's not over children or even pets. It's over ownership of a *drug patent*.

Ellen's lawsuit says that in happier times, when she and Tom were still married, they created two jointly-owned companies, with Ellen in control of one and Tom, the other.

Ellen says that after the divorce Tom falsely claimed that his company owns a drug patent that really belongs to hers. And he defrauded a *third* company into entering into a licensing agreement for the patent. When the third company discovered the deception, it sued Tom for fraud.

Now, according to Ellen, Tom is trying to settle the suit by entering into an agreement full of misrepresentations and still purporting to license the patent.

So Ellen is suing Tom to bar him from entering into that new agreement and, most important, to get a ruling that her company is the rightful owner of the patent.

Maybe the judge will be like Solomon and propose to cut the patent in two.

The case is *St. James Assocs. v. Smith*, Del. Chanc. Ct.

Ambulance Service and Other Learned Professions

Who knew? Ambulance service is considered a, quote, *learned profession*, up there with medicine and law—at least in New Jersey.

When John Cullum passed out at the gym, the ambulance bill was $1,750, plus mileage to the hospital. (No word on whether he passed out again when he got the bill.)

When Hala Hitti fainted and the same ambulance company assessed her, the bill was $1500, plus $14 for mileage to the hospital. The mileage fee was especially irritating because Hala had declined to *go* to the hospital.

When the ambulance company sued John and Hala for payment, they counterclaimed under the Consumer Protection Act on behalf of 36,000 people overbilled by the company. But the Superior Court affirmed dismissal of the counterclaims, holding that ambulance service is a *learned profession* and therefore exempt from the act. The rationale is that ambulance service is regulated by the state Department of Health, which includes oversight of charges.

But Hala's $14 fee was a different. The company graciously admitted that charging for mileage to the hospital was improper for people they didn't take to the hospital. That issue survived dismissal.

The case is *Atlantic Ambulance v. Cullum*, N.J. Super. Ct.

Yes, Virginia, Medical Judgment *Can* Be False

We normally think of medical judgment—actually, any kind of judgment—as being good or bad or somewhere in between. We don't normally think of medical judgment—even unsound medical judgment—as being *false*.

But a recent Tenth Circuit opinion says that it *can* be false—that if a surgeon operates outside recognized guidelines—and bills Medicare, the bill may violate the False Claims Act. Why? Because the bill certifies that the services were, quote, *reasonable and necessary.* If that certification is *objectively false*, it's a violation. And to determine whether it's objectively false, the fact-finder looks to industry guidelines.

What are the practical implications? First, medical judgment is not necessarily a defense. Second, the fact that the patient is satisfied may not matter. *Anyone* who knows about the surgery is a potential plaintiff, with a big incentive to sue: up to 30% of the government's recovery, which can be three times the Medicare bills plus over $20,000 per bill. Third—and this is something to think about-- medical malpractice coverage probably won't provide any help.

And one last thing: it the surgeon goes down, he may take the hospital with him, because the hospital will have submitted Medicare bills for the same procedures.

The case is *U.S. ex rel. Polukoff v. St. Mark's Hosp*., 10th Cir.

The Enemy of My Enemy Is My Friend

Here's a case to look at if you doubt the truth of the aphorism *the enemy of my enemy is my friend*. Crystal Evans sued Dr. Peter DiPaolo for medical malpractice. At that point, it would be safe to call Crystal and Peter *enemies*.

But then Crystal won a $4 million verdict, and Peter had only $1 million of insurance. So he sued his insurance company for failing to settle the case for $1 million before trial. Now Peter and his insurance company are enemies.

That makes Peter and Crystal friends. Why? Because the insurance company is now Crystal's enemy, too. She wants it to lose so that Peter can collect the $3 million he still owes her.

That was the reasoning of the appellate court when the insurer tried to subpoena communications between Crystal's and Peter's lawyers sent *after* the $4 million verdict. Communications *before the verdict*—when Crystal and Peter were still enemies--are *not* privileged. But communications *after* the verdict are privileged under the *common interest doctrine* because Crystal and Peter now share a common enemy.

The case is *DiPaolo v. N.J. Physicians United*, Super. Ct. of N.J.

Well, that's it for this month's edition of *The Lighter Side of Health Law.* I hope you enjoyed it. Check your *AHLA Weekly* and *Connections* magazine for the next edition.

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