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ATTORNEYS AT LAW

# THE BRIEF
of konowitz & greenberg

SUMMER 2009

## Helping our clients navigate difficult waters...

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# Media & Entertainment

## Copyright, Fair Use and the New Media Artist

It was once the case that the only way for a film-maker to have his or her work viewed by a large audience was to have it picked up by a film or television distribution company. With the advent of online video hosting services like YouTube, artists, professional and amateur alike, are now able to circumvent this process by posting their content on the Internet. The posting of online videos has changed the way people communicate their ideas and express themselves. However, with this explosion in free expression comes a growing debate on the doctrine of Fair Use.

Copyright law protects authors by prohibiting the verbatim copying of their work. It also protects authors from infringement by distribution, display, public performance, derivative works and similar unauthorized use of the work. However, the law recognizes that there is a delicate balance between the rights of the author of the original work and the rights of others to use portions of the work to create new content. The doctrine of Fair Use permits the use of portions of original work, provided the new creation transforms, comments on, critiques, parodies or is a satire of the original. The challenge of the doctrine lies in drawing the line between prohibited derivative work and acceptable transformative work. That is, how much transformation or commentary is enough to be deemed "Fair Use?"

As a rule, this determination is made by judges on a case-by-case basis. If you intend to post a video or film that has clips from copyrighted works, and particularly if you intend to market your own work for profit, it is important to make sure that you understand and adhere to the best practices of Fair Use.

K&G's team of friendly, accessible and capable professionals is here to help individuals and businesses with the issues they face today: managing privately-held businesses, estate planning, trust administration, adoptions, divorces, real estate transactions, and business and civil litigation. We offer high-quality, efficient "service, service, service" at a reasonable cost. Responsiveness to our clients is our priority.

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# Assisted Reproductive Technology and Adoption:

## Different Paths, Similar Issues, Similar Goals

As many of you know, last year I served as President of the American Academy of Adoption Attorneys. During my year as President, the Academy continued to explore the relationship between Assisted Reproductive Technologies ("ART")—such as in vitro fertilization, artificial insemination, surrogacy and gestational carriers—and Adoption. In light of the growth and development of ART in recent years, I appointed a task force to develop a plan to add a special division to the Academy for attorneys who are expert in the area of ART law.

I believe this is appropriate because adoption and ART share many of the same issues and goals, including:

- Family building
- Dealing with infertility
- Locating reputable resources
- Obtaining reliable medical histories
- Setting appropriate pre-birth contact
- Identifying the applicable law when more than one state is involved
- Dealing with the age-old question: "Where did I come from?"
- Securing the birth certificate
- Defining appropriate post-birth contact

However, from my perspective, the most critical issue for both ART and adoption is protecting the rights of each person involved in the process. For this reason, both avenues to family building demand high ethical standards, and the law, practice and policy continues to evolve to ensure that those standards are met. Currently, I am working with several of my colleagues in setting up continuing legal education courses sponsored by the Academy to assist in that endeavor.

If you or anyone you know is considering building a family in a manner other than the "old fashioned" way, please feel free to contact me if you would like to discuss protecting your rights and interests during the process.

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# Insurance Defense

## Who is Watching Out for Your Interests?

Suppose the unthinkable occurs and you or your business is involved in a serious accident and are sued. Fortunately, you have liability insurance and the insurance company agrees to cover and defend the case. Problem solved, right? Maybe not.

While many people believe that the attorney appointed by the insurance company to defend the case is protecting their interests in the lawsuit, that is not always the case. Insurance counsel must follow the directions of the insurance company and, depending on the value of the claim and the amount of insurance you have purchased, a judgment easily could exceed the policy limits of the coverage, leaving you or your business exposed to liability for any excess judgment. In such cases, businesses should have independent counsel, in addition to counsel appointed by the insurance company, to monitor and help resolve the case in a manner beneficial to the insured, not the insurance company.

Independent counsel can serve this role in a variety of ways. For example, in the course of litigation where the amount of coverage available on a claim may not be sufficient to cover a judgment, the insurer may have the opportunity to settle the case for the policy limits. In such situations, independent counsel can play a crucial role in airing the insured's view of the case and encouraging the insurance company to accept the settlement, thereby avoiding any potential personal liability to the individual or business.

Without such active involvement by independent counsel, the insurance company may choose to reject such a settlement demand and roll the dice at trial, leaving the insured on the hook for any judgment in excess of the policy limits. Having independent counsel in place to watch your back and protect your interests and those of your family or business is a valuable tool to have in your arsenal when dealing with insurance litigation.

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# Probate

## Sweeping Changes to Guardianship Law

Article V of the newly adopted Massachusetts Uniform Probate Code (the "Probate Code") enacts long overdue changes intended to modernize the guardianship and conservatorship laws in Massachusetts. Effective July 1, 2009, the Probate Code seeks to protect the individual's fundamental rights and minimize government intrusions imposed by the Probate Court when court involvement is necessary. This article highlights some of the most significant changes.

Prior to enacting the new Probate Code, when a person was incapacitated, Massachusetts law permitted the court to appoint a guardian to have custody of both the person and the property of the incapacitated person. The Probate Code, however, makes a clear distinction between guardians and conservators to eliminate the inherent problem of having one person exert total control over another person's life. Now, a guardian may be appointed to have custody exclusively of the person, while a conservator may be appointed to have control only over the property of the incapacitated person.

Under the Probate Code, a guardian is directed to make decisions regarding the incapacitated person's support, care, education, health and welfare. When an incapacitated person needs help managing property or business affairs, a conservator will be appointed. In the event that an incapacitated person needs medical and financial assistance, a court may appoint both a guardian and a conservator under separate petitions only after demonstrating the need for both types of protection.

Since the granting of a guardianship and/or conservatorship deprives a person of certain fundamental rights, the Probate Code recognizes the need for a right to counsel and for the appointment of a guardian ad litem to investigate the condition of the person subject to a protective proceeding. The incapacitated person also has a right to be present at any hearing in person, to present evidence, cross-examine witnesses and to nominate his/her own guardian or conservator. Additional new protections for the incapacitated person include not only requiring courts to spell out the specific duties of an appointed guardian or conservator, but also placing certain limits on their authority and providing judicial oversight on an ongoing basis.

The Probate Code also includes several changes related to the guardianship of minors.

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### LATEST HEADLINE

In a recent victory, **Mia Rosenblatt Tinkjian** assisted a Condominium Association in recouping losses for unpaid condo fees from a former Unit Owner who had vacated the Unit, allowed the bank to foreclose on the property and declared personal bankruptcy.

### A VICTORY

Our latest addition to the Konowitz & Greenberg team, **Attorney Roz Kabrhel,** successfully recouped attorneys' fees, costs and expenses incurred for a client involved in a contested guardianship of a loved one.

### SPEAKING ENGAGEMENT

**Karen K. Greenberg** will be conducting a workshop with her colleague, Etta Lappen Davis, at the Council on Accreditation (COA) 2009 National Conference—**Strategies for Sustaining Success,** held August 9-11, 2009 in NYC. The workshop, **Adoption Ethics: Conflicting Rights and Interests,** will focus on ethical dilemmas in legal adoption practices.

### OTHER NEWS

For several years, **Attorney Karen K. Greenberg** and colleagues Etta Lappen Davis and Raquel Woodard, have been working on legislation to amend the Massachusetts Adoption Statutes, found at M.G.L.ch 210. On June 30, 2009, they met with Lt. Governor Timothy Murray to discuss their proposed legislation.

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# Corporate

## The Role of a General Counsel as a Specialist

Today's legal community is rampant with specialists. Specialization, however, has left many businesses without a true General Counsel. That is, without a generalist able to serve as a trusted advisor with business savvy, strategy and experience, provide knowledgeable interpretations of regulations and statutes, and act as a risk assessment expert.

An effective General Counsel realizes that company executives and entrepreneurs need to spend more time steering their companies in the proper direction and know that to do so they need informed but not overly detailed or cumbersome legal strategies, real-time decisions instead of theory, big picture solutions delivered on time and on budget, and advice that is innovative, aggressive and practical.

Ironically, in my practice as outside general counsel to my clients, I have come to realize that a true General Counsel is a specialist who specializes in:

- Being a listener, a mentor and learning the nuts and bolts of a business. This enables the General Counsel to be in a position to know what truly matters to the business and give unvarnished advice at critical junctures, while also keeping an eye on the full spectrum of a company's legal issues.
- Being a counselor and helping clients navigate through very difficult waters by being proactive rather that reactive, and striving to avoid disputes before they arise, resulting in significant cost savings in legal fees for the client.
- Being totally involved and coordinating with the client's team of advisors, facilitating communication and collaboration among all of these professionals, in order to ensure a unified approach to issues and avoid the "procrastination problem" that many businesses face in finding (or making) the time to talk with their advisors.

Armed with a thorough understanding of the company, as well as legal experience, strong analytical skills and judgment, a true General Counsel can guide a company through the best and worst of times.

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# Civil Rights

## Student Rights on the College Campus

For the past two years, I have taught an introductory law course at Brandeis University. Each semester, I invite the students to submit legal questions they would like to discuss. Overwhelmingly, the questions that I am asked most often relate to students' rights on campus: *When can campus police enter my room? Can I refuse to let them in? How can the school punish me for something that happens off campus?*

Of course, as a good teacher, I answer these questions with one of my own: *Were you issued a student handbook upon orientation?* The answer: *Yes*. Next question: *Did you read it?* The usual answer: *Not really.*

Perhaps it is unsurprising that an eighteen-year-old would care little about the information conveyed in a student handbook. However, the handbook governs the students' relationship with the university, and contains provisions that impact their freedom of speech and congregation, right to privacy and due process rights in disciplinary proceedings. In addition, the handbook typically explains the rights of students (and their parents) to access, inspect and request changes to their educational records under the Family Educational Rights and Privacy Act.

The student handbook of your child's university or college may very well be the first "contract" they enter into as adults. Most schools today require students to sign a document at freshman orientation indicating that they have read and understand the student handbook. In Massachusetts, courts have held that the student handbook has the force and effect of a contract.

More likely than not, your child will never have to worry about the provisions set forth in the student handbook—but what an excellent opportunity for parents to teach their kids—now adults—an essential tenant of contract law: *read before you sign.*