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In the Eyes of The Law, Actions Sometimes Speak Louder Than Words

By Briton S. Collins, Esq.

We've all seen it. It's standard boilerplate language in almost every contract we sign, and it reads something like this: "This agreement may only be modified or terminated by a document signed by both of the parties."

The intent of this language is clear: to try to prevent one party to a written contract from later claiming that another party orally agreed to a change in the contract's terms. While that is certainly a worthwhile goal and no doubt a justifiable use of 20 or so words in a contract, a recent decision by the Tennessee Court of Appeals (*Simpson v. National Fitness Center, Inc.*) reaffirmed the long-standing rule in Tennessee that written contracts may be modified or terminated by an oral agreement of the parties or by the acts or conduct of the parties - even if the contract specifically states (as most do) that the contract may only be modified in writing.

As far back as 1840, Tennessee courts have ruled that written contracts may be modified or terminated by an oral agreement of the parties where the evidence shows that both parties consented to the modification or termination. This is so even if the contract specifically states that it can only be modified in writing. Additionally, a party to a written contract may be deemed to have impliedly agreed to a modification or termination through that party's course of conduct where the party's conduct is inconsistent with the written document. This is again so even if the contract expressly states that the parties may only modify the agreement in writing. These principles have been repeated by our courts many times over the past two centuries, and they are a well-established part of the law in this state.

What you should take away from these rulings is that you must be very careful what you say and do during the course of performing your contracts. You cannot always rely on what is on paper. If your words and your conduct are inconsistent with the terms of your written contract, then a court may very well find that you have either explicitly or implicitly agreed to a modification or termination of your agreement, and in that case no amount of boilerplate language will save you. In that case, your actions will speak louder than your words.



Briton S. Collins focuses his practice on civil litigation and appeals, construction law, and representing local governmental agencies. If you have questions or for more information, please call Briton S. Collins at (865)-546-7311 or email bcollins@kmfpc.com.

In the Spotlight

Attorney Spotlight: Zack R. Gardner

What is your primary practice area?

My primary practice is nonprofit and tax-exempt entity governance and taxation. A very close second is technology transfers and commercialization, specifically in the context of government contracting and awards.

What do you like the most about your areas of practice or the practice of law generally?

I love my practice because its wide-ranging and absolutely enthralling. I get to help and work with people and organizations ranging from scientific research institutes to fortune 500 companies to churches and church-affiliated organizations. The issues vary widely but many have core similarities. There's rarely a dull moment in my practice. It helps that I find digging through the internal revenue code and reviewing/negotiating agreements pretty enjoyable.

Is there anything people would find surprising about your practice?

I think it would surprise people to find that not all nonprofit organizations are what they think of as traditional "charities". Many nonprofit or tax-exempt entities do work related to economic development or help further the state of scientific research in a variety of fields. There is a plethora of diversity within the world of nonprofits.

What do you do for fun?

When I am not in the office, I enjoy things like watching Tennessee Vol football, enjoying the mountains and hills of east Tennessee, and always spending time with my lovely wife, Leandra, and adventurous bulldog, Tatum. I also enjoy going to concerts, playing tabletop games (Roll for initiative!), and traveling.

Tell us about your family -- what role do they play in making you great at what you do?

I come from a diverse background—My mother hails from Salt Lake City, Utah and my father is from Albuquerque, New Mexico. My father is a retired military veteran and my mother is retired after having a multifaceted career that involved property management and work for local government. They, along with my only brother, live in Middle Tennessee. I have been with my wife for more than twelve years (married for just over three) and could not be happier.

Like many people, my family provides the stability and support that helped shape the man I am today. My parents instilled in me a strong work ethic and thirst for knowledge. My wife reminds me daily of just how lucky I am by always being there for me. Without any of them, I certainly would not be half the man, or half the attorney, that I am.

Do you have any hidden talents, hobbies or a fun fact to share?

I'm a pretty decent drummer. When I was 13, I worked the entire summer as a little league umpire to buy my first drum set. It was one of the proudest moments growing up.



If you chose a quote to live by, what would it be?

"He who knows only his side of the case knows little of that." – J.S. Mill, On Liberty

Zack R. Gardner assists nonprofit and tax-exempt entities with forming their organizations, and obtaining and maintaining their nonprofit and tax-exempt statuses. If you have questions about nonprofit issues or for more information, please call Zack Gardner at (865)-546-7311 or email zgardner@kmfpc.com.

Remote Workers 101: The Need for a Written Policy

By Ashley N. Trotto, Esq.

The number of employees working remotely in the United States has increased 80% in the last decade and shows no sign of slowing. Because of its newfound prevalence, employees are beginning to consider the ability to work from home a job requirement rather than a fringe benefit. In an effort to remain competitive, employers are working hard to effectively and efficiently provide the coveted flexible work environment that employees have come to expect.

Once an employer has decided to permit employees to work remotely, whether on a full-time, part-time, or as needed basis, the employer must implement that decision. The first step is creating and maintaining a comprehensive remote worker policy. The written policy serves as a tool for communicating with remote workers and as an additional layer of protection for the employer in the event of a dispute with an aggrieved employee.

At a minimum, the remote worker policy should cover the following topics:

- **Eligibility.** An employer must decide whether all employees or only a certain nondiscriminatory class or group of employees will be permitted to work remotely. That decision should be clearly documented.
- **Expectations.** Work hours, reporting requirements, accessibility, frequency and method of communication with management, workplace set-up, and any other specific work-related expectations should all be detailed in the policy.
- **Management.** Managing remote workers can be difficult for employers new to the experience. To keep both the employer and employee on track, information about how a remote worker's productivity and performance will be measured, and at what frequency, should be covered.
- **Compliance.** The remote worker policy should contain a statement that remote workers must comply with all other policies of the employer (e.g., the employee handbook) and should describe the consequences for noncompliance with any employer policy, including the remote worker policy specifically.
- **Acknowledgment.** Remote workers should be required to sign an acknowledgement stating that they've received, read, and understood the remote worker policy. This will protect the employer in a dispute where an employee claims that he or she was unaware of or did not fully understand the remote worker policy.

Having a written remote worker policy in place is imperative, but the employer's job isn't done there. As with other employer policies, it is of the utmost importance that the written policy be applied consistently and that it is appropriately revised as circumstances change.

If you have any questions about implementing and maintaining a remote worker policy, please feel free to call me at 865-546-7311 or send me an email at atrotto@kmfpc.com.



Ashley N. Trotto practices in the areas of ERISA law, pension plans, and employment law. Ms. Trotto assists private, governmental, and nonprofit clients in the design, implementation, and maintenance of their employee benefit plans and also helps those clients navigate the complicated landscape of the FLSA, HIPAA, COBRA, FMLA, ADA, and other employment-related legislation. Ms. Trotto focuses much of her time on assisting clients with issues related to health plan compliance.

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Tax Reform through Tax Simplification

By William E. Mason, Esq.

Regardless of politics, there are some obvious steps that can be taken to simplify the Internal Revenue Code, and thereby reduce the burden on taxpayers. The National Taxpayer Advocate, an IRS official, lists:

1. Consolidate and simplify the six “family status” provisions in the tax code. The Code currently uses different definitions for filing status, personal and dependency exemptions, the child tax credit, the earned income tax credit (EITC), the child and dependent care credit, and the separated spouse rule. Every individual taxpayer is affected by at least two of these provisions, and many taxpayers are affected by five.
2. Simplify other provisions that govern taxation of the family unit, including “joint and several liability” and the “kiddie tax”.
3. Consolidate the incentives that encourage savings for education. There are now at least 12 – far too many for parents and students to understand and compare.
4. Consolidate the incentives that encourage savings for retirement. There are now at least 15 – more than is rational or required; although each now has its own entrenched interest group.
5. Reduce procedural incentives to use tax “sunsets.” More than 70 provisions currently in the tax code are temporary and require periodic renewal. Expiring and renewed tax provisions create taxpayer uncertainty.
6. Minimize income phase-outs, which affect roughly half of all returns each year, introduce inflated marginal “rate bubbles,” and add complexity to tax computations.

This list addresses some of the most significant individual taxpayer challenges with the complexity of the Code. The National Taxpayer Advocate’s complete statement is at:

<https://taxpayeradvocate.irs.gov/news/NTA-Blog-Tax-Reform?category=Tax%20News>

The Taxpayer Advocacy Panel is the IRS citizen advisory committee charged with soliciting taxpayer suggestions on improvements to IRS services, and analyzing and making recommendations to the IRS on systemic issues, forms, publications and contacts with taxpayers. I am Tennessee’s representative to TAP and welcome your individual or business comments on improvements for the IRS.



Bill Mason has been practicing more than 40 years, most of that time in employment and employee benefits for employers. He serves on the Board of Directors for the Legacy Parks Foundation and the Education Subcommittee for the United Way of Greater Knoxville. He is the past Chair of the Hillcrest Healthcare Board of Directors. In 2016, the US Treasury Department appointed him as the IRS Taxpayer Advocacy Panel (TAP) representative for Tennessee. For additional information or questions, feel free to contact Bill at wemason@kmfpc.com or (865) 546-7311.