

WINTER 2007/2008 ISSUE

RESPONDING TO RETAIL THEFT

A Pennsylvania shopper's mistake led not only to her arrest for shoplifting but also to lengthy litigation about the legal limits on how retailers should respond to shoplifting.

The shopper was drawn to an elaborate display of luxury chocolates in a department store. Assuming that an open box was there for customers to sample, the shopper ate two of the chocolates. Security employees observed the shopper eating the chocolate on a video security camera. They approached her and asked her to go with them to the security office.

In the office, the security employees handcuffed the shopper to a table, searched the shopper's purse, patted her down, and took her identification. They then filled out a report identifying the chocolate as shoplifted and asked the shopper to sign it. The shopper requested the removal of the handcuffs, refused to sign the form as written, and asked to see a store manager.

The manager joined the security employees briefly but declined to order the removal of the handcuffs, stating that store policy required that all suspected shoplifters be handcuffed during questioning. The employees photographed the shopper, over her objections, and the shopper was kept in the security office for 50 minutes. She finally signed the admission form but scratched out her signature before leaving the office.

The store never filed criminal shoplifting charges. However, the shopper sued the store for unlawful imprisonment and battery.

Retail Theft Act

Pennsylvania's Retail Theft Act provides clear guidance to retail stores on how their employees may respond to shoplifting. When a store's security force has probable cause to believe that a person has stolen merchandise, the security force may detain the suspect in a reasonable manner, for a reasonable time, on or off the store premises.

The detention of a suspect must serve one or more of a list of purposes set out in the Act. They include detention:

1. to require the suspect to identify himself or herself;
2. to verify identification;
3. to determine whether the suspect has in his or her possession stolen merchandise;
4. to recover stolen merchandise;
5. to inform law enforcement; and
6. to institute criminal proceedings against the suspect.

In the suit brought by the chocolate-eating shopper against the store, the Pennsylvania appellate court found that the initial handcuffing did not violate the Retail Theft Act. But the security employees' refusal to release the shopper from the handcuffs once she objected and their continued use of the handcuffs and detention "exceeded all bounds of decency." The court expressed "outrage" at the use of "coercive tactics" to get a written confession from a shoplifter.

Handcuffing and detention may be used briefly to aid store security personnel in identifying a shoplifter, in securing merchandise, and in proceeding to police involvement. Such tactics may not be used to intimidate a suspect or to persuade a shopper to sign a confession.

If you work for a retail store, you and the store can be sued if you exceed the limits identified in the Retail Theft Act. Anyone stopped for suspected shoplifting should clearly request that the detention end once identification is established and a search for merchandise is complete. Once the identification inquiry and the merchandise search are complete, unless store security personnel are handing the matter over to law enforcement, they have no authority to continue to detain a suspected shoplifter.

INJURED CHILD DOES NOT NEED INDEPENDENT GUARDIAN

A severely injured child, whose parents sued a hospital and doctors for medical malpractice, recently became the focus of separate litigation regarding who should manage the child's case.

The child's parents hired attorneys who successfully sued the hospital and doctors, winning a \$15 million award. But during the appeal, the hospital's insurance company petitioned the trial court to appoint a separate lawyer to serve as a special guardian for the child, known at law as a guardian ad litem. A guardian ad litem is a person, usually a lawyer, appointed by the court to represent a minor child's interest in particular litigation before the court.

The insurance company noted that, during the appeal, the parties engaged in "excessive settlement negotiations" with the aid of a professional mediator who was a former judge. The parties reached an impasse in those negotiations when the insurance company offered \$7 million, an amount that the company claimed would be sufficient money to support the child for the rest of his life.

When the parents and their attorney refused the offer, the insurance company petitioned for the appointment of a special guardian ad litem for the child, in an effort to turn control of the settlement negotiations over to a lawyer who would not be responsible for following the parents' decisions. Claiming that a "substantial possibility" existed that the hospital would win the appeal and that the child could be left with nothing, the insurance company argued that the child needed his own independent guardian.

The court denied the insurance company's request. The court noted that the appointment of a guardian ad litem generally is reserved for extraordinary circumstances and for the kinds of cases where the child's interests may be directly and adversely affected, including proceedings to terminate parental rights and adoptions. Finding that both parents were focused on the

injured child's best interests, the court decided that the appointment of a guardian ad litem would not be proper. Shortly after the court's decision, the parents and the insurance company came to a settlement agreement.

Parents are entitled to sue on behalf of their children. They may choose the attorneys and they may manage the case. Only where extraordinary circumstances exist will the courts disturb parents' rights to manage legal matters for their child.

CONFIDENTIAL COMMUNICATIONS WITH ACCOUNTANTS

Pennsylvania law provides a limited protection of confidentiality between a client and a certified public accountant (CPA). The confidentiality does not apply generally to accountants, but only to licensed CPAs and anyone working under the supervision of a CPA. Information that a CPA gains from a client through the provision of professional services is deemed to be confidential. Unless properly authorized by the client, CPAs and their staffs cannot be made to disclose confidential information, nor may they voluntarily disclose confidential information.

This protection of confidentiality does not apply in a proceeding or disciplinary investigation where the professional services of the CPA are in dispute. It also does not apply when a CPA is "reporting on the examination of financial statements." This broad exception is not particularly clear and could warrant or require disclosure by a CPA in many different kinds of circumstances.

Federal law also provides a limited protection of confidentiality between CPAs and their clients. Clients enjoy a privilege of confidentiality with their CPAs, enrolled actuaries, and enrolled agents with the IRS. However, in criminal tax proceedings, the IRS can require CPAs and enrolled agents to disclose all oral and written communications with clients. An additional restriction provides that the privilege does not extend to written advice given to corporations regarding certain tax shelters.

Steps to Take

There are steps that you can take that may protect you in your relationship with your accountant. As to any issues potentially relating to litigation, you should consider hiring your accountant through your attorney. The attorney-client privilege is much stronger and will likely protect the documents given to your accountant, as well as the work your accountant prepares, if all documents are released through and initially produced for your attorney.

When an accountant is hired by a taxpayer's attorney to work under the attorney's direction and control to prepare for legal tax concerns, and if the accountant's work is necessary or highly useful to the attorney, the communications between the client and the accountant, as well as the accountant's work papers, may be protected by the attorney-client privilege.

A client's records in existence or prepared by an accountant before an attorney's involvement cannot be protected from disclosure by the attorney-client privilege. Courts are unlikely to

extend the attorney-client privilege to advice given by an accountant who has worked for the taxpayer before the attorney hires the accountant. To protect an accountant's work by the umbrella of the attorney-client privilege, the accountant should be hired and paid by the attorney, and a written agreement should establish that the work product belongs to the attorney and is confidential.

To avoid having to assert a privilege, you may want to consider retaining all of your records when your accountant's work is complete. If your accountant has little or nothing to produce in response to a summons, the confidentiality issue is unimportant. When you are asked to produce records yourself, you may be entitled to assert a privilege against self-incrimination in some instances.

As to your tax planning and/or tax consultations with your attorney, you enjoy the expansive protection of the attorney-client privilege. However, courts have found that no privilege results where an attorney is merely "translating his activities into those of an accountant." If you use an attorney to perform essentially accounting functions, the privilege is lost. No clear advice has yet been offered by the courts as to just what functions are "essentially accounting." Interpretations of IRS Code provisions or Regulations is a legal function, while the physical preparation of tax return schedules is probably an accounting function.

Where a law firm is the first professional consulted by a client and where the law firm takes the lead role in the provision of tax advice and tax planning, the attorney-client privilege is more likely to protect the disclosure of the client's statements and documents, including issues relating to the preparation of tax returns.

When dealing with either your attorney or your accountant, consider specifically limiting the use of documents by delivering them with a brief cover letter that advises that you expect them to be treated with the highest confidentiality. The courts often decide challenges to document requests by first examining whether the client really expected confidentiality. If you let third parties see or handle your confidential documents, or if you do anything that indicates that you do not expect confidentiality from your professional advisors, the courts may be less inclined to protect your privacy.

USING A RACIAL LABEL CAN BE WORKPLACE HARASSMENT

A hospital billing clerk, fired for violating the hospital's harassment policy, lost her unemployment benefits when the Unemployment Board found that her comments to another employee constituted willful misconduct in violation of the hospital's written harassment policy.

A fired employee is entitled to collect unemployment compensation unless he or she was fired for "willful misconduct." The Unemployment Act defines "willful misconduct" as:

1. an act of wanton or willful disregard of the employer's interest;
2. a deliberate violation of the employer's rules;

3. a disregard of standards of behavior which the employer has a right to expect of an employee; or
4. negligence indicating an intentional disregard of the employer's interest or the employee's duties and obligations to the employer.

Employers have the burden of proving willful misconduct. If the misconduct involves the violation of a work rule, the employer must also prove that the rule was reasonable and that the employee was aware of the rule. The rule need not be written, but proving the existence of an unwritten rule can be difficult. The employee can defend his or her conduct by producing evidence that the rule was not reasonable, that he or she did not know that the rule existed, or that he or she had good cause to violate the rule.

In the case of the hospital billing clerk, the hospital had a written policy that specifically prohibited the use of racial slurs, racial nicknames, or racial labels of any kind. The clerk, who was African-American, made a series of comments that resulted in her firing. On several occasions she referred to the biracial daughter of a fellow employee as a "zebra." She also told another African-American employee to avoid sharing a coffee cup with a Caucasian employee so that she would not "turn white."

The billing clerk claimed that her comments were not harassment. She stated that she generally used the term "zebra" to describe biracial children, including her dentist's children, and that she did not consider it to be derogatory, offensive, or harassing. She insisted that she did not deliberately violate the employer's policy.

The Unemployment Board ruled that the billing clerk's use of the word "zebra" constituted a label relating to race, which violated the employer's harassment policy. The Board also decided that the clerk had not met the standard of behavior that an employer has a right to expect from its employees.

If the hospital's harassment policy had been stated only in broad, general terms, the Board may not have found that the billing clerk violated a workplace rule. Employers who expect high standards of workplace civility should be as specific as possible when drafting their written policies. And, while many employees do not read written workplace policies carefully, all employees should be aware that the violation of any clearly written workplace rule can result in their being fired without the opportunity for unemployment benefits.

WHAT IS A TRADEMARK?

A trademark is a distinctive mark, word, design, picture, or arrangement that a seller uses in conjunction with a product and that helps consumers to identify the product with its producer.

Product trademarks, which are most familiar to consumers, are affixed to a good, its packaging, or its labeling. Service marks are used in connection with a service. Collective marks identify producers as belonging to a larger group, such as trade unions. Certification marks, like the

famous “Good Housekeeping Seal of Approval,” are licensed by groups that set specific criteria for their use.

THANK YOU!

Thank you for choosing our firm for your legal needs. We hope that you will continue to count on us when you need legal help. We are just a phone call away.

We also appreciate the trust that you have placed in us by referring your friends, family, and associates to us for legal services. Thanks!