2009

2009-04-24 H. Thomas Wells, Jr. ABA Presidential Correspondence

H. Thomas Wells Jr.

University of Alabama School of Law

CORRESPONDENCE LOG

H. Thomas Wells, Jr.

April 24, 2009

Origin	Correspondence	Date	Rcvd	Status (All suggested dispositions subject to review by TW)	CCs (Informational copies)
IL	**Chase T. Rogers, Chief Justice** **State of Connecticut Supreme Court** Ltr – re Client Security Fund	4/13	4/20	*NRN*	cc: John Holtaway
AL	**James R. Holland, II** **Wettermark Holland & Keith LLC** **Birmingham, AL** Ltr – re CLE Conference held March 13, 2009	4/14	4/20	*Referred to CRP and Office of General Counsel.*	
AL	**Paul M. Kaufmann** **American Board of Prof. Psychology** Response to James R. Holland, II Complaint Ltr – re: CLE Conference Held March 13, 2009	4/24	4/29	*Referred to CRP and Office of General Counsel.*	
IL	**Henry S. Bienen** **President, Northwestern University** Copy of letter sent to Hulett H. Askew re regulation by ABA Council on Legal Education of the terms and conditions of employment *(copies also sent to Hank White and Thomas Howell)*	4/14	4/20	*NRN*	
IL	**Bruce Connuck** **Acting Deputy Assistant Secretary** **Bureau of Democracy, Human Rights and Labor, U.S. Department of State** Ltr – Thanks for sending Secretary Clinton a copy of 3/18/09 letter to President of Kenya	4/10	4/21	*Forwarded to Michael Pates, Ctr for Human Rights*	
IL	**Jeffrey P. Minear** **Counselor to The Chief Justice** **Supreme Court of the United States** Ltr – Chief Justice unable to attend ABA Annual Meeting	4/14	4/21	*Forwarded to Marina Jacks, Kash Sullivan and Alpha Brady*	

cc: Janet Jackson, Ira Pilchen, Katy Englehart

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AL	**Hon. Jack T. Camp** **US District Court** **Newnan, GA** Ltr – congratulations on being ABA President; hope to see TW at Judicial Conference in Birmingham	4/20	4/22	*Forwardet to HTW for a response.*	
IL	**Justice David H. Souter** **Supreme Court of the United States** Ltr – unable to attend annual meeting	4/20	4/24	*Forwarded to Marina Jacks, Kash Sullivan and Alpha Brady*	
IL	**Robert Glovsky** **Certified Financial Planner** **Board of Standards, Inc.** Ltr – seeking nominations for CFP Board of Directors	4/21	4/24	*Forwarded to Marina Jacks*	
IL	**Ali Ahsan** **New York, NY** Ltr – enclosed a plaque to ABA members as a mark of appreciation of Pakistan's lawyers for their American counterparts support for judicial independence in Pakistan	4/14		*Beverly to draft response for HTW.*	
email	**J. Guy Joubert, President** **The Canadian Bar Association** Copy of letter sent to The Rt. Hon. Stephen Harper and to the U.S. President re: Repatriation of Omar Khadr	4/24	4/24	*Forwarded to HTW and HFW.*	cc: Ira Pilchen and Karl Camillucci

cc: Janet Jackson, Ira Pilchen, Katy Englehart

STATE OF CONNECTICUT
SUPREME COURT

CHAMBERS OF
CHASE T. ROGERS
CHIEF JUSTICE

231 CAPITOL AVENUE
HARTFORD, CT 06106

April 13, 2009

Attorney H. Thomas Wells, Jr.
American Bar Association
321 North Clark Street
Chicago, IL 60654-7598

Dear Attorney Wells:

Thank you for your letter opposing the removal by the Connecticut General Assembly of $2 million from the Connecticut Client Security Fund. As you know, the Connecticut Judicial Branch administers this fund, and we were not consulted regarding the removal of these monies.

I wanted to provide you with an update on recent developments. In response to the removal of the $2 million, Supreme Court Justice Joette Katz, in an op ed, and members of the bar made it absolutely clear that adequate funds must be in place to reimburse members of the public for losses they incur due to the malfeasance of lawyers. As a direct result of their combined efforts, the Legislature's Judiciary Committee recently voted to restore the $2 million cut. And, last week, Governor M. Jodi Rell said in a press release that she would "support language in the next deficit mitigation plan that reverses a previous move to withdraw $2 million from the Client Security Fund."

At this point, we are hopeful that the $2 million will be restored to the Client Security Fund. Thank you for your interest in this matter.

Very truly yours,

Chase T. Rogers
Chief Justice

CTR:maf

Defending Liberty
Pursuing Justice

H. Thomas Wells, Jr.
President

AMERICAN BAR ASSOCIATION

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March 19, 2009

The Honorable Chase T. Rogers
Connecticut Supreme Court
231 Capitol Avenue
Hartford, CT 06106

Re: State of Connecticut Public Act No. 09-02

Dear Chief Justice Rogers:

Every lawyers' fund for client protection is a public service, the purpose of which is to promote public confidence in the administration of justice and the integrity of the legal profession by providing some measure of reimbursement to clients who have lost money due to the dishonest conduct of their lawyers.

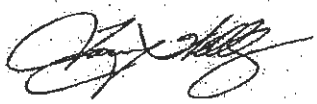
Thus, the American Bar Association was dismayed to learn that in an effort to stabilize the State's budget, the Connecticut legislature has passed Public Act 09-02, which mandates the transfer of $2,000,000 from the Connecticut Judicial Branch Client Security Fund ("the Fund") to the state's General Fund. Rule 4 of the ABA *Model Rules for Lawyers' Funds for Client Protection* suggests, and more significantly Section 2-68 of Connecticut's Superior Court Rules clearly states, that the Fund is a trust. Accordingly, all assets of the Fund should only be used for the Fund's stated purpose. Because the Connecticut Fund is financed through yearly assessments of lawyers licensed to practice law in Connecticut by the Supreme Court, and no taxpayer dollars are used to finance the Fund, we are concerned that the Connecticut legislature has taken such action. The goals of the Fund will not be accomplished by compromising its future health by redirecting its assets to the state's General Fund. Seemingly healthy funds should never be viewed as a funding source for legislative budgetary demands.

The Fund may be experiencing a period of financial stability right now but we respectfully remind the Court of the experience of the New Hampshire Public Protection Fund:

> By 1985, the fund had accumulated a reserve of approximately $123,000. As a consequence of favorable claims history, a sizeable reserve, and income earned on the reserve, the Bar Association ceased annual contributions to the fund in 1985. Unfortunately, by 1992, as a result of the dishonesty of Attorney John Fairbanks and a few others, the client indemnity fund was in default. . . Mandatory contributions will guarantee substantial revenue for the fund, which will compound during years of little demand while providing reserves in years of significant liability. *In re Proposed Public Protection Fund Rule*, 707 A.2d 125 (NH 1998).

The ABA Standing Committee on Client Protection stands ready to assist any efforts to preserve the integrity of the Fund. If you have any questions, please contact Associate Client Protection Counsel Selina Thomas at thomass@staff.abanet.org, or 312-988-6721.

Respectfully yours,



H. Thomas Wells, Jr.

cc: Livia D. Barndollar, President, Connecticut Bar Association
Janet Green Marbley, Chair, ABA Standing Committee on Client Protection

WHK WETTERMARK HOLLAND & KEITH LLC

ATTORNEYS FIGHTING FOR JUSTICE

April 14, 2009

H. Thomas Wells, Jr., President
American Bar Association
c/o Maynard, Cooper & Gale
2400 Regions/Harbert Plaza
1901 Sixth Avenue North
Birmingham, AL 35203

Re: March 13, 2009, ABA Conference
Dr. Paul Kaufman

Dear Mr. Wells:

The purpose of this letter is to discuss some recent remarks of Dr. Paul Kaufman at a recent ABA conference on Friday, March 13, 2009. I have attached the CLE outline that was provided to attendees at the presentation.

You need to know from the outset, that I have a personal stake in this matter. I am the lead attorney in the *Williams v. CSX* case, referred to numerous times during the presentation and cited numerous times in Dr. Kaufman's paper. My personal stake is something I value above all else, namely my reputation.

As you will see from the attached paper, Dr. Kaufman used the ABA platform to launch numerous personal attacks against Dorothy Sims, my esteemed co-counsel, as well as myself and several other lawyers. The rules of professionalism for most states, as well as for the ABA's own website, specifically prohibit such "personal attacks." Yet, I leave it to your sound judgment to take the measure of the personal attacks which occurred here.

Of particular note are the paragraphs accusing Ms. Sims and I of "a lack of candor" and by implication of being "intellectually dishonest." Without limiting his assault on lawyers, Dr. Kaufman goes on to direct his assault upon the Honorable Judge Bergman and the esteemed Dr. James Butcher, one of the principal founders of the psychological test known as the MMPI-2. In addition to committing libel and slander *per se*, Dr. Kaufman completely ignores the professionalism promoted by the ABA and every state bar association in the United States. Simply put, this conduct cannot be condoned. The fact that Ms. Sims was actually present at the panel discussion at the time when these statements were being made, is even more troubling to a sense of professionalism if not simple propriety.

As the American Bar Association is the organization with a long history of leading by example, I would ask that this conduct be publicly censured. At a minimum, a censure should

include a condemnation of these personal attacks, as well as a retraction of all written and verbal statements made by Dr. Kaufman at the ABA meeting. The scope of the censure should match the scope of the publication with a copy sent to each attendee. In addition, the "paper" written by Dr. Kaufman should be formally withdrawn from all ABA publications.

While it is quite clear that Dr. Kaufman advocates the use of the Fake Bad Scale to attack the credibility of victims in personal injury cases, he should not be allowed to promote his personal agenda at the expense of time honored professionalism. While it is too late to "un-ring the bell" and prevent Dr. Kaufman from publishing his paper in the first place, or using the ABA as a platform for his agenda, it is not too late for the ABA to enforce its own codes of conduct and stand firm on their rules of professionalism. A retraction and censure will, at a minimum, provide a measure to restore the honor and reputation of those whom Mr. Kaufman has seen fit to denigrate. I thank you, in advance, for your consideration in this matter and, welcome your response.

Sincerely,

James R. Holland, II

JRH/sel

cc: Gerald Rosenthal
Rosenthal, Leavy & Simon, PA
1645 Palm Beach Lakes Blvd., Ste. 350
West Palm Beach, FL 33401-2289

Dr. Paul Kaufman
c/o Nebraska Dept. Of Health & Human Services
University of Nebraska
P.O. Box 95026
Lincoln, Nebraska 68509-5026

Evidence Law Adapts to New Science:
Symptom Validity Techniques in Litigation

Paul M. Kaufmann, J.D., Ph.D., ABPP-CN
Nebraska Department of Health and Human Services
University of Nebraska – Lincoln

The Multistate Bar Examination (MBE) consists of 200 four option multiple choice items in which random guessing should yield a score near 50. There can only be two explanations for the rare outcome of MBE scores below 50. Either the candidate applies some fundamentally inaccurate understandings of the law throughout the examination or the candidate knows the proper answer to the questions and intentionally selects wrong answers. Neuropsychologists use this simple and widely understood concept from forced choice tests as one method for evaluating symptom validity. Stated in the form of a question, what is the likelihood of obtaining a score below chance performance on the MBE? A score below 50 on the MBE is highly unlikely and raises questions about the effort made by the candidate. The presumed outcome from random responding on "multiple-guess" tests is understood by every high school student.

The application of symptom validity science in neuropsychology is not new (Benton & Spreen, 1961) and it will not go away. The modern era of scientific investigation of symptom validity was heralded by the examination of faking believable deficits in neuropsychological testing (Heaton, Smith, Lehman, & Vogt, 1978; Pankratz, Fausti, & Peed, 1975), but probably began in earnest after descriptions of symptom validity testing (SVT) (Pankratz, 1979; Pankratz, Binder, & Wilcox, 1987). For the past twenty years, neuropsychology has seen a proliferation of research designs investigating symptom validity and an explosion of peer reviewed scientific research on malingering. The scientific evidence supporting application of SVT science in clinical neuropsychology practice is overwhelming and widely accepted (Boone, 2007; Larrabee, 2007; Morgan & Sweet, 2008). Neuropsychological methods are the best available for detecting

subtle neurologic impairments and those very same methods are the best at identifying subtle exaggerations of those impairments (AACN Consensus Conference on Response Bias, Effort and Malingering).

Some attorneys have taken to direct attacks on the reliability and relevance of neuropsychological methods and techniques. Nowhere is this current practice more evident than in SVT application in neuropsychological practice. The most common legal attack attempts to exclude SVT information from neuropsychological evaluations addressing response bias, insufficient effort, symptom exaggeration, and malingering. A recent tactic involves filing a motion *in limine* to exclude SVT science in an evidentiary hearing, then to withdraw the motion, only to reinstate it during trial (*Limbaugh-Kirker v. Decosta*, 2009). When contemplating legal strategy for addressing potentially damaging symptom validity science, the reasonable attorney should consider balancing the two following ABA Model Rules of Professional Conduct.

> Rule 1.3 Diligence - A lawyer shall act with reasonable diligence and promptness in representing a client.
>
> Comment [1] A lawyer must also act with commitment and dedication to the interests of the client and with ***zeal in advocacy*** upon the client's behalf. ***A lawyer is not bound, however, to press for every advantage that might be realized for a client.*** For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. [emphasis added]
>
> Rule 3.3 Candor Toward The Tribunal (a) A lawyer shall not knowingly:
>
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

> Comment [2] This Rule sets forth the special duties of lawyers as officers of the court to ***avoid conduct that undermines the integrity of the adjudicative process.*** A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, ***although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.*** [emphasis added].

Attorneys exercise professional discretion in how they engage in zealous advocacy for their clients. However, zealous advocacy must be tempered with candor before the tribunal. A failure to exercise candor during legal proceedings is a violation of professional responsibility. A lack of candor has been demonstrated by some attorneys in motion practice when attacking SVT science, as noted in a set of Florida cases that successfully excluded expert testimony based on the MMPI-2 symptom validity scale (FBS) (*Vandergracht v. Progressive Express*, 2005; *Williams v. CSX Transportation, Inc.*, 2007; *Davidson v. Strawberry Petroleum, Inc.*, 2007; *Stith v. State Farm*, 2008 *UpChurch v. Broward Co. School Board*, 2008; *Kirker v. Decosta*, 2009) and from those that were not successful in excluding such testimony (*Nason v. Shafranski*, 2008; *Solomon v. TK Power*, 2008; *Behrmann v. Liberty Mutual Ins. Co.*, 2008). For example, the plaintiff attorney in *Stith* was admonished by the judge for "intellectually dishonest" representations.

Further, withdrawing a motion *in limine* does not change the representations made therein, nor does it alter the attorney representations made during deposition. For example, zealous advocates seeking to exclude SVT science misrepresent the law when asking, "Doctor, you are aware that FBS has been excluded by ***every*** Florida judge hearing an objection to it?" Such questions embed knowingly false statements of law intended to discredit sound science, confuse expert witnesses, and mislead the court. Selectively citing FL cases in which FBS has

been excluded is a failure to disclose adverse legal authority, if the attorney knows other FL cases have allowed expert FBS testimony over various objections. Such conduct is a known false statement of law and potentially violates of Rule 3.3. Moreover, FBS is routinely accepted in most other worker compensation jurisdictions (*Mckinney-Prude v. Detroit Board of Education*, 2007; *Moore v. Daimler Chrysler Corp.*, 2007) without challenge and FBS has been admitted over objection in federal courts (*United States v. Bitton*, 2008). Ben-Porath, Greve, Bianchini, & Kaufmann (in press) explain that these zealous advocates use appropriate legal arguments in efforts to exclude FBS based on the rules of evidence and expert testimony, asserting that SVT science is: 1) more prejudicial than probative, 2) inadmissible character evidence, 3) wrongfully intruding into the province of the jury, or 4) not generally accepted by the relevant scientific community. I briefly address each to these arguments.

The first two arguments address relevance as defined in FED. R. EVID. 401, as follows:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Essentially, all relevant evidence is admissible, unless privileged. However, courts must balance other factors when determining admissibility under FED. R. EVID. 403, as follows:

> "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

The *Williams* judge weighed these concerns and determined, *inter alia*, that the probative value of FBS was outweighed by its prejudicial effect, commenting that the term "faking bad" was overtly prejudicial. In balancing the relevance of SVT science, this judge seemingly placed greater weight on the name of the scale rather that the reliability of its application.

The inadmissible character evidence argument is a derivative of the relevance question as addressed in FED. R. EVID. 404, as follows:

> "Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion."

This rule has some complicated exceptions in criminal cases that are beyond the scope of this paper, but in civil proceedings character evidence is generally inadmissible unless character is at issue (e.g. defamation). When FBS is elevated, our best science indicates that the examinee was likely over-endorsing symptoms – a fact that plaintiff attorneys typically misconstrue as though the expert is calling the plaintiff a fake, a fraud, or a liar. As we will discuss below, the plaintiff's expert (James Butcher, Ph.D.) in *Williams*, testimonial support for this distortion is inconsistent with any reasonable application of FBS science. See attached table from Greiffenstein, Fox, & Lees-Haley (2007).

In considering the best response to this inflammatory tactic, the testifying witness should remember that the scientific accuracy of their expert opinion and the confidence with which it is rendered, may not necessarily translate into credibility with the trier of fact. The expert should always be mindful that jurisdictional restrictions, local customs, or judge idiosyncrasies may limit the scope of their opinions regarding symptom exaggeration or suboptimal effort. Experienced experts recognize that terms like fake, fraud, and liar, when used in cross examination, draw for character judgments in a transparent effort to impeach the credibility of the expert. So when the plaintiff attorney asks, "Are you calling my client a fake, fraud, and a liar?" one effective response is, "No, FBS is just one indicator of symptom invalidity associated with the exaggerated reporting of symptoms." Upon hearing such testimony, a reasonably prudent juror would likely conclude the plaintiff was faking.

Respecting juror conclusions is the basis for the third argument against FBS admissibility. Judges make decisions about admissibility of evidence and generally, juries weigh the credibility of that evidence. In the end, the jury decides the credibility of the plaintiff's claim, not an expert witness. Experts must express appropriate opinions within the scope of their expertise in a manner that is helpful to the jury (FED. R. EVID. 702). However, experts must not state legal conclusions that potentially invade the province of the jury. In this regard, FED. R. EVID. 704 is a source of confusion for some attorneys, as follows:

> "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone."

Some attorneys misapply this rule in civil proceedings, while others over extend its reach by suggesting that experts cannot testify about their data when those data are directly relevant to a matter that a jury must decide, including whether or not symptoms or disabilities are exaggerated. In many respects, the "ultimate issue" rule is abandoned when the expert witness testimony is demonstrably helpful to the jury.

Having addressed the first three relevance-based arguments used in efforts to exclude FBS, the final argument questions the reliability of FBS. This strategy for excluding FBS uses the standards for evaluating experts as addressed in *Frye v. United States* (1923), *Daubert v. Merrill Dow Pharm., Inc.* (1993) and its progeny, FED. R. EVID. 702 Testimony by Experts and FED. R. EVID. 104 Preliminary Questions. Here, the judge plays the key role in determining reliability of the methods employed by expert witnesses. Briefly, a judge may deny the admission of evidence in a *Frye* jurisdiction, by simply finding that the methodology is not accepted in the relevant scientific community. The judge in *Vandergracht* (2005) made such a

finding and excluded FBS, because there was not "ample evidence that the test is accepted by his peers." For example, no survey data was presented to the judge showing that FBS application is common in neuropsychological practice.

In an apparent attempt at legal analysis, Butcher, Gass, Cumella, Kally, and Williams (2008) quote from the *Williams* court that excluded FBS testimony. Based on the evidence presented during the *Frye* hearing, Judge Bergmann concluded:

> "The FBS is very subjective and dependent on the interpretation of the person using or interpreting it. There is no definitive scoring because scoring has to be adjusted up and down based on the circumstances and there is a high degree of probability for false positives. Moreover, the scoring assessment has changed over the years from an original cut score of 20 in 1991, with recommended interpretive scores now ranging from 23 to 30; this coupled with the acknowledged bias against women and those with demonstrated serious injuries makes the FBS unreliable." (p. 11)

As is evident in his opinion, the judge in this case was presented with many of the same erroneous assertions that Butcher et al. (2008) advance. The following excerpts from this hearing illustrate the testimony upon which the Court relied in making its decision:

> Q: Okay. Let's go to your criticisms. What concerns do you have about the Fake Bad Scale?
>
> A: The way in which it was constructed was not up to standards as far as test construction goes. And one of the major problems with the Fake Bad Scale is that it has a high false positive rate based upon the cutoff scores that were initially provided by Lees-Haley a cutoff score of 20. And we published an article indicating that one of the main problems with the Fake Bad Scale -- and this was conducted by Paul Arbisi and myself and a couple of other people -- was that the Fake Bad Scale is comprised in large part of big chunks of items that are on existing symptom scales. So the same questions fall on the Fake Bad Scale that are actually on mental health and health symptom scales. That's the main problem with it. Most of the research on the Fake Bad Scale has not really used malingerers, per se, but they've used litigants. And some litigants are not malingerers. Actually, many are not malingerers. And so that's gotten kind of confused in the process.

The witness's characterization of the scale as having a high false positive rate, in particular in reference to a cutoff that has long ago and repeatedly been identified by the developer of the scale as too low, is clearly at odds with current literature. The issue of item overlap with substantive scales is not credible because the same criticism could be leveled at this witness's favored scale, F, and would be similarly misleading. The testimony that most of the research on the FBS has not used real malingerers is factually incorrect and inconsistent with the literature by Pen-Porath and his colleagues (in press). See attached table from Greiffenstein, Fox, & Lees-Haley (2007).

> Q: It says, "Score of 22 or higher." So, for example, if somebody gets a 23 and they're a woman, what percent of those individuals in your sample have you found to be malingering?
>
> A: If you look at just 22 and higher --
>
> Q: Uh-huh.
>
> A: -- 44 percent of women would be considered malingering in an inpatient psychiatric setting; they're in there for treatment, and they would be considered malingering.

Here the witness demonstrates Butcher et al.'s (2008) erroneous equating of elevated scores on FBS with malingering, and compounds the misleading nature of the testimony by relying on a cutoff lower than the one recommended by Greiffenstein et al. (2007) for interpreting scores of women with a history of psychiatric disorder. Moreover, the data are those reported by Butcher et al. (2003) where no information was available on whether these test-takers had any incentive to over-report, a necessary condition for a finding of malingering.

In response to a question about modifying cutoffs for FBS interpretation, the witness stated:

> A: He has -- he has altered his cutoff standard based on a number of things, including their most recent study of the 2007 article, they've jumped it way up to -- and it's a -- it's a variable standard. For example, I think, they call for a 26 cutoff is recommended for someone that has chronic and severe brain damage, or they recommend 29 plus if there's some kind of pre. For women if there's a some kind of a pre-injury psyche history, or 30 plus is recommended for those with a medical history that's complex and so forth. So, there is not a single cut score in the literature. It's wherever you look, you see a different picture.

Here, the witness demonstrates that he is indeed aware that the cutoff he referred to in the previous excerpt is incorrect and inappropriate. Moreover, contrary to the impression generated by this testimony, modifying cutoffs for MMPI-2 validity scales is standard practice. For example the MMPI-2 manual (Butcher et al., 2001) recommends different cutoffs for identifying over-reporting based on the F scale for nonclinical, clinical outpatient, and clinical inpatient settings.

Butcher et al. (2008) insinuate a connection between feedback provided by the developer of the FBS on a preliminary set of scales for a new version of the MMPI-2 and the addition of the scale to the MMPI-2 scoring materials. A similar attempt by the witness and the plaintiff's attorney in the *Williams* Frye hearing was rebuffed by the judge:

> Q: Can you tell me, sir, whether or not you're aware of the University of Minnesota Press through Dr. Ben-Porath deciding to include the MMPI scale -- Fake Bad Scale created by Dr. Paul Lees-Haley, and also a letter from Dr. Paul Lees-Haley just before that acceptance recommending the use of Dr. Ben-Porath's shorter test forms?
>
> Mr. F: Objection, Your Honor, leading.
>
> THE COURT: Overruled.
>
> Q: Go ahead.
>
> A: That's correct.
>
> Q: Doctor, do you have an opinion as to whether or not there is any quid pro quo or potential for quid pro quo involved in something like that, you approve my scales and I'll approve yours?

MR. F: Objection, Your Honor.

MS. S: Let me ask it another way.

Q: Can you rule it out?

MR. F: Objection, Your Honor, compound, leading.

THE COURT: Sustained.

Finally, the witness offered this observation to the judge in the *Williams* case:

> A: In my view, they present the Fake Bad Scale as like a silver bullet that goes into the person's psyche and picks out malingering, when in my personal view, in my opinion, it's more like a crude improvised explosive device that blows everything up. And that's the way these folks are using the test. When they see that FBS up, the person is malingering, there's nothing else to say.

Such inflammatory language reveals a personal bias that serves neither the scientific community in its efforts to assess the validity and utility of FBS, nor the legal community's need to rely on objective experts in understanding the scientific literature. Along the same lines, in an interview this witness gave to the Wall Street Journal, Dr. Butcher stated in reference to FBS "virtually everyone is a malingerer according to this scale. This is great for insurance companies but not great for people" (Armstrong, 2008, March 5).

As these excerpts reflect, the judge's opinion in the *Williams* case was swayed by testimony that is inconsistent with the scientific literature and characterized by many of the same flaws described by Ben-Porath et al. (in press). Rather then providing confirmation of the accuracy of Butcher et al.'s (2008) critique, the *Williams* decision reflects the problems trial judges face when presented with misleading testimony.

Frye versus *Daubert*

Although not applicable in the isolated *Frye* rulings that excluded FBS in a few Florida cases, the *Daubert* analysis is more complex and is applied in all federal courts and a majority of

states. *Daubert* examines whether the theory and methods used: 1) were generally adopted by the scientific community (*Frye* "general acceptance" test), 2) were subject to peer review and publication, 3) can be or have been tested, and 4) have a known and acceptable error rate (*Daubert*, p. 597). Although these factors are not exclusive, most courts apply them to determine the admissibility of evidence. There is not a single published case of FBS failing a *Daubert* challenge. In 2002, holdings from *Daubert* and its progeny were used to amend FED. R. EVID. 702 and codify these U.S. Supreme Court decisions into the current rules governing expert testimony. Rule 702 reads as follows:

> "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Moreover, FBS is routinely accepted in most other jurisdictions without challenge and has been admitted over objection in federal courts (*United States v. Bilton*, 2008).

Zealously advocacy with a lack of candor can sometimes lead to a breakdown in professional decorum (*Redwood v. Dobson*, 2007), resulting in attorney sanctions for incivility based on FED R. CIV. PRO. 30(d)(3), as follows:

> (A) Grounds. At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground that it is being conducted in bad faith or ***in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party***. The motion may be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order. [emphasis added]

FBS challenges will undoubtedly continue and attorneys will surely attempt to impeach ill-prepared experts. Pen-Porath, et. al. (in press) review SVT science and present new empirical data on the validity of MMPI-2 Symptom Validity Scale (FBS) as a measure of over-reporting in

personal injury litigants and claimants. When SVT science is presented to most courts, FBS testimony will be found to be based on sufficient data that is the product of reliable methods by experts who appropriately apply those methods to the facts of a case. Courts will scrutinize FBS and other symptom validity techniques, probing the relevance and reliability of each methodology. However, Butcher, et. al. (2008) have not made a persuasive scientific or legal case against FBS. SVT science will survive its collision with evidence law and the neuropsychologist expert using FBS along with other techniques will assist the jury in resolving the credibility of claims.

Protecting self-interest is a fundamental human adaptive trait required for survival. Injured parties and their advocates will present facts in the light most favorable to their position when confronted with strong external incentives, just as defendants and their advocates will rebut exaggerated claims. However, it is essential to preserve the objectivity, fairness, and integrity of neuropsychological evaluations in litigation as the best technology available to assist the trier of fact in resolving certain legal claims (Kaufmann, 2005). The application of SVT science in neuropsychological evaluation is the best method for assisting the trier of fact to sort out competing claims when adjudicating brain injury cases.

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Chances of MMPI-2 Symptom Validity Scale (FBS) False Positive Errors in a Mixed Sample of Patients with No Known Secondary Gain Incentives

First author (year)	Group	N	FBS cut score 20+	22+	25+	28+	29+
Miller (2001)	Severe TBI	28	11%	11%	4%	4%	0%
Tsushima (2001)	Psychiatric patient female	111	19%	10%	5.3%	3%	2%
Tsushima (2001)	Psychiatric patient male	97	33%	22%	10%	3%	1%
Iverson (2002)	Organ transplant, males	20	30%	25%	20%	10%	0%
Iverson (2002)	Substance abusers, male	25	24%	16%	8%	0%	0%
Iverson (2002)	Inmates, males	50	4%	0%	0%	0%	0%
Meyers (2002)	Moderate–severe CHI	59	15%	8.5%	5%	0%	0%
Larrabee(2003b)	CHI	29	21%	14%	7%	0%	0%
Ross (2004)	Clinical TBI	41	12%	10%	5%	0%	0%
Greiffenstein (2005)	Nontraumatic brain diseases	29	41%	17%	7%	0%	0%
Greve (2006)	Nontraumatic brain diseases	132	19%	8%	3%	0%	0%
Greve (2006)	Moderate–severe CHI, no incentive	18	22%	22%	11%	0%	0%
Fox(2005)	Probationers (criminal)	80	20%	14%	9%	1.5%	0%
Fox(2005)	Job applicants	69	1.5%	0%	0%	0%	0%
Barr (2005)	Inpatient epilepsy unit	51	31%	18%	10%	4%	0%
Wolfendorf (2005)	Mixed neurology	150	0%	0%	0%	0%	0%
Martinez (2005)	Acute head trauma	63	52	58	60	0%	0%
	Cumulative total	1,052	876	950	999	1,040	1,049
	Total False Positive Rate		18.7%	9.7%	5%	1.2%	0.3%

Adapted from Greiffenstein, Fox, and Lees-Haley, 2007, in K. Boone (Editor), *Assessment of feigned cognitive impairment*, Guilford Press Table 10.3, pg. 222.

Mastronardi, Kay

From: Peggy Sue Rentz [PRentz@maynardcooper.com]
Sent: Monday, April 20, 2009 11:11 AM
To: Pilchen, Ira; Mastronardi, Kay; Curd, Beverly
Subject: Ltr from James R. Holland re: ABA Conference on 3/13/09/Dr. Paul Kaufman
Attachments: 20090420120417.pdf

Good Morning,

Attached is a letter with attachments that Tommy received today regarding some recent remarks by Dr. Paul kaufman at a recent ABA conference.

Have a good day!
Peggy Sue

MAYNARD COOPER [redacted] & GALE PC
ATTORNEYS AT LAW

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DIPLOMATE IN CLINICAL NEUROPSYCHOLOGY
AMERICAN BOARD OF PROFESSIONAL PSYCHOLOGY
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April 24, 2009

H. Thomas Wells, Jr., President
American Bar Association
c/o Maynard, Cooper & Gale
2400 Regions/Harbert Plaza
1901 Sixth Avenue North
Birmingham, AL 35203

Re: April 14, 2009 letter
James R. Holland II

Dear Mr. Wells:

I appreciated the opportunity to talk with you regarding matters raised by Mr. Holland, one of your members. Based on our telephone conversation, I understand that the ABA has never received a complaint of this nature and that the ABA does not involve itself in lawyer discipline, even as it may discipline its own members. To paraphrase your words, the ABA encourages civil debate about relevant differences of professional opinion. As a practicing litigator, I have a difference of professional opinion with Ms. Sims and Mr. Holland regarding the proper balance between ABA Rule 1.3 Diligence (Zealous Advocacy) and ABA Rule 3.3 Candor Before the Tribunal. I deny the allegations of libel and slander *per se* contained in Mr. Holland's letter. In my opinion, a reasonable review of the facts will show that Mr. Holland's allegations are without merit and possibly frivolous. Mr. Holland's allegations may raise certain concerns with ABA Rule 8.3 or ABA Constitution § 3.3(b)(2) "for other good cause" provision.

On September 14, 2008, I received an invitation to join an ABA panel discussion from Kim R. Martens, Conference Program Chair, ABA 2009 Workers' Compensation Midwinter Seminar and Conference, as follows:

> "We (ABA lawyers, judges and educators) present a variety of panels of experts who explore current hot topics and issues of interest to workers' compensation players ***from all sides*** (employers, insurers, claimant and defense attorneys, judges and law professors).
>
> We are looking for someone qualified to present the strengths and attributes of the "fake bad scale" and we have a preliminary commitment from Dorothy Clay Sims of Sims, Stakenborg & Henry, P.A., Ocala, FL ***to present the opposing view*** of utilization of the "fake bad scale" in workers' compensation litigation." (September 14, 2008 e-mail) (emphasis added).

As you can see, I was invited to present a view that Ms. Sims opposes in a session eventually titled *Are you really telling the truth about how bad your pain is? Symptom validity (SV) science in our*

workers' compensation courts – Are SV scales and related techniques admissible or are they nothing more than a new polygraph? During that March 13 presentation in New Orleans, I briefly highlighted differences of opinion with Ms. Sims in a civil and professional manner. As a scientifically trained and practicing board-certified neuropsychologist, SV science is well established in the relevant scientific community and a majority of courts admit expert opinions based on SV science. When I congratulated Ms. Sims on her zealous advocacy, I openly acknowledge that she is free to advocate against prevailing science and law, but reasonable people may disagree with her opinions.

The material contained in my ABA submission *Evidence law adapts to new science: Symptom validity techniques in litigation*, for which Mr. Holland takes exception, relies heavily on a peer-reviewed, empirical, scientific manuscript that was published at essentially the same time, see

Ben-Porath, Y.S., Greve, K.W., Bianchini, K.J., & Kaufmann, P.M. (2009). The MMPI-2 Symptom Validity Scale (FBS) Is an Empirically Validated Measure of Overreporting in Personal Injury Litigants and Claimants: Reply to Butcher et al. (2008). *Psychological Injury and Law, 2*(1), 62-85.

This publication is the most recent scientific empirical study of FBS (formerly "fake bad scale") for which Mr. Martens invited me to present. The study adds new findings to the SV scientific literature that has been evolving rapidly in the last 20 years. It also demonstrates the opinions that I expressed at the debate are grounded in sound science. I would be pleased to offer additional information from the Conference presentation should the ABA wish to investigate this matter further. In keeping with the conclusion of our conversation, I would also be happy to appear at any other ABA forums to discuss the balance of ABA Rules 1.3 and 3.3, or to describe the application of neuropsychology and SV science in litigation. I look forward to hearing from you.

As a member of the Board of Directors for the American Academy of Clinical Neuropsychology (AACN) and speaking on behalf of its President, Dr. Greg J. Lamberty, I invite the ABA to consider further professional dialog with AACN on topics of mutual interest. For example, AACN recently concluded a Consensus Conference on Response Bias, Effort, and Malingering in neuropsychological evaluations and will be publishing a statement later this year in our flagship journal, *The Clinical Neuropsychologist*. Neuropsychology and SV science are increasingly used in criminal and civil proceedings, well beyond the arena of workers' compensation litigation. If you have any further questions, please do not hesitate to contact me or AACN President Lamberty.

Thank you for taking time out of your busy schedule to talk with me today.

Sincerely,

Paul M. Kaufmann

cc: James R. Holland, II
Wettermark, Holland & Keith, LLC
2101 Highland Avenue South, Suite 700
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NORTHWESTERN
UNIVERSITY

April 14, 2009

Mr. Hulett H. Askew
Consultant
Office of the Consultant on Legal Education
Section of Legal Education and Admissions to the Bar
American Bar Association
321 N. Clark Street, 21st floor
Chicago, IL 60610

Re: *Statement of Certain University Presidents to the ABA Council on Legal Education*

Dear Mr. Askew:

I enclose a statement, which has been approved and signed by 14 university presidents and chancellors, on the regulation by the American Bar Association's Council on Legal Education and Admission to the Bar (the "Council") of the terms and conditions of employment of our faculty and other employees in our respective law schools (the "Statement"). Each of our universities has an American Bar Association accredited law school. I ask that you forward the Statement to each member of the Council for his or her consideration.

I understand that the Statement has already caused some discussion within the law school community. In preparing the Statement, I approached a small number of university presidents and chancellors (approximately 25), contrary to published reports that I "sent a letter 130 college presidents" (as reported by Douglas Lederman on Inside Higher Education on March 2, 2009). My letter and proposed Statement to those leaders (and to their law school deans) was a private communication. It was not sent by me to any other university leaders, the press, or any others.

On behalf of the other signatories and myself, I urge the Council to consider the Statement carefully, and make the changes proposed to its Standards for the Approval of Law Schools. I would welcome a chance to discuss this issue further with you or the Council.

Thank you for your assistance.

Sincerely,

Henry S. Bienen

cc: Statement signatories
H. Thomas Wells, President, ABA
Hank White, Executive Director, ABA
Thomas Howell, General Counsel, ABA

Statement to the
ABA Council on Legal Education and Admission to the Bar
on
Standards Requiring Specific Terms and Conditions of Employment

April 14, 2009

To: American Bar Association's Council on Legal Education and Admission to the Bar (the "ABA Council")

We the undersigned are chancellors, presidents, and provosts of our respective universities. Each of our universities includes as one of its constituent schools a law school accredited by the ABA Council. Each of us is ultimately responsible to our governing boards and to our students who attend them for the quality of the legal education provided by our law schools.

We understand that the ABA Council has been considering whether to continue to regulate the terms and conditions of employment of faculty and others within law schools accredited by the ABA Council.

We urge the ABA Council to remove from its Standards for Approval of Law Schools all Standards and Interpretations that require that a law school must provide specified terms and conditions of employment to its faculty and others. In particular, we urge the Council to remove the Standards and related Interpretations listed on Schedule A attached to this Statement.

Such requirements are unrelated to the quality of the education that our law schools provide and for which we are responsible. To our knowledge, no other accrediting agency authorized by the Department of Education requires specific terms and conditions of employment. While the accrediting standards of other agencies do vary in approach and content, none of them to our knowledge specifies the employment arrangements that the accredited educational program must have with its faculty and employees. Instead, they all focus solely on the resulting quality of the educational program, which is the purpose for accreditation in the first place.

We adhere to the following principles:

(1) The terms and conditions of employment offered to our faculty are within the exclusive province of our individual institutions. The ability of each of our universities to make those judgments and determinations is fundamental to our being able to offer flexible, responsive, and innovative educational programs.
(2) As a corollary to the preceding, each of our respective institutions is free to offer its faculty, law library directors, deans, and others tenure or tenure-like security if we make the individual determination that doing so will help us attract and retain the best personnel. We recognize that tenure is a

venerable institution and affords one way to advance our respective missions. This is not an assault on the system of tenure, only a rejection of the premise that it is the only way to provide an excellent educational product in our law schools.

(3) Each of us individually - and each of our universities - has adopted and strongly endorses and enforces the principles of academic freedom as stated in the 1940 Declaration of the American Association of University Professors. We do not believe that the academic freedom of our faculty or of our institutions requires the imposition of uniform terms and conditions of employment.

We urge the Council to remove immediately from its Standards for the Approval of Law School those Standards and Interpretations that purport to require that our law schools provide specific terms and conditions of employment. We would welcome their replacement with reasonable standards that require our law schools to retain competent and dedicated faculty and that protect the academic freedom of all faculty regardless of the terms and conditions of their employment.

There may be serious internal obstacles within the ABA Council to taking this action, but those obstacles must not be allowed to preserve the status quo so that the ABA Council continues to impose these inappropriate requirements on our law schools.

Signed by the following:

Michael Adams, President, University of Georgia
Charles Bantz, Chancellor, Indiana University-Purdue University Indianapolis
Henry S. Bienen, President, Northwestern University
Lawrence Biondi, Saint Louis University
Mary Sue Coleman, University of Michigan
John Hennessy, Stanford University
Robert Khayat, Chancellor, University of Mississippi
Alan Merten, President, George Mason University
Mark Nordenberg, University of Pittsburgh
Steven Sample, President, University of Southern California
David Skorton, President, Cornell University
Graham Spanier, President, Penn State University
Thomas Wetherell, President, Florida State University
Robert Zimmer, University of Chicago

Schedule A

Standards Related to Terms and Conditions of Employment

The following Standards should be removed or modified to eliminate the requirement that law schools provide certain and terms and conditions of employment:

- Dean (Standard 206(c)): "Except in extraordinary circumstances, a dean shall also hold appointment as a member of the faculty with tenure."

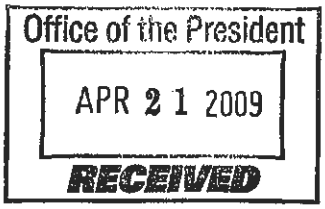
- Student-Faculty Ratio (Interpretation 402-1(1)(A)): For the purposes of the published student-faculty ratio a law school must differentiate among faculty and instructors based on the terms and conditions of their employment by counting certain faculty who are "not on tenure track or its equivalent who teach a full load" as 0.7, and "adjuncts, emeriti faculty, non-tenure track administrators who teach, librarians who teach, and teachers from other units of the university" as 0.2. This provision creates perverse incentives that may limit hiring of non-tenure track faculty.

- Faculty (Standard 405(b) and Interpretation 405-1): "A law school shall have an established and announced policy with respect to academic freedom ~~and~~ure...." (to the extent that it is interpreted to require a system of tenure or tenure-like job security).

- Clinical Faculty (Standard 405(c) and Interpretations 405-6, 405-7, and 405-8): "A law school shall afford to full-time clinical faculty members a form of security of position reasonably similar to tenure, and non-compensatory perquisites reasonably similar to those provided to other full-time faculty members."

- Legal Writing Faculty (Standard 405(d)): "A law school shall afford legal writing teachers such security of position and other rights and privileges of faculty membership as may be necessary to (1) attract and retain a faculty that is well qualified to provide legal writing instruction as required by Standard 302(a)(2) and (2) safeguard academic freedom."

- Law Librarian (Standard 603(d) and Interpretation 603-3): "Except in extraordinary circumstances, a law library director shall hold a law faculty appointment with security of faculty positions."



United States Department of State

Washington, D.C. 20520

April 10, 2009

Dear Mr. Wells:

Thank you for sending Secretary Clinton a copy of your March 18th letter to the President of Kenya, the Honorable Mwai Kibaki, regarding the murder of Oscar Kamau King'ara and John Paul Oulu, two prominent human rights activists in Kenya. We share your concerns about the murders, the need for an independent investigation, and the importance of respecting the rights of human rights defenders. Secretary Clinton has ask me to reply on her behalf.

As you may be aware, the United States embassy in Nairobi issued a statement strongly condemning the murders. It stated, in part:

> The United States is gravely concerned and urges the Kenyan government to launch an immediate, comprehensive, and transparent investigation into this crime. We urge government to do all in its power to bring those responsible for the murders to justice and to prevent Kenya from becoming a place where human rights defenders can be murdered with impunity. The government should protect any witnesses associated with this case under the Witness Protection Act of 2006.

The United States offered the services of the FBI to aid in the private investigations but, to our regret, the police prevailed upon the government to turn down the offer. Since the killings appear to have been politically motivated, an independent investigation is critical and we will continue to call upon the government to support such an investigation and, more generally, move forward on much needed reform of the police system to address impunity, corruption and human rights abuses.

H. Thomas Wells, Jr.,
President, American Bar Association,
321 North Clark Street,
Chicago, IL 60654-7598.

Equally important is working to ensure that Kenya respects its obligations under international law to respect the rights of human rights defenders. It appears in this case, criticism of the Government of Kenya may have played a role in the murder of these two activists, leaders of the Oscar Foundation, who were investigating allegations of extrajudicial killings in Kenya at the time of their deaths. We are also hearing of threats from unknown sources to a number of other human rights workers which we find very disturbing.

Thank you again for your concern and recommendations into this grave matter. The United States will continue to work with the Government of Kenya to encourage a comprehensive and transparent investigation into the crime. Politically motivated killings, especially those targeting human rights workers, including those by any government or its agents, will continue to be condemned by the United States.

Sincerely,

Bruce Connuck
Acting Deputy Assistant Secretary
Bureau of Democracy, Human Rights and Labor

Rule of Law

Defending Liberty
Pursuing Justice

H. Thomas Wells, Jr.
President

AMERICAN BAR ASSOCIATION

321 North Clark Street
Chicago, IL 60654-7598
(312) 988-5109
Fax: (312) 988-5100
E-mail: abapresident@abanet.org

Via fax (011-254-20-250264)

March 18, 2009

His Excellency The Hon. Mwai Kibaki C.G.H., M.P.
President of Kenya
Harambee House, Harambee Avenue
P.O. Box 30510, Nairobi
Kenya

Re: The murders of Oscar Kamau King'ara and John Paul Oulu

Your Excellency:

The American Bar Association (ABA) is an independent, voluntary, non-governmental organization of lawyers and judges, with more than 410,000 members worldwide. It regards human rights and the rule of law as cornerstones of a free and fair society and is committed to strengthening them in the United States and abroad.

The ABA is deeply concerned about the recent brutal murders in Nairobi of two human rights defenders, Oscar Kamau King'ara and John Paul Oulu. Their organization, the Oscar Foundation Free Legal Aid Clinic, has led efforts to document alleged extrajudicial killings by Kenyan police. On March 5, 2009, a government spokesman publicly accused the Oscar Foundation of being a front for the outlaw Mungiki sect, suspected followers of which, according to the foundation, have been subjected to extrajudicial execution. Shortly after that announcement, King'ara and Oulu's car was cornered in traffic by several other vehicles, from which armed assailants emerged and shot both men dead at point-blank range.

Given public speculation about police involvement in the murders, and in light of the Oscar Foundation's past allegations of police abuse, the ABA respectfully urges your government to let independent authorities conduct a thorough and impartial investigation of these crimes, and to ensure that swift and effective justice is rendered in accordance with international due process and fair trial standards. We further urge your government's full and consistent observance of the United Nations Declaration on Human Rights Defenders, Article 8(2) of which declares the right of all persons "to submit to governmental bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to

any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms."

Sincerely,

H. Thomas Wells, Jr.

cc (via fax): Prime Minister Raila Odinga
Minister for Internal Security George Saitoti
Hon. Hillary R. Clinton, U.S. Secretary of State
Hon. Peter Ogego, Ambassador of Kenya to the United States
Kenya National Commission on Human Rights
UN Spec. Rapporteur on the Situation of Human Rights Defenders
UN Spec. Rapporteur on Extrajudicial, Summary or Arbitrary Executions

Supreme Court of the United States
Washington, D. C. 20543

COUNSELOR TO
THE CHIEF JUSTICE

April 14, 2009

H. Thomas Wells, Jr.
President
American Bar Association
321 North Clark Street
Chicago, Illinois 60654-7598

Dear Mr. Wells:

The Chief Justice has asked me to respond to your March 2009, letter inviting him to attend the American Bar Association's 132nd annual meeting to be held July 30 to August 4, 2009. The Chief Justice is unable to accept because of other pending engagements. He nevertheless appreciates your kind invitation.

Sincerely,

Jeffrey P. Minear

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
18 GREENVILLE STREET
POST OFFICE BOX 939
NEWNAN, GEORGIA 30264
(678) 423-3020

CHAMBERS OF
JACK T. CAMP, JUDGE

April 20, 2009

Atlanta Division:
2142 United States Courthouse
Atlanta, Georgia 30303
(404) 215-1520

Reply to:

H. Thomas Wells, Jr.
Attorney at Law
Maynard, Cooper and Gale, PC
1901 6th Avenue North, Suite 2400
Birmingham, AL 35203

Dear Tommy:

I had hoped to have the opportunity to visit with you when you were in Atlanta a couple of weeks ago. However, that was a long court day for me, and I headed home rather than stop by the State Bar.

Congratulations on being ABA President. That is quite an honor, and I am sure that it takes a substantial amount of time.

You and I have not visited since the old Cabiness Firm days. Since the Judicial Conference is in Birmingham this year, I hope to see you then.

Yours truly,

Jack Camp

JC:pkl

Mastronardi, Kay

From: Peggy Sue Rentz [PRentz@maynardcooper.com]
Sent: Wednesday, April 22, 2009 11:24 AM
To: Pilchen, Ira; Mastronardi, Kay; Curd, Beverly
Subject: Friendly/congrats letter from Jack Camp to Tommy
Attachments: 20090422122004.pdf

Hey,

Tommy received the attached letter from Jack Camp today.

Have a good day.
Peggy Sue

MAYNARD COOPER & GALE PC
ATTORNEYS AT LAW

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE DAVID H. SOUTER

April 20, 2009

Dear Mr. Wells:

Thanks for the kindness of your invitation to the annual meeting next summer. I will not be able to attend, but I much appreciate your thought of me.

Yours sincerely,

David Souter

H. Thomas Wells, Jr., Esquire
American Bar Association
321 North Clark Street
Chicago, Illinois 60654-7598

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April 21, 2009

Mr. H. Thomas Wells, Jr.
President
American Bar Association
321 North Clark Street
Chicago, IL 60610

Dear H. Thomas:

The Nominating Committee of Certified Financial Planner Board of Standards Inc. (CFP Board) seeks your assistance as it begins a search for individuals to serve on CFP Board's Board of Directors beginning in January 2010. Board Directors serve four-year terms on CFP Board's governing body, and the majority of Board members must hold CFP® certification. To complement the experience of the existing Board Directors, the Committee would like to see qualified candidates who are leaders in financial planning and have a passion for how CFP® professionals can benefit the public.

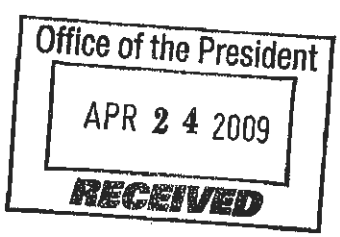
Each year only two to four new Board positions are available. Each interested candidate will receive a Position and Candidate Specification document which includes the details on the duties of a Board Director, as well as an application. To demonstrate interest, a candidate is asked to complete the application no later than June 12, 2009. Candidate applications will be carefully reviewed, and selected candidates will be interviewed by the Committee during the summer.

We appreciate your recommendations, for our consideration, of individuals you feel will provide expertise and add value to CFP Board and its mission. To recommend them, please either send their names and contact information to Tammy Turner, Executive Assistant to the CEO at CFP Board, by e-mail at tturner@CFPBoard.org or encourage them to go directly to CFP Board's Web site at www.CFP.net/volunteers to learn more and download the Board Director Volunteer application form.

Thank you for your assistance and recommendations.

Sincerely,

Robert Glovsky, J.D., LLM, CFP®, CLU, ChFC
Chair, Nominating Committee



Mr. H. Thomas Wells Jr.
President,
American Bar Association
740 15th Street, N.W.
Washington, DC 20005-1019
202.662.1000

April 14, 2009

Sir,

On behalf of the legal team of the Chief Justice of Pakistan, Mr. Iftikhar Mohammad Chaudhry, and the lawyers of Pakistan, I would like to present the enclosed plaque to the members of the American Bar Association.

This token is presented as a mark of appreciation of Pakistan's lawyers for their American counterparts for the support they voiced over the past two years for the struggle for judicial independence in Pakistan.

As you will note from the date on the plaque, it was originally intended to be presented to the ABA last November during the Chief Justice's visit to the United States to accept Harvard Law School's Medal of Freedom and the New York City Bar's Honorary Membership. Unfortunately, due to scheduling constraints, it proved impossible at the time.

However, I am delighted to convey this delayed appreciation at this time. As you know, the Chief Justice and all remaining deposed judges were restored their offices in March, marking a remarkable success for the lawyers movement.

This movement, while spearheaded by Pakistan's lawyers and sustained by Pakistan's civil society and political parties, gained tremendously from the strong expressions of support from the ABA, and America's lawyers in general.

Thank you once again for your support over these past two years.

With warm regards,

Ali Ahsan

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New York, NY 10011
Ali.ahsan@aya.yale.edu

CABINET DU PRÉSIDENT
OFFICE OF THE PRESIDENT

April 24, 2009

The Right Honourable Stephen Harper, P.C., M.P.
House of Commons
Ottawa, Ontario
K1A 0A6

The President of the United States
White House
1600 Pennsylvania Avenue NW
Washington, DC 20500

Re: Repatriation of Omar Khadr

Dear Prime Minister and Mr. President:

On behalf of the Canadian Bar Association (CBA), I write to you to urge the U.S. and Canadian governments to work together to facilitate the repatriation of Omar Khadr, the only Western citizen who continues to be detained at Guantánamo Bay.

The CBA is a national association representing 38,000 jurists across Canada. We work to promote the Rule of Law and improve the administration of justice in Canada and around the world. It is in this light that we have protested Mr. Khadr's subjection to the military tribunal process in Guantánamo Bay and called for his repatriation. We take no position on Mr. Khadr's guilt or innocence. Our concern is that he receive a fair trial in accordance with all procedural protections and special considerations to be afforded a minor, as required by domestic and international law. Canada's justice system is well equipped to fairly and openly assess Mr. Khadr's criminal culpability, in a manner that reflects his status as a minor at the relevant time.

Mr. President, we welcomed the news of your decision to close Guantánamo Bay within the year and to assign officials to review the status of all detainees. Pursuant to your executive order, you have tasked review members to first consider "whether it is possible to transfer or release the individuals consistent with the national security and foreign policy interests of the United States and, if so, whether and how the Secretary of Defense may effect their transfer or release."

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Home Page/Page d'accueil : www.cba.org E-Mail/Courriel : info@cba.org

Yesterday, Canada's Federal Court ruled the ongoing refusal of the Government of Canada to request Mr. Khadr's repatriation to Canada "offends a principle of fundamental justice and violates Mr. Khadr's rights under s. 7 of the *Charter*". It ordered the government to seek Khadr's repatriation as soon as practicable.[1]

Mr. Khadr was 15 years old when he was wounded on the battlefield in Afghanistan, a child under the terms of the *Convention on the Rights of the Child.* Mr. Khadr has not been fully afforded the basic entitlements of due process under the Rule of Law, such as the right to counsel and the right to know the case against him. He has not been afforded any process that took into account his unique needs and status as a minor under the *Optional Protocol of the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.*. He has been detained in the general population of detainees in Guantánamo Bay and has not received any physical, psychological or educational services that would assist in his rehabilitation. The Federal Court of Canada found that the terms of the *Convention on the Rights of the Child* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* were violated in relation to Mr. Khadr's treatment.

Prime Minister, the time has come for the Canadian government to advise the U.S. that it is willing to negotiate the terms of Mr. Khadr's repatriation to Canada to face Canadian justice. In turn, Mr. President, we urge the U.S. government to negotiate the terms of Mr. Khadr's repatriation with the Canadian government and to transfer available evidence respecting his conduct to the Canadian government. We urge you to come to an agreement that recognizes international human rights obligations, due process and the Rule of Law, and the desirability of ensuring the national security of both countries,

Yours truly,

J. Guy Joubert

c. The Honourable Lawrence Cannon, P.C., M.P., Minister of Foreign Affairs
The Honourable Rob Nicholson, P.C., M.P., Minister of Justice
H. Thomas Wells, Jr., President, American Bar Association

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1 *Khadr v. Canada*, 2009 FC 405