



Vantage Points - Fall Edition 2007

Dear Friends:

Nearly everyone here in Southern West Virginia is welcoming the change of seasons this Fall. Our summer has been hot and dry. We are in a drought, water tables are low and lawns have been brown and "crisp" for months. The question we all are asking is, "Will our winter be as cold as the summer was hot?" That makes me shiver!!

Our articles this autumn involve some "hot" topics as well. Small business owners will want to read the work of Bo Sweeney and Christa Dotson from our litigation group on protecting intellectual property, known as "IP." Counterfeiting and IP theft are a huge business; avoid being taken!! Max Corley, another of our litigators, has addressed the very serious workplace issue of harassment, which often has a sexual nature. Charles Gould, who is heading our Domestic Relations practice, writes on Pre-marital Agreements, or pre-nups. These agreements are increasingly common to protect personal and business assets for each spouse. We hope you can use some idea from each article.

We also continue to grow to meet your needs. Nicholas E. Mayo, a law graduate of the Shepard Broad Law Center at Nova Southeastern University in Florida has joined our Business Services group. He and his wife Lauren, a Huntington native, are settling into their new address and we are delighted with their arrival. Please join us in welcoming Nick and Lauren to our area!!

Finally, our congratulations to Steve Golder, Lee Murray Hall, Tom Krieger, Tom Scarr and Bo Sweeney upon being named to The Best Lawyers in America, 2008 Edition. Details of their inclusion are located in this Press Release. Each are most deserving.

We wish for you a refreshing Fall season and prosperous year end. Please contact us with your thoughts on topics for our future newsletters and how we can serve you better.



Warmly,

A handwritten signature in black ink that reads "Barry Taylor".

Barry Taylor
Chief Executive Officer



PREMARITAL AGREEMENTS

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Premarital agreements, also known as prenuptial agreements or “prenups,” are gaining prevalence and importance as today’s couples make decisions to remarry or marry later in life. A premarital agreement is a written contract signed by spouses-to-be that governs how their assets will be divided in the event that the marriage is terminated by death, divorce, separation or annulment. When written correctly, premarital agreements can protect business and personal assets, compensation and future inheritance. They can provide peace of mind by spelling out how the financial aspects of the marriage will be handled, and they help avoid costly battles over assets upon divorce.

Most states, including West Virginia, are considered “equitable jurisdiction” states. This essentially means that everything earned or bought by a couple after their marriage, as well as any increases in the value of property bought by one spouse prior to the marriage, is considered marital property. In the event of a divorce, the courts presume that all marital properties and assets such as these are to be divided equally. However, a valid premarital agreement permits the parties, rather than the courts, to determine how their marital property shall be divided.

In addition to providing for the division of marital property, premarital agreements can address other issues, including but not limited to:

- defining the respective property rights of the parties in the event of death, thus preserving family ties and inheritance,
- identifying and protecting separate business and personal assets,
- protecting the couple’s separate earnings,
- providing terms for spousal support in the event of divorce or separation and
- identifying each party’s responsibility for debts and liabilities.

The validity of a premarital agreement is dependent upon it having been signed voluntarily and with each party possessing full knowledge of its content and legal effect. It is important to note that premarital agreements can be set aside by the courts if there was fraud, duress or misrepresentation when the agreement was signed or if the parties failed to fully disclose their assets and liabilities. As such, it is important that both parties seek an attorney’s advice and counsel before signing a premarital agreement.

If you are contemplating marriage and have significant separate assets or are concerned about the effect that marriage will have on your property rights, you may want to speak to an attorney about the pros and cons of a premarital agreement. We at Jenkins Fenstermaker would be more than happy to discuss any questions you may have.



Harassment in the Work Place

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Employers in West Virginia are faced with an array of risk management issues on a daily basis that threaten the continued viability and profitability of their businesses. One such issue is an employer's potential liability to an employee for workplace harassment, even when the employer had no knowledge of the harassment or, having such knowledge, failed to take reasonable steps to prevent or end the harassment. Unfortunately, harassment in the workplace is a common occurrence. The belief that your place of employment is immune from this problem is unrealistic. Employers, therefore, must recognize this risk and take appropriate steps to prevent, handle and stop workplace harassment.

Workplace harassment is prohibited by federal and state law, including Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA) and the West Virginia Human Rights Act. These laws essentially have defined harassment as conduct that demonstrates an animosity toward an individual based upon his or her race, color, religion, sex, national origin, disability or age. Thus, harassment is prohibited on the basis of an individual's membership in one of these protected classes.

There are generally two kinds of sexual harassment: 1) "quid pro quo" (Latin, meaning "what for what" or "something for something") and 2) hostile working environment. "Quid pro quo" harassment typically means that sexual favors are being sought from the employee in exchange for either favorable treatment or protection from unfavorable treatment. "Hostile working environment" harassment is characterized by a work environment that is so sexually charged that it adversely affects an employee's job performance or job opportunities.

An employer's liability for harassment and its available defenses will depend upon the source of the harassment. When the source of the harassment is management personnel, some plaintiffs' lawyers argue that the employer is "strictly liable" for the conduct, irrespective of whether the employer knew of the offending conduct.

An employer may avoid vicarious liability from the actions of a supervisor when no tangible employment action is taken against the employee (i.e. demotions, undesirable work assignments, lack of promotion) and the employer can show that:

- (1) It exercised reasonable care to prevent and promptly correct any harassing behavior, and
- (2) The employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

On the other hand, when the source of the harassment is a co-worker, an employer may be liable, depending on the employer's knowledge of the offending conduct, the effectiveness of the employer's remedial procedures and the adequacy of the employer's response. Thus, an employer that has established clear rules prohibiting sexual harassment and has provided an effective mechanism for receiving, investigating and resolving complaints of harassment may not be liable in the case of co-worker harassment when the employer has neither knowledge of the misconduct nor a reason to

know about it. *Hanlon v. Chambers*, 461 S.E.2d 473 (W.Va. 1995). Furthermore, a court will evaluate whether the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

So, what can employers do to prevent harassment claims? Employers should first develop a sufficient anti-harassment policy and a practical enforcement program. The policy should be written in a manner that ensures it will be enforced to the letter. The policy should instruct employees on actions they are to take and encourage the reporting of claims. The policy also should advise employees of the serious consequences to themselves and the employer for violations.

The employer also should develop a practical procedure to enforce the policy, including an effective grievance procedure. All complaints should earn the immediate attention of supervisors, managers and the personnel department. A non-attorney, in-house human resources manager is typically the best choice for an investigator; an outside human resources consultant is an alternative. As noted, one of the best defenses afforded employers in harassment claims is a prompt, thorough and impartial investigation of the complaint, including adequate documentation of the investigation. The employer also must follow up on the complaint and ensure that an appropriate response is forthcoming within a reasonable period of time.

Once the investigation is complete, the employer should provide prompt discipline if warranted by the investigation. The reasonableness of the employer's response depends on its ability to stop the offending conduct. Please note that courts have held that the accused harasser is entitled to a fair hearing before disciplinary action is taken. Any disciplinary notice should go into the perpetrator's file; the harassment complaint should not be placed in the victim's file. If no discipline is imposed, it should be explained and justified to the complainant.

Lastly, employers must take steps to avoid retaliation. It is unlawful, under both federal and West Virginia law, to retaliate against an employee for complaining about harassment.

In today's litigious environment, employers are wise to consult counsel in drafting harassment policies and procedures or to have their existing policies and procedures reviewed to ensure effectiveness and compliance with West Virginia and federal laws. The prompt assistance and advice of counsel can be invaluable in preserving and strengthening an employer's defense to a harassment claim.



Protecting your Business from Intellectual Property Theft

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The formula for Coca-Cola has remained a closely held trade secret since the drink was developed in 1886. The McDonalds golden arches are recognized worldwide as the company's symbols are found in 119 countries. Both are examples of intellectual property (IP), which, in one form or another, touches our lives every day. Still, as we plan new businesses and products, this highly profitable aspect of business development often is overlooked.

IP protection is a key to the success of businesses old and new alike. While businesses dedicate considerable time, energy and expense to raising new business ventures, often the company's most valuable IP assets are unprotected. This is unfortunate for unsuspecting business owners because the threat of IP theft is pervasive in our economy. A recent U.S. Chamber of Commerce Report estimates that American businesses lose \$250 billion and 750,000 jobs each year due to IP theft. This problem is causing great harm in virtually every sector of American industry including the automotive, electronic, pharmaceutical, computer software and recording industries, to name only a few.

Small businesses are particularly at risk of IP theft because they often lack the resources necessary to sufficiently protect new products and ideas. The risk of IP theft is easy to overlook during the formative years of a business venture because the costs of office space, staffing and technology can be staggering. However, the problem is so pervasive that the United States Patent and Trademark Office (USPTO) has launched a Small Business Education Campaign to make entrepreneurs aware of these threats.

Protecting your IP is possible even for small business owners. The simplest step in protecting the IP of your business to keep it secret during development. You can do this by having your attorney draft a nondisclosure agreement for employees and others with whom you share your business ideas. In addition, IP protection in the form of patents, trademarks, copyrights and trade secrets can be utilized to keep your business profitable and secure from counterfeiting and piracy. Small businesses conducting business abroad are not protected by simply securing IP protection in the United States; businesses should consider filing for protection in every country where business is conducted. Finally, some companies now offer insurance to cover the legal expense of enforcing IP rights in infringement actions.

If you discover that one of your business products is being counterfeited or infringed upon, there are options available before filing suit. First, make sure that you have sought proper IP protection and registration of the work in question. Second, have your attorney draft a cease-and-desist letter outlining the infringing activity and damages to which the infringer may be exposed. Finally, if the infringement continues, your attorney can help evaluate whether it is necessary to resort to the

legal system to seek an injunction.

The importance of registering with either the USPTO or the US Copyright Office cannot be overstated. Registered works are afforded much greater protection in the face of infringing activity, and the government has steeper penalties for infringement of registered works. These penalties include the recovery of costs, attorney's fees and statutory damages of up to \$150,000 against those who are found to be infringing on IP rights.

As IP theft becomes more common, it is critical to make IP patent, trademark, copyright and trade secret protections a central part of your business strategy. There are many ways to protect new ideas and business ventures as they arise. We would be happy to assist you in determining which IP protection may be of the greatest benefit to your business.