Cohen Garelick & Glazier
8888 Keystone Crossing Boulevard
Suite 800
Indianapolis, Indiana 46240
Phone (317) 573-8888
Fax (317) 574-3855

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Visit the Cohen Garelick & Glazier website at www.cgglawfirm.com for a variety of articles, the latest news wire and attorney updates. View the following articles featured only on our website:

"Economic Loss Rule Bars Misrepresentation Claim" – provides insight into contractual relationships established when buying a home.

"Website Terms of Use" – essential information recapping the Computer Fraud and Abuse Act.

"Employers and Job References" – a resource for any business owner or manager on legal issues surrounding references for former employees.

"Estate Planning: A Gift of Debt" – a case study to guide items you may wish to clarify in your estate planning documents.

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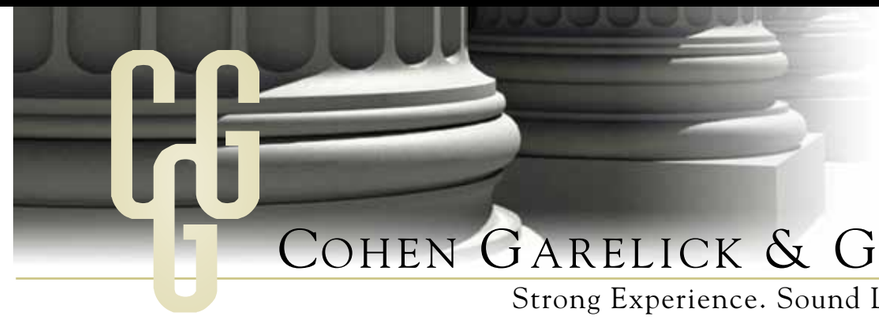

COHEN GARELICK & GLAZIER
Strong Experience. Sound Legal Advice.

Appellate Decision Won

In most cases, building a family through adoption is a joyous and heart warming time. Some adoption cases, however, are more difficult than others. In January 2008, Cohen Garelick & Glazier won a favorable decision in the Court of Appeals of Indiana on behalf of adoptive parents facing a contested adoption. This decision was upheld by the **Indiana** and **United States Supreme Courts**. The final decision came almost two years after the original petition to adopt was filed.

Working in the best interest of the child, our attorneys shepherded the adoptive parents through the intricate maze of a contested adoption. Department of Child Services, the CHINS (child in need of services) process, DNA testing, grandparents' rights and the parenting capacity of the biological mother and father were relevant in all stages of the case.

As the case progressed and the adoptive family's fate landed in the hands of an appellate court, it was Cohen Garelick & Glazier's superior knowledge of the Indiana Code, probate court rulings and precedent-setting case law that worked in the best interest of the child and the adoptive family. Once the appellate decision was rendered, the adoption was allowed to move forward to a successful completion.

Whether an adoption is simple or complex, our adoption attorneys recognize that finalizing a parent-child union is a priceless event. For adoptive parents, it is reassuring to know that Cohen Garelick & Glazier attorneys are prepared to handle any adoption whether it is simple or contentious.

Further, the firm's experience to navigate every level of the court system extends beyond adoption law. The attorneys at Cohen Garelick & Glazier provide services in 19 different practice areas, and every practice group is prepared to serve clients from local to federal courts.

Ed Schrager earned the distinction, Super Lawyer

Recently, three Cohen Garelick & Glazier attorneys earned 2009 Super Lawyer designations: Michael Bishop, Jill Goldenberg (see story page 2), and Ed Schrager (pictured).

Jill Goldenberg Earns Spot in Top 25


Jill Goldenberg

In addition to being named one of Indiana's 2009 *Super Lawyers*, Jill Goldenberg earned a coveted spot among the "Top 25 Women" to receive the *Super Lawyer* designation. Jill's achievement places her among an elite group of Indiana attorneys who received the highest point totals in the nomination, research and blue ribbon review process.

"Peer recognition makes this a true honor," explains Jill. "When I was first notified about being among the top twenty-five women attorneys, I was awed and proud to be closely affiliated with women I respect and admire in my profession."

Jill devotes the majority of her practice to family law or mediations and arbitrations involving family law matters. She is certified by the Indiana Certifying Organization of the Indiana Bar Association as an Indiana Certified Family Law Specialist. Jill is also a registered domestic mediator. Since completing her mediation training, she has mediated over 100 cases. Further, she serves as a family law arbitrator.

The achievement of *Super Lawyer* is based on a statewide nomination process and peer evaluations. Only five percent of Indiana attorneys are selected for this honor each year.

Guiding Companies in the Technology Age

Recently recognized as one of the "Top 100 Lawyers" by the American Trial Lawyers Association, senior partner Bob Garelick's outstanding career includes guiding businesses through difficult litigation. As technology evolves, Bob offers insight into policies and procedures regarding electronic documentation.

"In the past, when a business dispute arose and litigation followed, each side would request from the other written documents to make their case. Most businesses housed files in specific locations. Producing documents was relatively simple," Bob explains.

Today, the same dispute is likely to call for the same documents and all relevant electronically stored information (ESI). ESI is everywhere, in hard drives, PDA's, flash drives, laptops, home computers, back-up devices and cell phones.

Bob continues, "For instance, consider a small company with twenty employees facing a customer dispute over a product purchased one year ago. The customer's claim is that the product was not suitable and the company knew that when the sale was made. The customer seeks a refund of the price paid and substantial damages."

A lawsuit is filed and the manufacturing company receives a request to produce all ESI relating to the customer and the design, development and manufacturing of the product purchased. However, much of the ESI requested has been inadvertently purged, part of a routine company practice to save storage space.


Bob Garelick

"Purging ESI relevant to an active case can lead to additional costs for data retrieval," explains Bob. "Not to mention court sanctions and the possibility of an unfavorable judgment."

CGG's business lawyers and the firm's experienced litigators are prepared to provide guidance on ESI retention policies for companies. The policies would delineate when and under what circumstances ESI would be deleted.

Restrictive Covenants for Professionals:

An Update from Co-Managing Partner Chuck Cohen


Chuck Cohen

For years, we always advised that a restrictive covenant in a professional employment agreement should not be longer or broader than is absolutely required for protection. A fairly recent (March, 2008) Indiana Supreme Court decision supports that position and provides insights into how restrictive covenants fare under Indiana law.

A podiatrist was employed by a practice with several offices in Indiana. During the last two years of his employment, the podiatrist only worked in Marion, Howard, and Tippecanoe County offices. However, under the restrictive covenant in his employment agreement, upon termination, he was prohibited from practicing in 14 counties listed in the agreement, two unlisted counties in which the practice had offices, and all counties contiguous to those 16 counties. The total number of counties in which he was restricted from practicing was 43. The podiatrist also could not solicit patients from, or employees of, his former employer. The length of the restriction was two years. After termination, the podiatrist accepted employment with a practice located in Hamilton County (contiguous to Marion County) in an office located 10 minutes from one of his former employer's offices.

The Supreme Court held that the practice restriction would apply only in Marion, Howard, and Tippecanoe Counties, the counties in which the podiatrist had worked during the two years before termination. Thus, the podiatrist was not prohibited from practicing in Hamilton County.

Here are the principles gleaned directly or indirectly from this case:

- Restrictive covenants are not unenforceable against professionals as a matter of public policy so long as they are reasonable. Although this case dealt with a podiatrist, the same principles apply to medical or dental professionals.
- A restrictive covenant that covers areas in which the professional did not perform services nor have patient contact will not be enforced. The geographical restriction should relate to where professional services were performed and patient relationships developed.
- If the restrictive covenant is written in such a way that the court can excise and enforce portions of the covenant, it will do so, but it will not re-write the covenant. Thus, the court selected and enforced the covenant in the three counties where the podiatrist performed professionally while not enforcing the covenant in the other 40 counties.
- Depending on the drawing area of the practice, a mileage restriction from offices in which the professional actually worked may be more suitable than a general area. The court determined that the contiguous county provision was unreasonable because in some cases it reached far beyond the former employer's practice area.
- A "no defense" clause[1] in an employment agreement may prevent a breach of the agreement by the employer from causing the restrictive covenant to be unenforceable. It depends upon how major the breach was.
- Although it was too late to prevent the podiatrist from soliciting his former employer's patients and employees, the case was sent back to the trial court to determine whether the former employer was entitled to damages because of a breach of these restrictions.
- From an employer's standpoint, there should be a provision whereby the covenant is "tolled" during any period when it is being violated. Otherwise, unless the employer has been able to enjoin the professional from competition while the case is being decided, the restrictive period may be over before the case is decided. If the running of the period is tolled, the period would start to run from the time the case is finally decided.[2]
- Attorney fees are not mentioned in this case. However, we recommend to employers that it is fair to have a provision whereby the prevailing party in litigation recover attorney fees and costs of litigation. This tends to discourage spurious lawsuits.

1 A clause that provides that any breach of the employment agreement by the employer is not a defense of the employee against enforcement of the restrictive covenant.
2 In this case, even though the restrictive period was over, the Supreme Court heard the case because it was a matter of public interest and a recurrent issue.