



# Cincinnati Law Library News

A Monthly Newsletter from the Cincinnati Law Library Association

July 2006

## Inside This Issue

- 1 White Collar Crime: Mail and Wire Fraud**
- 1 Pimp Your Search: Supreme Court, Firefox, & Rollyo**
- 5 New Database: ALI-ABA Direct-to-Library**
- 6 Tech Tip: Printing a Fastcase Case**
- 8 Elder Law CLE**

## Appellate Courts Extend "Intangible Rights" Theory Of Mail And Wire Fraud From Corrupt Government Officials To Private-Sector

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<http://www.blankrome.com/index.cfm?contentID=37&itemID=211>

The federal Ninth Circuit Court of Appeals recently made clear that the so-called "honest services intangible rights" theory of mail and wire fraud—*i.e.*, that one can commit mail or wire fraud by failing to provide honest services—applies not just to corrupt government officials, but also to private-sector individuals, at least where a fiduciary relationship exists between the defendant and the victim. *United States v. Williams*, 441 F.3d 716 (9<sup>th</sup> Cir. 2006).

Prior to 1987, the federal government typically used the mail and wire fraud

statutes to charge government officials with criminal wrongdoing upon the theory that public officials committed wire fraud when, for example, they accepted bribes because bribery deprived the public of its right to the official's honest services. The government relied on this theory because in the typical bribery situation there may be no victim, since the person paying the bribe is more than happy to do so, and may have actually initiated the

*Continued on page 3*

## Pimp Your Search: Supreme Court, Firefox & Rollyo

David Whelan, Law Librarian

Search remains the cornerstone of legal research. Your searching may take the form of using keywords in a paper index and then moving to sections of a treatise or statutory code, or it may involve stringing terms of art together to find electronic case law. Electronic search is a moving target, with new developments improving our research possibilities all the time.

searching of Ohio judicial opinions. The search tool currently available at the Supreme Court's Reporter of Decisions page (see sidebar on page 7 for address) is poor unless you are looking for a specific party or Webcite citation. The keyword search is limiting, and the search form's determination to reset your search scope (court and time period) is annoying.

*Continued on page 7*

The Ohio Supreme Court's addition of Google as a search option will enhance

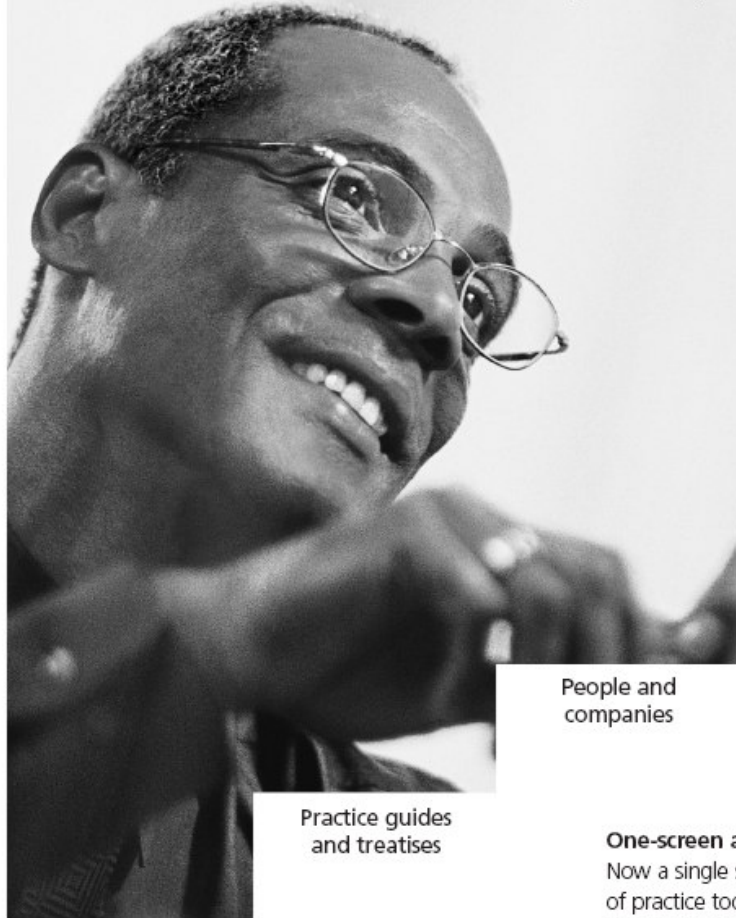
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*Mail & Wire Fraud, continued from page 1*

scheme. In *McNally v. United States*, 483 U.S. 359 (1987), the Supreme Court nixed this theory, interpreting the mail and wire fraud statutes to protect only property rights, and not the intangible right of citizens to good government.

In 1988, Congress responded to *McNally* by enacting section 1346 of the Federal Criminal Code. This section defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C.

§ 1346. It did not, however, define the term "intangible right of honest services," or otherwise indicate whether the services involved were limited to those provided by a government employee. The statute since has allowed the federal government to charge and convict corrupt federal, state, and local government officials of fraud, but has been more controversial with respect to its application to private, non-governmental persons.

The new Ninth Circuit case involved a criminal prosecution brought against John Anthony Williams, a self-employed insurance salesman and licensed financial planner who was retained as a commissioned agent by Waddell & Reed, a financial services company. In 1998, Williams sold an \$88,000 annuity to the victim, an 87-year-old man with only an eighth-grade education. Combined with an inheritance he had received on his brother's life insurance policy and the purchase of other annuities from Williams, the victim's financial holdings totaled over \$635,000. On Williams's instruction, the victim signed a durable power of attorney naming Williams as his agent. Williams then opened a private mailbox in the victim's name without his knowledge, opened a joint bank account in

both of their names, and presented the victim with surrender forms for three of his annuities. Williams used the surrender forms to liquidate the annuities, and deposited the proceeds into the joint bank account. He then transferred the money into accounts that he controlled and used it for personal items, such as a condominium in Belize.

The government's indictment charged Williams with mail and wire fraud under the traditional theory that Williams had defrauded the victim of money, and also under the "intangible rights" theory, alleging that Williams scheme also had deprived the victim of Williams's honest services. The jury returned a "general" verdict that found Williams guilty of mail and wire fraud, but did not specify the theory under which he was found guilty. On appeal, Williams argued that the "intangible rights" theory applies only to government officials and that, in the absence of a "special" verdict identifying the specific theory used by the jury, his conviction must be set aside because of the danger that the jury relied upon the purportedly improper "intangible rights" theory.

In finding that Williams properly could be charged with, and convicted of, mail and wire fraud under the "intangible rights" theory, the Ninth Circuit held that, because the victim employed Williams as a fiduciary, Williams "therefore undertook the high duties of honesty and loyalty to him." 441 F.3d at 724. The Court also rejected Williams' argument that the "intangible rights" provision was unconstitutional because it was too vague, holding that a "person of ordinary intelligence would reasonably understand" that obtaining a power of attorney from an 87-year-old client and then stealing \$400,000 from him was a crime. *Id.* at 724-25.

*Continued on page 4*

*Mail & Wire Fraud, continued from page 3*

The Ninth Circuit's *Williams* decision makes clear a trend in the federal courts of appeals to apply the "intangible rights" theory not only to government officials, but also to persons engaged in private enterprise. As the Ninth Circuit itself acknowledged, five of 12 federal circuit courts of appeals have so held. *See United States v. Rybicki*, 354 F.3d 124, 127 (2d Cir. 2003) (private lawyers); *United States v. Vinyard*, 266 F.3d 320, 326 (4<sup>th</sup> Cir. 2001) (private attorney); *United States v. Frost*, 125 F.3d 346, 366 (6<sup>th</sup> Cir. 1997) (university professors); *United States v. deVegeter*, 198 F.3d 1324, 1330 (11<sup>th</sup> Cir. 1999); *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 973 (D.C. Cir. 1998).

The trend is of special importance to corporate officers and directors, as virtually every court in every state views them as owing fiduciary duties to their corporation's shareholders and, in some instances, creditors. Moreover, most federal courts of appeals have held that, in certain circumstances, a government official's failure to disclose a material conflict of interest can fit within the meaning of the term "honest services." For example, even before the enactment of section 1346 the Ninth Circuit had held that a "non-disclosure of material information" can be honest services mail fraud. *United States v. Bohonus*, 628 F.2d 1167, 1171 (9<sup>th</sup> Cir. 1980). The Third Circuit recently affirmed a fraud conviction of a government official on this conflict of interest notion. *United States v. Panarella*, 277 F.3d 678, 691 (3d Cir.) ("where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived

the public of his honest services under 18 U.S.C. § 1346"), *cert. denied*, 123 S. Ct. 95 (2002). *Williams* and like cases create potential exposure to criminal liability for corporate officials who approve or enter into corporate transactions while having a conflict of interest. The federal First Circuit Court of Appeals, moreover, has expanded the term "bribery" in government official cases to include what it calls "coaxing," which is "a more generalized pattern of gratuities to coax 'ongoing favorable official action.'" *United States v. Woodward*, 149 F.3d 46, 55 (1<sup>st</sup> Cir. 1998) (citation omitted).

As one commentator noted a dozen years ago in discussing the "intangible rights" theory applied to government officials, "'honest services' is an evolving, aspirational term that describes a level of conduct that may never be obtained . . . . In real world politics, only a blurred and shifting line separates political corruption from political patronage, and honest from dishonest service." G. Moohr, *Mail Fraud and the Intangible Rights Doctrine Someone to Watch Over Us*, 31 *Harv. J. Legis.* 153, 196 (1994) (citations omitted). It appears that the term "honest services" is evolving yet again, with a growing number of federal courts applying the theory to private actors with fiduciary duties.





## New Database: ALI-ABA Direct to Library Resources

The Law Library has acquired a license to the American Law Institute – American Bar Association database known as “Direct to Library”. Although this resource is available only within the Law Library, it provides a huge chunk of content that was not accessible to us before.

ALI-ABA publishes books, magazines, and forms. One of the hallmarks of the Direct-to-Library resource, and of ALI-ABA’s Web site, is the ability to access discrete parts of any document. For example, by selecting the Books area, and then the Real Estate category, and so on until a list of chapters and individual forms appears. Each one is a PDF that can be viewed and printed from a Library PC. Reference librarians can also e-mail a copy of an article or chapter, but it will only be accessible for 7 days.

CLE course manuals are a highlight of ALI-ABA’s Direct-to-Library contents. The ten topical areas include bankruptcy, estate planning, litigation, and intellectual property. Each area has recent CLE materials,

although coverage varies. For example, while there are only CLE manuals since 2005 for bankruptcy, there are nearly 60 manuals on estate planning from 2001 to the present.

Each CLE manual contains multiple subchapters, and the contents of both the CLE manuals and electronic books are keyword searchable.

The ALI-ABA magazine archives are a valuable addition to the Law Library’s periodical collection. The Practical Real Estate Lawyer and Practical Tax Lawyer are new to the Library, joining the Practical Lawyer and Practical Litigator. All periodicals provide a 6 year archive.

Only need a form? Check out the forms directory, where you can browse by category or search by keyword within a category. All forms are in an editable format.

The Direct-to-Library resource expands your access to practical forms and periodicals. We look forward to helping you use it the next time you are in the Library.

## Member Benefits

All members have access to the following valuable resources and services:

**Circulation privileges** to borrow from over 40,000 print volumes for **up to 6 weeks** at a time

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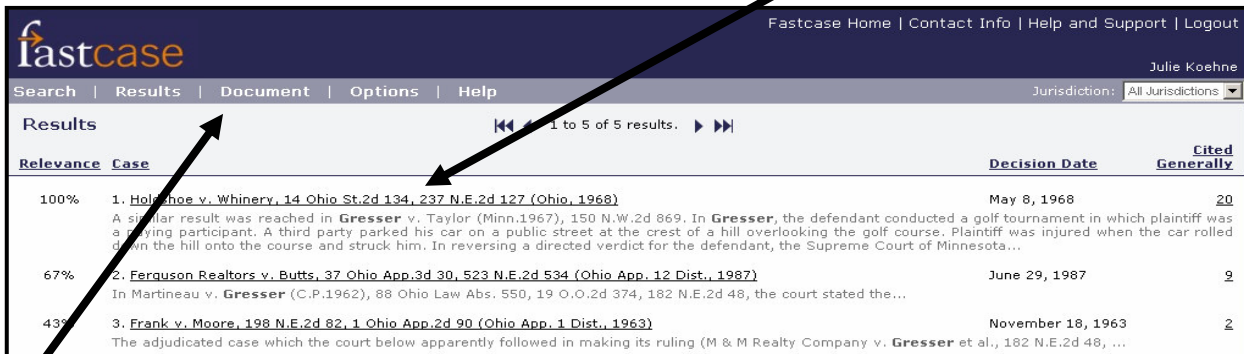
special needs trust

ALI-ABA Direct to Library: Search for "special needs trust" articles

## Tech Tip: Printing a Fastcase Case

Julie Koehne, Assistant Law Librarian

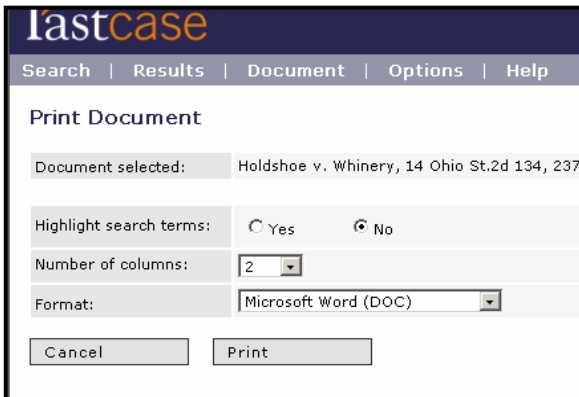
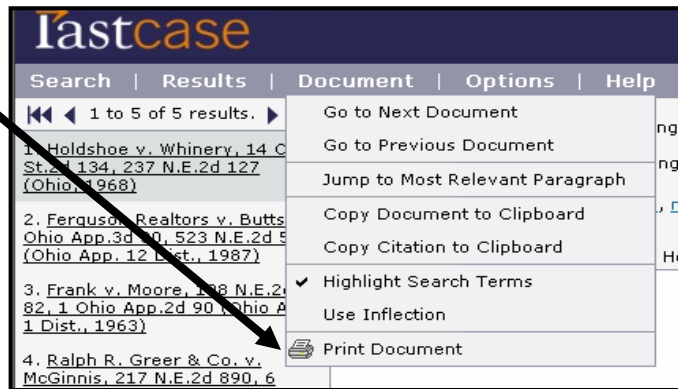
- 1 From the list of cases you retrieved with your query, click on a case name to view the case.



- 2 Move your mouse pointer up to the Fastcase menu bar and hover over the word **Document**. A drop down menu will appear.

- 3 Select **Print Document** from the menu.

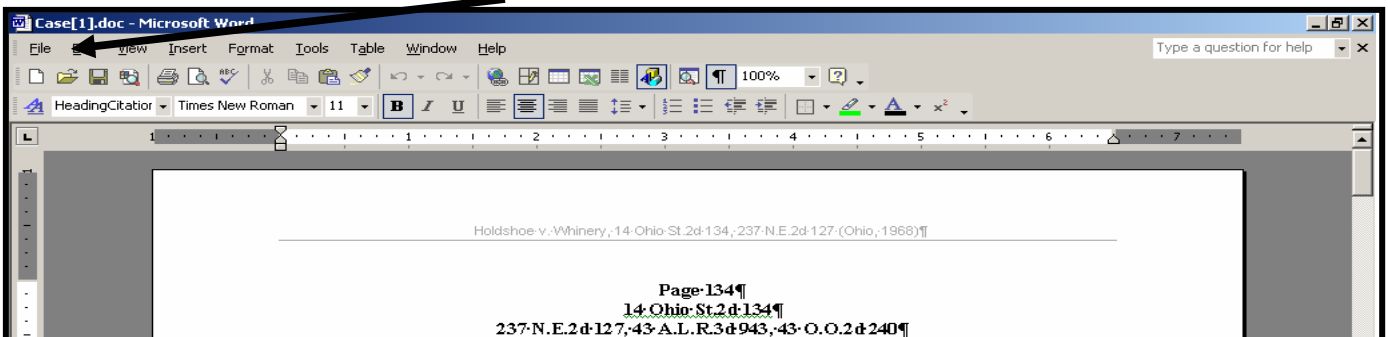
- 4 The **Print Document** screen will appear. Review the options and make any changes, like format or dual-column printing. Click **Print**.



- 5 Next, you will be given a choice to either open the case with your word processor or Adobe Reader, depending on the format you selected, or to save the case to your computer.

- 6 If you only want to print the case, without saving it, click **Open**.

- 7 Once you have selected **Open**, a number of windows will appear. The first window to pop up will be a blank Web browser window which you can ignore. The second window will be your word processor or Adobe Reader, displaying the case you will print. Click on the **FILE** menu of your word processor or Adobe Reader program and select **PRINT**.



*Pimp Your Search, continued from page 1*

There is now a way to use Google to search the Court's opinions. Some sites rely on a Google form, but the Court has bought the nifty Google appliance and is customizing it for its own documents. They have created a separate library for the opinions, which, although not segmented by court or date, is easy to search.

For one thing, the Webcite citation format (year-Ohio-number) works much better using Google. Here's an example:

2000 Ohio 91

This Webcite will yield **no results** on the Reporter's search page, because it omits the hyphens between "2000", "Ohio", and "91". A Webcite search on this page will only work if it is formed "2000-Ohio-91". Google doesn't care about hyphens, and will find it either way.

Even though the new search bunches all opinions together, you can limit it to Hamilton County cases by searching for your keywords and adding "First District Court of Appeals". This is not perfect, as it will pick up cases where other courts have specifically referred to our Court of Appeals, but it narrows the results.



*Searching for First District Court of Appeals cases*

**Firefox Extensions**

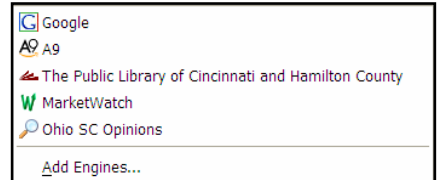
The Firefox Web browser from Mozilla is a phenomenal research tool, because it keeps all of your research windows together. Each one has its own tab, and while one is loading, you can toggle to another and keep working without resorting to your task bar.

While you can download a specialized toolbar for Firefox, it comes with its own highly customizable search box. It defaults to Google, Yahoo, Amazon, and a handful of other search engines. You can also add more from a library of search engines provided by Firefox.

This library is limited to major search sources. A new plug-in enables you to add many more search engines of your own. The Search Engine Ordering plug-in allows you to sort engines, delete engines, and add your personal favorites.

How does this work? First, install the plug-in (once you have installed Firefox). Go to the Public Library of Cincinnati and Hamilton County or to the Ohio Supreme Court's new Google search interface. Click your **right** mouse button and a menu will appear and the last option will be

to *Add this search to the searchbar*. Click that choice with your **left** mouse button and you are finished. Now, if you want to search the site you added, you can do it from your Firefox search bar.



*Customized Firefox Searchbar*

This will not work on every search engine, for technical reasons unique to certain search forms.

**Rollyo**

Rollyo is a novel development that allows you to **roll your own**. It uses Yahoo! search to retrieve documents from a set of sites you specify. For example, you could create a Custom Searchroll that looks at [www.irs.gov](http://www.irs.gov), [www.tax.ohio.gov](http://www.tax.ohio.gov), and <http://revenue.ky.gov/> without having to visit each site. You retrieve your custom Rollyo and it looks at the sites you have aggregated together.

For Firefox users, you can add a Rollyo Searchroll to your Firefox searchbar with all of your other searches.

**Pimp Your Search Web Sites**

- Ohio Supreme Court Reporter of Decisions  
<http://www.sconet.state.oh.us/ROD/newpdf/default.asp>
- Google Ohio Supreme Court Search  
<http://search.supremecourtfohio.gov/>
- Firefox @ Mozilla.com  
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- Search Engine Ordering Plug-in for Firefox  
<https://addons.mozilla.org/firefox/2164/>
- Rollyo  
<http://www.rollyo.com>

Elder Law CLE: July 21

Ms. Sheline, Pro Seniors' Staff Attorney & Medicaid Specialist, will provide an update on recent Medicaid changes including:

- Ohio's New Medicaid Assisted Living Waiver
- Ohio's New Crime of Medicaid Eligibility Fraud
- Medicaid Changes Included in the Federal Deficit Reduction Act of 2005
- Changes to Ohio's Medicaid Estate Recovery Law & Medicaid Estate Recovery Liens.

The CLE seminar will be held Friday, July 21, in the Law Library's Board Room on the 6th Floor of the Hamilton County Courthouse. Lunch will be provided at 12:30, with the seminar going from 1pm – 2pm.

Price: \$15, members; \$50, non-members

Please reserve your place by calling or e-mailing Madonna (946.5301 or [mstoneki@cms.hamilton-co.org](mailto:mstoneki@cms.hamilton-co.org)) or completing the online reservation form at <http://www.cincinnatiilaw.org/cle/signup.html>

July 2006 Law Library Newsletter

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| INSIDE THIS MONTH  |
| • White Collar Crime: Intangible Rights Theory of Mail and Wire Fraud Extended |
| • Tech Tip: Printing a Fastcase Case   |
| • Elder Law CLE  |
| • Pimp Your Search: Supreme Court & More                                       |

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