Defending Liberty
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$5,000 REWARD

FOR

BEST ESSAY

THE 2010 BERT W. LEVIT ESSAY CONTEST

SPONSORED BY

THE ABA STANDING COMMITTEE
ON LAWYERS' PROFESSIONAL LIABILITY

AND

LONG & LEVIT LLP

FOR

LAW STUDENTS AND YOUNG LAWYERS

POSTMARK DEADLINE: FEBRUARY 19, 2010

TOPIC

THE ESSAY CONTEST TOPIC THIS YEAR CONCERNS PLEADING AND PROOF BURDENS, IN A LEGAL MALPRACTICE CASE, ON THE ISSUE OF COLLECTIBILITY OF DAMAGES IN THE UNDERLYING CASE.

FOR

THE ESSAY CONTEST HYPOTHETICAL AND RULES VISIT
WWW.ABANET.ORG/LEGALSERVICES/LPL/LEVIT/LEVIT.HTML
QUESTIONS? CALL 312/988-5763

AMERICAN BAR ASSOCIATION

Standing Committee on Lawyers' Professional Liability
321 N. Clark Street
Chicago, IL 60654-7598
FAX: (312) 988-5483
http://www.abalegalservices.org/lpl

November 6, 2009

Re: $5,000 Legal Essay Contest

Dear Faculty Member:

We request your help in notifying your legal ethics law students of the opportunity to participate in the 2010 Bert W. Levit Essay Contest, sponsored by the Standing Committee on Lawyers' Professional Liability of the American Bar Association. The LPL Committee sponsors the contest annually to generate interest and ideas among law students and young lawyers on the topics of interest in the area of lawyers' professional liability.

The winner of the Levit Essay Contest will be awarded a prize of $5,000, as well as an all-expenses-paid trip to Washington, D.C. in April 2010, free admission to the Committee's National Legal Malpractice Conference, attendance at the April 16 Committee dinner as our guest, and the prize presentation. The contest is supported by Long & Levit LLP.

This year's contest hypothetical concerns whether, in a legal malpractice case, the burden of pleading and proving "collectibility" of damages in the underlying case should lie with plaintiff, or whether, rather, it should be the malpractice defendant's burden to plead and prove that any underlying damages are "uncollectible."

The essay contest is accepting entries now. The postmark deadline for submission of entries is February 19, 2010. Contest rules and information are posted online at www.abanet.org/legalservices/lpl/levit.html.

The contest is open to law students and young lawyers who will have enrolled as members of the American Bar Association no later than February 15, 2010. Law students wishing to enroll may go to www.abanet.org/join/lsd_enroll/ls_enroll.cfm or call 800-285-2221.

Enclosed are the contest hypothetical and flyer promoting the contest. Please take a minute to have the flyer posted on an appropriate kiosk or bulletin board at your school. The flyer can also be found at, and downloaded from, the link above.

Thank you for your interest.

Sincerely,

Edith Matthai
Chair
ABA Standing Committee on
Lawyers' Professional Liability

2010 Levit Essay Contest

The Hypothetical

You are an appellate court clerk in the fictional state of Grace, which has no case law on point. Your judge has asked you to draft an appellate court opinion on the following case before the court. She cautioned that she expects a dissenting minority opinion, and you should be prepared to address all sides of the issue. You should look to leading cases in other jurisdictions as instructive authority.

Teetering Totters, Inc., maker of high-end playground equipment, entered into a $500,000 contract to purchase grab-bars, handles and swing-set chains from The Hold-On-Tight Company. Hold-On-Tight delivered all of the items, but Teetering Totters paid only $100,000 of the $500,000 due. Teetering was teetering on insolvency, as the worldwide economic crisis drove down orders of playground equipment, and children did not feel like playing as much.

Hold-On-Tight hired attorney May Q. Whole to sue Teetering for breach of contract. Teetering counterclaimed that Hold-On-Tight had delivered non-conforming adult size equipment, knowing full well that the equipment was intended for children's playgrounds. Attorney Whole retained the nation's leading expert on appropriate playground handle sizes, Noah Lot, who was prepared to testify at trial that children's hands and feet were bigger than ever, and that Hold-On-Tight's playground handles, while suitable for small adults as well as most children, were well within industry sizing standards for children's playgrounds. Lot was the author of the seminal work: "The Right Size Playground Equipment Handles for Our Children."

A week before trial, Judge I. Said Zipit postponed the February 10 trial date for two weeks, until February 24, for reasons he did not care to explain. Ms. Whole was about to inform expert Lot of the new trial date when she received the following email from Mr. Lot: "I am so glad this trial will finally be over the week of the 10th. On the 24th, my wife, Walka, and I are embarking on our life-long dream, a week alone in the Tibetan wilderness, cut off from the world!" Attorney Whole immediately replied to Noah Lot, explaining the trial would start February 24, and imploring him to postpone the trip, noting Mr. Lot's professional duty to their client Hold-On-Tight. Lot said he was very sorry but could not change his schedule, adding, "That would be your problem."

Attorney Whole immediately informed the judge and opposing counsel that plaintiff's expert could not appear on the re-scheduled trial date, but the judge refused to reschedule the trial, and said Ms. Whole would have to find and prepare a new expert in advance of the trial date, with expedited expert depositions. When Ms. Whole said there was no way she could adequately locate and prepare an available expert in two weeks, Judge Zipit replied, "That would be your problem."

In the circumstances, the best Ms. Whole could do was to retain an engineer who for three years in the 1970s had designed children's handle bars for bicycles. The expert disclosure report from the new expert, Klaus E. Knuff, stated that in his opinion the playground handles delivered by Hold-On-Tight to Teetering were not too large for children to use safely, but he admitted on cross examination that the functions of bike handlebars and playground handles were vastly different, and that he had never worked on or developed expertise specifically related to playground equipment handles. Judge Zipit subsequently granted Teetering's motion to exclude Knuff's testimony as not satisfying expert reliability standards.

At trial, Teetering's expert witness, Mary Handle, the nation's third-leading expert on appropriate playground handle sizes, testified that the handle equipment delivered by Hold-On-Tight was far too large for the average modern child, and presented a significant risk of injury. Mary testified that she personally had patented more than 100 hundred playground handle parts, including the widely used Kid-Secure™, and had authored the Handles Chapter of the Playground Equipment Safety Handbook for The Playground Institution.

On Hold-On-Tight's claim for unpaid merchandise, the jury found in favor of defendant Teetering, and also awarded Teetering $100,000 on its counterclaim for a refund on its initial payment of $100,000 for non-conforming goods.

Hold-On-Tight later sued May Q. Whole for legal malpractice, alleging that her negligence in failing to deliver a competent trial expert had cost Hold-On-Tight $500,000 in damages – the entire contract amount including the $100,000 it was forced to disgorge to Teetering on the counterclaim. In the malpractice case, Hold-On-Tight did not plead or prove that any damages it should have been awarded in the underlying case (if not for its attorney's negligence) were "collectible" from Teetering.

The trial court entered judgment for malpractice damages for the full amount of damages claimed: $500,000. On appeal, Attorney Whole raised the following issue:*

That the court below erred by holding that it was not plaintiff's burden to plead and prove that the damages in the underlying case were "collectible" from malpractice defendant Teetering, considering its financial condition. Rather, the court below held, as a matter of law, that it was defendant Whole's burden to plead and prove, as a defense, that those damages were "uncollectible," and that defendant May Q. Whole had not pled or proved that defense.

Your draft opinion should address this issue.

* The judge has instructed you: "Don't worry about whether other issues could have or should have been raised on appeal – they weren't!"