FANTASY SUPREME COURT LEAGUE: THE 2016 SEASON

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Sean Carter is the founder of *Lawpsided Seminars*, a company devoted to solid legal continuing education with a healthy dose of laughter.

Sean Carter graduated from Harvard Law School in 1992. His ten years of legal practice focused on corporate securities and mergers and acquisitions. During this time, he represented such clients as GNC, Experian, The Boston Beer Company, Homeside Lending, Safelite Auto Glass, J. Crew and many others, before eventually serving as in-house counsel to a publicly-traded finance company.

In 2002, Mr. Carter left the practice of law to pursue a career as the country's foremost Humorist at Law. Since then, Mr. Carter has crisscrossed the country delivering his Lawpsided Seminars for state and local bar associations, law firms, in-house corporate legal departments and law schools. Each year, he presents more than 100 humorous programs on such topics as legal ethics, stress management, constitutional law, legal marketing and much more.

Mr. Carter is the author of the first-ever comedic legal treatise -- *If It Does Not Fit, Must You Acquit?: Your Humorous Guide to the Law*. His syndicated legal humor column has appeared in general circulation newspapers in more than 30 states and his weekly humor column for lawyers appeared in the *ABA e-Report* from 2003 to 2006.

Finally, Sean lives in Mesa, Arizona with his wife and four sons.

SPOKEO, INC. v. ROBINS

(Fair Credit Reporting Act; Standing)
Hearing Date: November 2, 2015
Opinion Date: May 16, 2016

Spokeo is an information-searching company that gathers public data and provides web-based reports about individuals. One such individual is Thomas Robins, who discovered that the information about his employment status, education, relatives, wealth and educational attainment were false. The Fair Credit Reporting Act (the "FCRA") requires that companies like Spokeo "follow reasonable procedures to ensure maximum possible accuracy" and provides for a private cause of action for consumers. As a result, Robins filed a class action lawsuit in federal court seeking $1,000 per violation (as set forth in the FCRA) on behalf of himself and all similarly-situated individuals, which could number in the millions.

Spokeo immediately moved to have the case dismissed on the grounds that Robins lacked standing to bring the case; notwithstanding the private right of action set forth in the FCRA. In short, Spokeo argued that Robins had suffered no injury in fact as a result of the incorrect information about him on Spokeo. And that, while Congress may set forth a specific monetary amount to simplify the damage assessment process under the FCRA, Congress' establishment of $1,000 per violation does not obviate the need for the plaintiffs to establish an injury in fact in the first place.

On appeal, the Ninth Circuit overturned the district court, ruling that Robins had claimed a particularized harm – that the false statements on his Spokeo report made it more difficult for him to obtain employment, creating financial, mental and emotional harm. Furthermore, the appeals court held that Congress' effort to redress this harm by establishing damages for each FCRA violation was permissible and not in conflict with the standing requirement.

Did the Supreme Court agree with the Ninth Circuit?

_ Yes, the Supreme Court affirmed, ruling that the plaintiffs suffered harm by virtue of the FCRA violation and that statutory damages are permissible in this case.

_ No, the Supreme Court reversed, ruling that *each* defendant must demonstrate a particularized harm to establish standing.

Vote Spread: _____

Points: _____

Total: _____

FOSTER v. CHAPMAN

(Equal Protection; Jury Selection)
Hearing Date: November 2, 2015
Opinion Date: May 23, 2016

In May 1987, Timothy Tyrone Foster, an African American defendant, was tried for one count of malice murder and one count of burglary. During voir dire, the prosecution used its peremptory strikes to remove all four of the black prospective jurors from the pool. Foster was later convicted and sentenced to death.

Years later, Foster's lawyers made an open records request to see the prosecutor's jury selection notes. They discovered that the names of the black potential jurors had been highlighted in green, prompting a *Batson* challenge. In *Batson v. Kentucky (1986)*, the Supreme Court ruled that excluding jurors on the basis of race violates the defendant's equal protection rights. However, the state defended its actions by attempting to demonstrate that the prosecutors had race-neutral reasons for striking these jurors.

The superior court ruled that the Foster did not meet his burden of proving that the strikes were racially-motivated. "The court finds the record evidence shows that every prospective juror, regardless of race, was thoroughly investigated and considered by the prosecution before the exercise of its peremptory challenges." As a result, it upheld Foster's conviction. The Georgia Supreme Court affirmed.

Did the Supreme Court agree with the Georgia Supreme Court?

_ Yes, the Supreme Court affirmed, giving deference to the prosecution's contention that the strikes were race-neutral.

_ No, the Supreme Court reversed, concluding that the, despite the prosecutions contentions, the strikes were, in fact, based on the jurors' race.

Vote Spread: _____

Points: _____

Total: _____

HARRIS v. ARIZONA INDEPENDENT REDISTRICTING COMMISSION

(Voting Rights Act; One Man, One Vote)
Hearing Date: December 8, 2015
Opinion Date: April 20, 2016

Arizona's constitution requires legislative districts to be redrawn every ten years by a five-member independent commission (the "Commission"). In doing so, the Commission must consider several specific criteria: the federal Constitution and the Voting Rights Act; creating districts with equal populations; creating districts that are geographically compact and contiguous; preserving groups of people with common bonds or interests, which are often racial or ethnic; adhering to geographic features such as municipal or city boundaries; and maintaining political competitiveness, as long as it will not undermine the other criteria. Taking such criteria into effect, it completed a redistricting plan following in the 2010 census.

Shortly thereafter, a group of Arizona voters filed a lawsuit in federal court challenging this redistricting plan, arguing that it was motivated by partisan considerations, namely securing political advantage for the Democrats. As a result, the plan violated the Equal Protection Clause of the 14th Amendment. Specifically, the plaintiffs contended that the Commission put too many voters in 16 Republican districts and too few voters in 11 Democratic districts. And in doing so, it violated the principle of "one man, one vote," which requires that each district have roughly the same number of voters so that each person's vote counts equally.

In a five-day bench trial, the Commission defended its actions by arguing that the "one man, one vote" principle doesn't require that each district have the same exact amount of voters and that minor deviations are allowed. And further, that these minor deviations were not the result of partisan wrangling, but rather to conform to the mandates of the federal Voting Rights Act.

A three-judge panel agreed with the Commission and ruled that the 2010 redistricting plan did not violate the plaintiffs' equal protection rights under the 14th Amendment.

Did the Supreme Court agree with the lower court?

_ Yes, the Supreme Court affirmed, concluding that slight deviations are permissible for purposes of complying with the Voting Rights Act.

_ No, the Supreme Court reversed, ruling that these deviations were impermissible gerrymandering.

Vote Spread: _____

Points: _____

Total: _____

FISHER v. UNIVERSITY OF TEXAS AT AUSTIN

(Affirmative Action; Equal Protection)
Hearing Date: December 9, 2015
Opinion Date: June 23, 2016

The University of Texas at Austin admits undergraduate students using the following process: Under its Ten Percent Plan, any Texas student who finishes in the top 10% of his/her high school graduating class is automatically admitted into the university. This accounts for 85% of its annual admissions. Students who do not qualify for admission under the Ten Percent Plan may still be admitted to the college and are judged on a number of criteria, one of which is race.

In 2007, Abigail Noel Fisher, a young white woman from Sugarland, Texas, applied to the college. She did not qualify under the Ten Percent Plan and was subsequently denied admission. In response, Fisher filed a lawsuit in federal court claiming that she had been discriminated against on the basis of her race because minority students with less impressive credentials had been admitted instead of her.

The district court denied Fisher's claim citing the Supreme Court's 2003 decision in *Grutter v. Bollinger*. In *Grutter*, the Court affirmed the University of Michigan Law School's admissions program, which also included race as one of many factors to be considered, because it is a "narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." The Fifth Circuit Court of Appeals affirmed this ruling.

On appeal to the Supreme Court during its 2012-2013 term, Fisher argued that the Ten Percent Plan has already resulted in a "critical mass" of diversity at the college and therefore, using race as a factor with respect to the remaining applicant pool was impermissible. Without ruling explicitly on this point, the Supreme Court remanded the case with instructions for the Fifth Circuit to apply strict scrutiny in judging the constitutionality of the policy. On remand, the Fifth Circuit once again upheld the university's affirmative action admission policy.

Did the Supreme Court agree with the Fifth Circuit?

_ Yes, the Supreme Court affirmed, concluding that the University of Texas at Austin may continue to use race as a factor in admissions.

_ No, the Supreme Court reversed, ruling that race may no longer be considered.

Vote Spread: _____

Points: _____

Total: _____

FRIEDRICHS v. CALIFORNIA TEACHERS ASSOCIATION

(First Amendment; Union Speech)
Hearing Date: January 11, 2016
Opinion Date: March 29, 2016

The California Teachers Association (the "CTA"), the public employee union for teachers in California, charges dues to its members to cover the costs of bargaining for higher pay and better working conditions (the "agency fee") and the costs of political activities on behalf of members. Also, as a result of the Supreme Court's ruling in *Abood v. Detroit Board of Education (1977)*, the CTA can assess the agency fee against non-members, who likewise benefit from the CTAs bargaining efforts. However, *Abood* did acknowledge the rights of non-members to opt-out of paying for a union's political activities, since forced subsidization of political speech would violate their 1st Amendment rights.

In April 2013, ten teachers and the Christian Education filed a lawsuit in federal district court, claiming that compelling them to pay even the agency fee is a violation of their 1st Amendment rights. In short, they argue that a public employee union's bargaining effort is inherently "political" as it involves an attempt to secure a greater allocation of scarce public resources for its employees. And, as a result, non-members should not be forced to subsidize such speech, unless they choose to do so. Furthermore, the plaintiffs requested the court strike down the current California requirement that non-members affirmative object to paying such "political fees." Instead, non-members should be presumed to be opted out of such fees, unlike they take affirmatively "opt-in" to pay for political activities.

The CTA moved to dismiss, arguing that its bargaining activities are not in fact "political," but rather merely an effort to secure the greatest employment benefits for its members. And since California state law makes all such employment benefits available to all public school teachers, even non-members, the CTA must have the ability to charge "free riders" the agency fee. The district court agreed with the CTA and dismissed the lawsuit. The Ninth Circuit affirmed the district court summarily.

Did the Supreme Court agree with the Ninth Circuit?

_ Yes, the Supreme Court affirmed, concluding that public employee union bargaining activities are not "political" and therefore, non-members can be assessed an agency fee.

_ No, the Supreme Court reversed, ruling these bargaining activities are political and/or non-members must opt-in to pay them.

Vote Spread: _____

Points: _____

Total: _____

HEFFERNAN v. CITY OF PATERSON

(Freedom of Speech; Freedom of Association)
Hearing Date: January 19, 2016
Opinion Date: April 26, 2016

Detective Jeffrey Heffernan was a twenty-year veteran police officer in Paterson, N.J. During the 2006 mayoral election, the incumbent mayor, who had the support of the chief of police (Heffernan's ultimate supervisor), was challenged by a former Paterson police officer and a friend of Heffernan. Notwithstanding their friendship, Heffernan did not work on the challenger's campaign. In fact, as a non-resident, Heffernan would not even vote in the election. However, one afternoon, while off duty, Heffernan went to the challenger's campaign center to pick up a yard sign for his bedridden mother. He was spotted holding the sign by a member of the mayor's security detail. The very next day, Heffernan was demoted to patrol officer.

He filed suit in federal district court, claiming that his superiors had demoted him because they mistakenly believed he was supporting the mayor's rival; and that this retaliation was a violation of his 1st Amendment rights to freedom of speech and freedom of association.

Surprisingly, the City of Paterson freely admitted that Heffernan's demotion was a direct result of its belief that he was supporting the mayor's political rival. The city then went further to acknowledge that its belief was mistaken. As a result, Heffernan was not in fact exercising his right to political speech. And therefore, the city could not have possibly violated 1st Amendment rights that Heffernan, by his own admission, had not actually exercised. The district court ultimately agreed and granted summary judgment to the defendant.

On appeal, Heffernan argued that the district court erred by basing its ruling on whether he had, in fact, been exercising his 1st Amendment rights. The proper inquiry should have been whether the city had acted with an improper motive (i.e., to retaliate against Heffernan for his perceived exercise of 1st Amendment rights). However, the Third Circuit disagreed and affirmed the district court.

Did the Supreme Court agree with the Third Circuit?

_ Yes, a public employer can only be held liable for retaliation when the employee was actually exercising constitutionally-protected rights.

_ No, the Supreme Court reversed, ruling that an employer may held liable based upon its i*ntent* to violate an employee's rights.

Vote Spread: _____

Points: _____

Total: _____

UTAH v. STRIEFF

(Fourth Amendment; Unlawful Stop)
Hearing Date: February 22, 2016
Opinion Date: June 20, 2016

In December 2006, an anonymous caller left a message on a police drug tip line reporting "narcotics activity" at a South Salt Lake City residence. Police officer Douglas Fackrell conducted intermittent surveillance of the residence over the next week and observed that there were frequent visitors who left within minutes of arriving at the residence.

Suspicious of this frequent short-term traffic, Officer Fackrell stopped one such visitor, Edward Strieff, as he left the house. Fackrell identified himself and began to question Strieff about possible drug activity at the house. During the course of this stop, Fackrell obtained Strieff's identification and ran a check that turned up an outstanding "small traffic warrant." Fackrell then arrested Strieff on the outstanding warrant and searched him incident to the arrest. During the search, the officer found a baggie of methamphetamine in Strieff's pockets.

Strieff was charged with unlawful drug possession. He moved to suppress the evidence seized in the search incident to his arrest, arguing that it was fruit of an unlawful investigatory stop. The prosecution conceded that Officer Fackrell had stopped Strieff without reasonable articulable suspicion but argued that the search had been conducted pursuant to an intervening circumstance (the discovery of a prior warrant), which *attenuated* the taint of the unlawful stop. The district court agreed and denied Strieff's motion to suppress and subsequent motion to reconsider. Strieff entered a conditional guilty plea, reserving his right to appeal the denial of his suppression motion.

The state court of appeals affirmed the lower court under the attenuation exception to the exclusionary rule. However, the Utah Supreme Court reversed the lower courts, concluding that the attenuation exception only applies to cases "involving an independent act of the defendant's 'free will' in confessing to a crime or consenting to a search."

Did the U.S. Supreme Court agree with the Utah Supreme Court?

_ Yes, the Supreme Court affirmed, ruling that the attenuation exception requires an action on the part of the defendant to attenuate the police misconduct.

_ No, the Supreme Court reversed, ruling that the discovery of a previous warrant attenuates an unlawful stop.

Vote Spread: _____

Points: _____

Total: _____

WILLIAMS v. PENNSYLVANIA

(Due Process; Judicial Recusal)
Hearing Date: February 29, 2016
Opinion Date: June 9, 2016

In February 1986, Terrance Williams was convicted of his second homicide and was sentenced to death. Years later, Williams challenged his death sentence on the ground that the victim had sexually abused him and that prosecutors were aware of this history of abuse, but withheld that information, all the while making contrary statements to the court. On state collateral review, the court sided with Williams, holding that exculpatory evidence had been suppressed in violation of his *Brady* rights.

The case then reached the Supreme Court of Pennsylvania, which was, at that time, headed by Chief Justice Ronald Castille. At the time of William's prosecution, Castille had been the district attorney of Philadelphia and had personally signed off on the decision to seek the death penalty. Williams requested that Castille recuse himself, but because the actions of his former office were "on trial" in the matter. However, Castille refused on the ground that his own involvement in the Williams's prosecution was limited to signing off on the memorandum prepared by his assistant district attorneys and therefore, he could decide the matter without improper bias. The Supreme Court of Pennsylvania then went on to unanimously reverse the collateral review court and reinstate Williams' death penalty.

On appeal to the U.S. Supreme Court, Williams argues that Castille's refusal to recuse himself is a denial of due process and therefore, entitles Williams to a new hearing before the current state supreme court, from which Castille has retired. But the state argues that Castille's role in the original prosecution was minimal and even if due process required recusal, Castille's refusal to do so in this case was "harmless error" since the decision to reinstate Williams' conviction was unanimous.

Did the U.S. Supreme Court agree with the Supreme Court of Pennsylvania?

_ Yes, the Supreme Court affirmed, ruling that the Chief Justice's participation did not create an impermissible bias.

_ No, the Supreme Court reversed and remanded to the state high court for a post-conviction relief hearing on the merits.

Vote Spread: _____

Points: _____

Total: _____

WHOLE WOMAN'S HEALTH v. HELLERSTEDT

(Right of Privacy; Abortion Access)
Hearing Date: March 2, 2016
Opinion Date: June 27, 2016

In 2013, Texas – despite a well-publicized filibuster by state senator Wendy Davis – passed a law known as H.B. 2. In part, the law requires (1) physicians who perform abortions to have admitting privileges at a hospital no more than thirty miles from the clinic; and (2) abortion clinics to have facilities equal to an outpatient surgical center. Several Texas clinics went to court, seeking to block the law.

In federal district court, Texas maintained that it enacted the law to protect the health of its female residents who seek abortions. The clinics countered that the law was actually enacted for the purpose of shutting down abortion clinics, three-quarters of which could not comply with the new requirements under the law. The district court agreed with the clinics and enjoined enforcement of these two provisions of the law.

However, on appeal, the Fifth Circuit reversed, upholding the Texas law as a permissible exercise of the state's power to protect the health of its residents. And that despite the clinics' arguments about the efficacy of the law or the ability to accomplish its purposes in a less restrictive manner, Texas lawmakers were entitled to deference provided that there was a *rational basis* for the law.

On appeal to the Supreme Court, the clinics argue that passing the rational basis test is not enough, citing *Planned Parenthood v. Casey*, a case challenging the constitutionality of Pennsylvania's efforts to restrict abortions by requiring married woman to notify their husbands and requiring minors to get parental consent before having an abortion. In overturning these restrictions, the Supreme Court ruled that a state may not impose "undue burdens" which would create a "substantial obstacle" for a woman seeking an abortion.

Did the Supreme Court agree with the Fifth Circuit?

_ Yes, the Supreme Court affirmed, ruling that the Texas restrictions do not impose an undue burden.

_ No, the Supreme Court reversed, ruling that the Texas law creates substantial obstacles to obtaining an abortion and therefore, it is unconstitutional.

Vote Spread: _____

Points: _____

Total: _____

ZUBIK v. BURWELL

(Obamacare; Religious Freedom; Contraceptive Mandate)
Hearing Date: March 23, 2016
Opinion Date: May 16, 2016

This is one of seven consolidated cases challenging the Affordable Care Act ("ACA" or "Obamacare"). The ACA requires, among other things, that employers over a certain size provide their employees with health care coverage offering "preventative services"; one of which is birth control. Employers who fail to provide qualifying coverage to their employees would be subject to daily fines on a per-employee basis, which could run into the millions of dollars for larger employers.

From the outset, religious entities objected to being required to provide or subsidize contraceptives, the use of which violates their religious teachings. To accommodate these concerns, the administration agreed to an exemption for religious institutions, allowing them to provide plans that do not cover contraceptives. In turn, the government would arrange for free contraceptive coverage to be provided for these employees outside of the employers' healthcare plan. In 2014, in *Burwell v. Hobby Lobby Stores*, the Supreme Court ruled that even for-profit entities must be provided this exemption to contraceptive coverage when such coverage would violate the religious beliefs of its owners.

In light of the foregoing, the Obama administration formulated rules allowing entities to opt-out of contraceptive coverage for their employees by providing the government written notice of their intent to opt-out. The government would then step in to provide contraceptives to covered employees. These new regulations were immediately challenged under the Religious Freedom Restoration Act ("RFRA") as imposing a "substantial burden" on their exercise of religious belief because the act of providing written certification to the government triggers the contraceptive coverage for employees, making the employer complicit in a process that is contrary to its religious views.

> How will the Supreme Court rule on the question of whether requiring an employer to affirmatively opt-out of contraceptive coverage imposes a substantial burden on the exercise of that employer's religious beliefs?
>
> _ The affirmative opt-out requirement violates RFRA by creating a substantial burden where less restrictive means are available to fulfill the government's interests.
>
> _ The affirmative opt-out requirement does NOT violate RFRA.

BETTERMAN v. MONTANA

(Sixth Amendment; Speedy Trials)
Hearing Date: March 28, 2016
Opinion Date: May 19, 2016

Pursuant to charges of felony partner or family member assault, Betterman was ordered to appear in a Montana court on December 8, 2011. Betterman failed to appear, but did turn himself two months later. On March 15, 2012, he was sentenced for the underlying assault and given five years in prison, with two years suspended. One next month later, Betterman was back in court to plead guilty to felony bail jumping. Pending sentencing on the bail jumping charge, Betterman was remanded to the local jail, where he resided for the next 14 months. Finally, in June 2013, he was sentenced to seven years on the bail jumping charge, four years suspended, and to run *consecutive* to the underlying assault sentence.

On appeal to the Montana Supreme Court, Betterman challenged his conviction for bail jumping on the grounds that he had been delayed a speedy trial as required by the Sixth Amendment. Furthermore, Betterman argues that housing him in the local jail (as opposed to state prison) during his unconstitutionally long wait for sentencing, prevented him from meeting the requirements for conditional release on the underlying assault conviction.

In opposition, Montana argued that the Sixth Amendment only provides the right to a speedy *trial*, and not a speedy sentencing. And therefore, the delay was not unconstitutional and the bail jumping (and underlying assault) sentences should be upheld.

The Montana Supreme Court disagreed, concluding that the Sixth Amendment guarantee did extend to the sentencing. However, it concluded that the delay in sentencing was not purposeful or oppressive, but rather "institutional." It further concluded that the prejudice to Betterman from this delay was neither substantial or demonstrable. As a result, the court upheld the convictions.

Did the Supreme Court agree with the Montana Supreme Court?

_ Yes, the Supreme Court affirmed, ruling that the constitutional violation, if any, was not substantial or demonstrable enough to warrant overturning the sentences.

_ No, the Supreme Court reversed, ruling that this constitutional violation did warrant overturning the sentences.

Vote Spread: _____

Points: _____

Total: _____

UNITED STATES v. TEXAS

(Immigration; Executive Orders)
Hearing Date: April 18, 2016
Opinion Date: June 23, 2016

In November 2014, after years of being able to forge an agreement on immigration reform with Congress, President Obama issued a series of executive orders, which became known as Deferred Action for Parents of Americans and Lawful Permanent Residents ("DAPA"). DAPA defers the compelled deportation of certain undocumented immigrants, many of whom are parents of children who have a legal right to remain in the U.S. The parents would not gain U.S. citizenship, but would be allowed to remain in the country without legal status and could get a job and access to public benefits, such as driver's licenses.

Twenty-six (26) states then joined together to file a lawsuit challenging the legality of DAPA. Specifically, they challenged DAPA as being: (1) "arbitrary and capricious" in violation of the Administrative Procedure Act; and (2) subject to the notice and comment procedures of the APA before it can take effect. The district court, while not ruling fully on the merits, determined that the plaintiffs had a strong likelihood of success and issued a temporary injunction to keep DAPA from going into effect.

On appeal to the Fifth Circuit, the Obama administration argued that the states don't have standing to challenge federal action that will not cause direct harm to the states. In response, the states argued that Texas would suffer harm because it would bear the financial burden of issuing driver's licenses to individuals who would have otherwise been deported. The Obama administration also argued that the deferments under DAPA were not justiciable because they simply represent prosecutorial discretion, something not usually subject to review. But the states countered that DAPA provides more than simply a guideline for prosecutorial discretion, but rather provides "lawful presence" to those who would otherwise not have such a status under duly-enacted law. On both counts, the Fifth Circuit sided with the states and upheld the injunction against DAPA.

Did the Supreme Court agree with the Fifth Circuit?

_ Yes, the Supreme Court affirmed, ruling that the President exceeded his authority in issuing DAPA.

_ No, the Supreme Court reversed, holding that DAPA is well within the President's executive powers.

Vote Spread: _____

Points: _____

Total: _____

BERNARD v. MINNESOTA

(Fourth Amendment; DUI Tests)
Hearing Date: April 20, 2016
Opinion Date: June 23, 2016

On August 5, 2012, the Saint Paul police received a report that three intoxicated men were attempting to get a boat out of the water at a local boat launch and had gotten their truck stuck in the river. When police arrived at the boat launch, they found the truck and the three men, one of whom was William Robert Bernard. Bernard was in his underwear and he smelled of alcohol and had bloodshot, watery eyes. He admitted to police that he had been drinking, but denied driving the truck, despite the fact that he was holding the keys to the truck in his hand at the time. The officers attempted to conduct a field sobriety test on Bernard, but he declined.

The officers arrested Bernard on suspicion of DWI and took him to the police station. Once there, the officers read him his rights and informed him that state law required him to take a chemical test, and that refusal to take a test was a crime. Nevertheless, Bernard refused to submit to a chemical test. As a result, he was charged with two counts of first-degree test refusal.

At trial, he moved to dismiss, arguing that the test refusal statute violates due process because it makes it a crime to refuse an unreasonable, warrantless search. The trial judge disagreed that the test refusal law was unconstitutional, but nonetheless, dismissed the charges on the grounds that the officers had no lawful basis upon which to conduct a warrantless search in the first place.

However, the appeals court reversed, holding that the officers did have probably cause to conduct the search and therefore, Bernard's refusal to consent to a breathalyzer test was punishable under the state's test refusal law. The Minnesota Supreme Court affirmed the appeals court, ruling that a breathalyzer test would have been constitutional as a search incident to a valid arrest and the test refusal law satisfied due process as a reasonable means to a permissible objective.

Did the Supreme Court agree with the Minnesota Supreme Court?

_ Yes, the Supreme Court affirmed, ruling that the refusal to take a breathalyzer test can be punished as a crime.

_ No, the Supreme Court reversed, ruling that motorists have a right to refuse warrantless searches, absent some exigent circumstances.

Vote Spread: _____

Points: _____

Total: _____

MCDONNELL v. UNITED STATES

(Political Corruption; Bribery)
Hearing Date: April 27, 2016
Opinion Date: June 27, 2016

In 2014, former Virginia Governor Bob McDonnell was indicted on charges of corruption, fraud and conspiracy in connection with accepting more than $177,000 in cash, loans and gifts from local businessman Jonnie Williams. Williams wanted the state's public universities to perform research studies on his company's nutritional supplement. Towards tthat end, Gov. McDonnell arranged meetings between Williams and other state officials to discuss the product, hosted events for Williams' company at the Governor's Mansion and contacted other government officials concerning the desired research studies. After a very public trial, McDonnell was convicted and sentenced to two years in prison.

Specifically, he was convicted of violating the federal bribery statute (18 USC 201(b)(2)(a)), which makes it a crime for public officials to demand or receive anything of value in return for the performance of any "official act." On appeal to the Fourth Circuit, he argued that the trial judge erred in not clearly instructing the jury as to the definition of "official act" as set forth in the bribery statute:

"[The] term 'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit."

McDonnell argued that none of the five "official acts" alleged by the prosecution meets this definition of "official act." And while McDonnell certainly attempted to use his influence on behalf of his benefactor, he never went so far as to "put his thumb on the scale" through any official act in his capacity as the Governor of Virginia. Notwithstanding the foregoing, the Fourth Circuit was not convinced by this argument and upheld his conviction.

Did the Supreme Court agree with the Fourth Circuit?

_ Yes, the Supreme Court affirmed, ruling that setting up meetings and hosting events are enough to trigger the federal bribery statute.

_ No, the Supreme Court vacated the convictions, holding that these actions are not "official acts" within the meaning of the statute.

Vote Spread: _____

Points: _____

Total: _____

YELP, I'VE FOR SOCIAL MEDIA AND I CAN'T LINKEDOUT

The Ethical Pitfalls of Social Media

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INTRODUCTION

Some lawyers are wary of social media and have largely avoided using some of the most common platforms – Facebook, Twitter and LinkedIn. However, social media encompasses more than just the "Big Three." Merriam-Webster's online dictionary defines the term as:

> "Forms of electronic communication through which users create online communities to share information, ideas, personal messages, and other content."

As you can see, the operative word in the phrase is **social**. It encompasses any exchange of information that happens through an electronic medium. Therefore, unless a lawyer can conduct her practice solely by means of face-to-face or pen-to-paper interactions, she is going to use social media to some extent. In fact, there is a strong argument that it is unethical to not be engaged in social media.

For example, one of lawyer's most basic duties is to provide "competent representation."

RULE 1.1: COMPETENCE

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

It is difficult to argue that one can stay truly abreast of changes in the law without reading practice blogs, electronic bar newsletters and/or trade listservs. In today's fast-paced society, it is no longer possible to stay "on the cutting edge" by relying on the monthly bar journal and the local bar association's annual legal developments seminar.

That being said, social media does create a number of potential ethical pitfalls that lawyers must be careful to avoid.

CONFIDENTIALITY

Social media is a great tool to communicate our whereabouts and activities. However, as lawyers, we have an ethical obligation to not communicate information concerning our clients. As a result, we must be careful to avoid communications that explicitly, or even implicitly, will reveal information about our clients. In some cases, even communicating the existence of a lawyer-client relationship can reveal sensitive information about the client, such as when the attorney specializes in an area of law, such as divorce law, white collar criminal defense, etc. And in all cases, we must avoid providing enough "clues" for others to ascertain confidential information.

RULE 1.6: CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by division (b) or required by division (c) of this rule.

(c) A lawyer shall reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law, to the extent the lawyer reasonably believes necessary to comply with Rule 3.3 or 4.1.

[4] Division (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

In some situations, a lawyer may reveal confidential client information, such as to "establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client," as provided under Rule 1.6(b)(5). However, even in such a case, the lawyer must only make such disclosures in the appropriate legal forum and not on social media.

In most jurisdictions, it is still an open question as to how far lawyers must go to make "reasonable efforts" to prevent inadvertent or unauthorized disclosure. However, with the ease that information can be disseminated online, it is more incumbent than ever for attorneys to remind their paralegals, secretaries and others

about their duties of confidentiality to the client, as a breach of this duty can be imputed to the lawyer:

RULE 5.3: RESPONSIBILITIES REGARDING NONLAWYER ASSISTANCE

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Ohio Rules of Professional Conduct if engaged in by a lawyer if either of the following applies:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;

(2) the lawyer has managerial authority in the law firm or government agency in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

CLIENT COMMUNICATIONS

Perhaps the greatest single source of discontent among clients is a lawyer's failure to communicate with the client in accordance with Rule 1.4:

RULE 1.4: COMMUNICATION

(a) A lawyer shall do all of the following:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, division (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. Client telephone calls should be promptly returned or acknowledged.

Lawyers who employ multiple social media platforms to communicate with clients increase their risk of breaching this most important duty. Simply put, the lawyer who initiates and/or accepts client communications through multiple sources (e.g., e-mail, Twitter, LinkedIn, Facebook, and Skype) has created a duty to regularly check *each* of these sources for incoming client communications.

Finally, lawyers should be careful to avoid unwittingly creating a lawyer-client relationship by virtue of such communications with prospective client. This is easier said than done because there can be a very fine line between providing "friendly advice" and "legal representation" and that line can become especially blurry online.

The line was perhaps best delineated in the landmark case of *Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686,1980 Minn.* In this case, Joan Togstad met with an attorney at his offices to discuss the possibility of bringing a medical malpractice action against her physician. The attorney told her that she didn't have much of a case. She later learned that she did have a valid claim, but by then, the statutes of limitation had expired. So Togstad sued the lawyer for *legal* malpractice instead. In his defense, the lawyer claimed that he had never established an actual attorney-client relationship with the plaintiff. However, the Minnesota court disagreed, holding:

> "[A]n attorney-client relationship is created whenever an individual seeks and receives legal advice from an attorney in circumstances in which a reasonable person would rely on such advice."

In the *Togstad* case, it was deemed reasonable for the plaintiff to rely on legal advice she received from an attorney in his actual law offices. It is less clear whether relying on advice in the comments to a Facebook post would be deemed "reasonable." However, a court might find it reasonable for someone to rely on legal advice they receive from a reply to a lawyer's blog post under the theory that a lawyer's blog is his "online office" – the place at which he regularly conducts client intakes.

And the danger of unwittingly creating attorney-client relationships also subjects the lawyer to the risk of committing the unauthorized practice of law in situations in which the "client" is out-of-state.

RULE 5.5 UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(b) A lawyer who is not admitted to practice in this jurisdiction shall not do either of the following:

(1) except as authorized by these rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

IMPROPER CONTACTS

Judges, Jurors and Third Parties

Rules 3.5, 4.2, and 4.3 place significant limits on a lawyer's permissible contacts with judges, jurors and third parties. Needless to say, contacts made through social media platforms are not exempt from these restrictions.

RULE 3.5 IMPARTIALITY AND DECORUM OF THE TRIBUNAL

(a) A lawyer shall not do any of the following:

(1) seek to influence a judicial officer, juror, prospective juror, or other official by means prohibited by law;

(2) lend anything of value or give anything of more than de minimis value to a judicial officer, official, or employee of a tribunal;

(3) communicate ex parte with either of the following:

(i) a judicial officer or other official as to the merits of the case during the proceeding unless authorized to do so by law or court order;

(ii) a juror or prospective juror during the proceeding unless otherwise authorized to do so by law or court order.

(4) communicate with a juror or prospective juror after discharge of the jury if any of the following applies:

(i) the communication is prohibited by law or court order;

(ii) the juror has made known to the lawyer a desire not to communicate;

(iii) the communication involves misrepresentation, coercion, duress, or harassment;

RULE 4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

RULE 4.3 DEALING WITH UNREPRESENTED PERSON

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Romantic Advances

The conflict of interest rules specifically address the dangers of lawyers becoming romantically involved with participants in the legal process. Rule 1.8(j) specifically prohibits romantic relationships with clients. And more generally, Rule 1.7(a) prohibits a lawyer from undertaking any representation where "there is a significant risk that the representation … will be materially limited by … a personal interest of the lawyer." Needless to say, a lawyer who is romantically involved with the opposing party, opposing counsel, the judge or material witnesses will be materially limited in his or her ability to fully represent the client.

A lawyer's decision to employ social media platforms as a way to facilitate such a romantic relationship is not particularly relevant for these purposes. However, the use of social media makes such activities more easily discoverable by inquiring parties. Moreover, innocent or perhaps even "playful" interactions can be misconstrued from reading a text transcript.

RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS

(a) A lawyer's acceptance or continuation of representation of a client creates a conflict of interest if either of the following applies:

(1) the representation of that client will be directly adverse to another current client;

(2) there is a substantial risk that the lawyer's ability to consider, recommend, or carry out an appropriate course of action for that client will be materially limited by the lawyer's responsibilities to another client, a former client, or a third person or by the lawyer's own personal interests.

RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

IMPROPER INVESTIGATIONS

In an attempt to investigate factual claims relevant to the representation, a lawyer may not use any artifice of fraud or deceit in an attempt to ascertain information, such as posing as another person online.

RULE 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly do either of the following:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

RULE 8.4 MISCONDUCT

It is professional misconduct for a lawyer to do any of the following:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

In the same vein, a lawyer may not conceal or destroy (or counsel others to conceal or destroy) relevant information contained on social media sites that are subject to a court order.

RULE 3.4 FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not do any of the following:

(a) unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on a good faith assertion that no valid obligation exists;

(d) in pretrial procedure, intentionally or habitually make a frivolous motion or discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence or by a good-faith belief that such evidence may exist, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused;

(f) [RESERVED]

(g) advise or cause a person to hide or to leave the jurisdiction of a tribunal for the purpose of becoming unavailable as a witness.

IMPROPER ANNOUNCEMENTS

Pending Litigation

In some cases, a lawyer will be under strict orders from the court to avoid discussing a pending legal matter in the "media." Most often, this prohibition will also apply to "social media." Furthermore, even without a specific judicial order, it may violate client confidentiality or materially prejudice the proceeding to post documents, videos or other evidence to social media websites or to "live blog" judicial proceedings.

RULE 3.6 TRIAL PUBLICITY

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Criticism of Judges

Rule 8.2 prohibits lawyers from making knowingly false and reckless statements about a judge's qualifications or integrity. This prohibition obviously applies to blog posts. It also applies to seemingly fleeting Tweets and Facebook status updates.

RULE 8.2 JUDICIAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judicial officer, or candidate for election or appointment to judicial office.

(b) A lawyer who is a candidate for judicial office shall not violate the provisions of the Ohio Code of Judicial Conduct applicable to judicial candidates.

Marketing

Social media can be a powerful marketing tool for lawyers. However, we must be mindful that there are lawyer-specific limitations on how we may use this medium. For example, we may not use some forms of social media to solicit legal work, except from those whom we already have a personal or business

relationship. Likewise, in those cases where it is allowed, we may be required to provide certain written disclosures.

RULE 7.3 SOLICITATION OF CLIENTS

(a) A lawyer shall not by in-person, live telephone, or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless either of the following applies:

(1) the person contacted is a lawyer;

(2) the person contacted has a family, close personal, or prior professional relationship with the lawyer.

(b) A lawyer shall not solicit professional employment by written, recorded, or electronic communication or by in-person, telephone, or real-time electronic contact even when not otherwise prohibited by division (a), if either of the following applies:

(1) the person being solicited has made known to the lawyer a desire not to be solicited by the lawyer;

(2) the solicitation involves coercion, duress, or harassment;

(3) the lawyer knows or reasonably should know that the person to whom the communication is addressed is a minor or an incompetent or that the person's physical, emotional, or mental state makes it unlikely that the person could exercise reasonable judgment in employing a lawyer.

(c) Unless the recipient of the communication is a person specified in division (a)(1) or (2) of this rule, every written, recorded, or electronic communication from a lawyer soliciting professional employment from anyone whom the lawyer reasonably believes to be in need of legal services in a particular matter shall comply with all of the following:

(1) Disclose accurately and fully the manner in which the lawyer or law firm became aware of the identity and specific legal need of the addressee;

(2) Disclaim or refrain from expressing any predetermined evaluation of the merits of the addressee's case;

(3) Conspicuously include in its text and on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication the recital - "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY."

Furthermore, even in cases in which lawyers may communicate about our services, we must do so with the upmost honesty. In fact, while civil law usually only requires marketers to be factual in their claims, the rules of legal ethics require lawyers to be "truthful." The best illustration of the difference between fact and truth comes from Dr. Martin Luther King:

> *"A fact is the absence of contradiction. The truth is the presence of coherence."*

RULE 7.1 COMMUNICATIONS CONCERNING A LAWYER'S SERVICES

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

[1] This Rule governs all communications about a lawyer's services, including advertising permitted by Rule 7.2. Whatever means are used to make known a lawyer's services, statements about them must be truthful.

[2] Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

[3] An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead the public.