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WHERE THE LEGAL COMMUNITY CONNECTS

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Delayed Attestation: When Witnessing Occurs After Execution of a Will

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For those needing a refresher on their law school Decedents' Estates course, witnesses do *not* need to sign the will at the same time the testator does, however, they must sign within a "reasonable time."

What is a reasonable time?

In *In re Estate of Jung*, the court held that "the language of [A.R.S. § 14-2502] does not limit that reasonable time to a time before the decedent's death and the comment to the [Uniform Probate Code "UPC"] provision on which it is based expressly notes that a witness signing after the testator's death is not prohibited."

In *Jung*, the time between the date of the signing (and witnessing of the signing) and the date of the witness signing the will was less than 40 days. The court held that the witness must sign "within a reasonable time after witnessing the testator's signature or acknowledgment of the will." The court in *Jung* confirmed that the issue of what is a "reasonable time" is an issue of fact.

The issue of a "reasonable time" was addressed in an unpublished memorandum decision in *In re Estate of Trinka*, where the court of appeals held that "reasonable time" was not always a question of fact and a 400-day delay was unreasonable as a matter of law. *Trinka*, in addition to being unpublished, is not terribly useful on its facts to generate a rule. The decedent in *Trinka* died one day after he executed a will, but the proponent of the will did not provide evidence to support that he was a witness until over a year later.

The *Trinka* court relied on the New Jersey Supreme Court's decision in *In re Estate of Peters*, for the proposition that the delay was unreasonable. *Peters* falls in line with a series of cases that reject post-death attesta-

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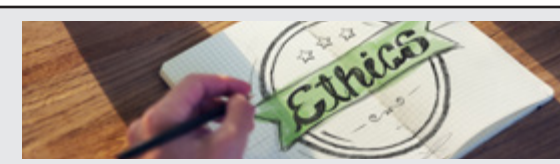
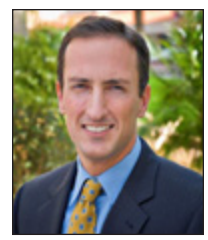
Q&A



LAWYER LIABILITY AND ETHICS

Skunks, Lawyers, and Videotape



Joseph Brophy

Abraham Lincoln once quipped: "What kills a skunk is the publicity it gives itself." In a similar vein, the last words my Marine Corps drill instructor, SSgt. Derrick Pipkin, ever said to us before he walked out the door of the squad bay on the last day of boot camp were, "Don't do anything stupid when you get to the fleet. And if you do something stupid, don't record it or take pictures." These were wise men. A recent case out of Orange County, California, illustrates what happens when lawyers ignore these rules. This can also be filed under this column's ongoing documentation of the perils of social media in the legal profession.

Lawyer was retained to represent a gastroenterologist in a medical malpractice suit arising out of the death of a patient in the doctor's care. The decedent's family claimed that the doctor's negligent insertion of a feeding tube resulted in damage to the decedent's colon, which in turn resulted in sepsis and death. At trial, Lawyer argued that the mistakes of other hospital staff and the decedent's history of excessive alcohol consumption were the cause of death, and that the medical examiner's conclusion regarding cause of death was wrong. Lawyer obtained a defense verdict for his client after a mere 26 minutes of jury deliberation. Then things went south for Lawyer and client alike.

Lawyer decided to exercise his bragging rights in front of an audience back at the office and to have someone film the festivities. In addition to having one of his partners ring a "victory bell" in front of a room full of coworkers (the firm had a bell mounted on the wall), Lawyer provided the following succinct summary of what the case was about: "A guy that was probably negligently killed, but we kind of made it look like other people did it. And we actually had a death certificate that said he died in the very way the plaintiff said he died." Then, for reasons that are not clear from the court's record, someone at Lawyer's firm decided it was a good idea to post the video to the firm's Instagram page.

The firm removed the video from Instagram, but not before the video spread across the California legal community and plaintiff's counsel preserved the video and included it in a motion for new trial. The motion provided a wide array of reasons a new trial should be granted (none of them particularly persuasive), but one that caught the court's attention was the argument related to the video. Plaintiff's counsel argued that Lawyer was not just celebrating a victory in a case where someone was dead, but rather the fact that he and his team were able to trick the jury into believing something that was not true. This argument was made as though the losing side in a trial thinking the jury was tricked into believing something that was not true is an unusual event.

Lawyer argued that his words on video were "imprecise," the video was not material to the verdict and that it was a hyperbolic celebration made to recognize the work his colleagues put into the case rather than a commentary on the merits. Moreover, the video itself was not the kind of "newly discovered evidence" that would justify a new trial. In fact, Lawyer argued, statements by counsel are not evidence at all.

Citing Lawyer's remarks on the video as "very important" to his decision, Judge James Crandall granted the motion for new trial. Judge Crandall felt that saying "a guy was probably negligently killed" and "we kind of made it look like other people did it," was an admission of negligence. Moreover, it was not the bragging that was the problem, it was "bragging that justice wasn't done, that's what bothers the court." Judge Crandall, af-

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THE BULLETIN BOARD

News from the legal community

The *Maricopa Lawyer* invites members to send news of moves, promotions, honors and special events to post in this space. Photos are welcome. Send your news to maricopalawyer@maricopabar.org.

GALLAGHER & KENNEDY

Randy E. Brogdon

Gallagher & Kennedy is pleased to welcome back **Randy E. Brogdon** to its environmental department. Brogdon began his legal career at G&K in 1995 until 2001 when he relocated to Atlanta, Georgia, and began working at Troutman Pepper.

Brogdon's national practice includes representation of electric utilities, chemical companies, manufacturing facilities, major airlines, mining operations, landfills, and other industry sectors in environmental regulation, transactions, audits, and litigation. His specialty is developing comprehensive environmental compliance strategies and implementing best practices to reduce risk. Working with national companies, Brogdon advises on air and water quality permitting and compliance, environmental mergers and acquisitions, responding to notices of violation, negotiating consent decrees, and resolving compliance issues with states, environmental groups, EPA Regions, and the Department of Justice.

Before returning to G&K, Brogdon worked at Troutman Pepper for 21 years and served as Practice Group Leader for its environmental and natural resources group—one of the largest in the country—for almost 10 years. In his leadership capacity, Brogdon diversified the team's client base and helped grow the practice from approximately 25 attorneys in three U.S. offices to over 40 attorneys in eight U.S. offices. ■

BULLETIN BOARD POLICY

If you are an MCBA member and you've moved, been promoted, hired an associate, taken on a partner, or received a promotion or award, we'd like to hear from you. Talks, speeches (unless they are of national stature), CLE presentations and political announcements are not accepted. In addition, the Maricopa Lawyer will not print notices of honors determined by other publications (e.g., Super Lawyers, Best Lawyers, etc.). Notices are printed at no cost, must be submitted in writing and are subject to editing. Items are printed as space is available. News releases regarding lawyers who are not MCBA members in good standing will not be printed. ■

MEMBER SPOTLIGHT

JAY WHITE

First Legal

HOW LONG HAVE YOU BEEN A MEMBER OF THE MCBA?

I originally joined in 2014 and was a member until I moved to California. I joined again as soon as I moved back this April. It's a given, if I am in AZ I will be a member.

HAVE YOU EVER BEEN INVOLVED WITH ANY SECTIONS OR DIVISIONS?

I have not yet served on a MCBA section or division, but am looking to do so next term. Being involved in the community is important to me and I have previously served on the AZ Bar Technology Committee and am serving my second stint as President of the AZ Chapter for the Association of eDiscovery Specialist.

HOW LONG HAVE YOU BEEN PRACTICING IN YOUR FIELD?

21 years

WHAT WAS YOUR FIRST AREA OF PRACTICE?

Intellectual Property Litigation

WHAT DO YOU SEE AS THE FOCUS FOR THE MCBA THIS YEAR?

Hopefully reuniting the community in person.

WHAT ISSUES DO YOU SEE FACING THE LEGAL COMMUNITY IN ARIZONA?

I believe Arizona, as with most of the country, has a way to go in educating the legal community on Information Governance and eDiscovery. Technology is here to make litigation easier and more cost effective and many believe the opposite.

IF YOU HADN'T BEEN A CERTIFIED EDISCOVERY SPECIALIST WHAT ELSE WOULD YOU BE?

I would have been a race car driver.

IF YOU COULD BE ANY FICTIONAL CHARACTER—ON TV, IN BOOKS, IN MOVIES—WHO WOULD IT BE AND WHY?

There is a character in a series of books by David Baldacci, Amos Decker. Amos has a condition called hyperthymesia, it is a rare condition that makes him unable to forget anything. Drawing upon my fairly good memory and building on facts has allowed me the successes I have had. If I were Amos Decker, I could use a perfect memory to accomplish just about anything.

WHAT'S THE STRANGEST JOB YOU'VE EVER HELD?

Between high school and college, I had a summer job as a tire thrower. It was a job loading tires in transport trucks. We got paid $0.10 per tire. Mostly car tires, but at times we would get big rig tires, lawn mower tires, and everything in between. The younger guys, like I was at the time, could make a few hundred dollars by lunch time and head home, it was quite the experience. ■

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ter telling Lawyer he was a good lawyer with a good reputation, concluded with this gem: "But good men make mistakes. The pope goes to confession." It's a great line, but you will not find it in the rules of evidence or civil procedure.

This ruling presents a number of questions. Lawyer arguably violated some ethical rules, such as ER 1.6 (the duty of confidentiality prohibits discussing the facts of your client's case on social media) and 8.4 (conduct prejudicial to the administration of justice), although neither the court nor plaintiff suggested any ethical rules were broken. However, ER 1.6 does not exist to ensure a lawyer's opponent gets a fair trial, invoking the ethical rules in situations where a judicial proceeding is not affected or absent an injured client is problematic, and the rules of professional conduct are rarely (if ever) used as a substitute for the rules of civil procedure or evidence.

Moreover, whether ethical rules were violated would seem to be very separate questions from what the jury evidently felt was compelling evidence that the doctor did nothing wrong. Should the client suffer the consequences of his lawyer being braggadocious and self-aggrandizing, particularly when there is no suggestion that the client authorized or endorsed Lawyer's statements? Are the post-trial statements of counsel really the kind of "new evidence" that courts should consider when deciding to grant a motion for new trial—unsworn statements by a non-party with no personal knowledge as to the facts of the case or expertise on the medical issues? Neither the judge nor the plaintiff cited precedent to support their position.

Perhaps recognizing the injustice to the defendant or the fact that he was skating on thin ice in terms of precedent and legal authority, Judge Crandall also threw in additional grounds for his ruling—the 26-minute deliberation time (the judge suggested the jury did not seem to review the evidence) and a mid-trial break of a couple weeks to accommodate the schedule of defense counsel (the judge thought this perhaps affected the jury's recall of the evidence during deliberations). Defendant promptly fired Lawyer and filed an appeal, so this will not be the end of the matter. Until the California Court of Appeals weighs in, it's probably best to keep your victory celebrations low key and off social media. ■

Joseph Brophy is a partner with Jennings Haug Keleher McLeod in Phoenix. His practice focuses on professional responsibility, lawyer discipline and complex civil litigation. He can be reached at JAB@jhkmlaw.com.