THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

THE ADVOCATE

THE ADVOCATE

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WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION

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PRESIDENT'S MESSAGE

When I began my term of office as President last July, I never dreamed I would end it at home. Like most of us, I have spent the last couple of months working remotely. I have disciplined myself to work at least five full days, mostly without interruptions. I am sitting at my desk in my small home office writing this message.

Working from home has both advantages and disadvantages. First, the advantages. I have very little commuting time. I wear shorts every day and rarely wear shoes. I get to eat lunch at home, usually leftovers.

With email and the Internet, I can still stay connected. With remote software, I can log on to my desktop and the office server. I have a printer, a scanner and a copy machine. I've watched multiple free legal webinars presented by nationally known speakers.

Now the disadvantages. Not all of my files are digital, so I often need something that's sitting in a file drawer in the office. My paralegal quit unexpectedly in February and, for obvious reasons, I have not been able to replace her. I now have to do her job as well as my own. Ordering medical records and bills and sorting out liens can be very tedious.

On a bright note, however, I have learned how to navigate the Medicare portal for dealing with Medicare liens. It reminds me of the old arcade game, Whack-A-Mole. The Medicare contractor will add to the lien almost every new bill that is paid, regardless of whether it's related to my case. Even flu shots are fair game. Just as soon as I dispute and have one unrelated bill removed from the lien, another one pops up.

Sheltering in place and staying at home have had their advantages. I've been able to spend a lot more time with my family. I am exercising more than ever. Netflix has opened up a whole new world of entertainment to me with shows such as Tiger King and Outer Banks (be sure not to miss this one). I've been in more frequent contact with my geographically distant relatives through Zoom and other social media.

I am saddened that many, much anticipated WPTLA events had to be canceled due to Covid-19. I was looking forward to our Washington County meeting at Bella Serra, a new venue that I have visited before. One of our key signature events, the Judiciary Dinner, was canceled for the first time ever. Even our annual membership meeting which includes our elections, had to be conducted by phone conference.

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Due to the cancelation of the 2020 Judiciary Dinner, we will be presenting articles in this edition and in upcoming editions of The Advocate to highlight the Honorees who would have been acknowledged during the Judiciary Dinner. Please be sure to read all of the articles highlighting our members of the judiciary retiring or attaining senior status, our essay scholarship winners, and the Champion of Justice and Daniel M. Berger Community Service Award honorees.

2020 SCHOLARSHIP ESSAY CONTEST

Every year WPTLA sponsors several community programs. One of our finest outreach programs is our annual high school essay contest. Each school district in our area is invited to submit one student essay addressing a specific legal issue. Our essay committee endeavors to present an issue which is both current and illustrative of the effect of legal decisions upon our rights and responsibilities as citizens of the United States of America. This years' essay topic arises from an actual case which is pending before the United States Supreme Court. The case is *Espinoza v. Montana Department of Revenue*, No. 18-1195 Supreme Court of the United States of America. The facts for the students were summarized as follows:

> **FACTS:**
>
> **In 2015 the Montana legislature enacted a tax credit scholarship program to provide parents and students a choice in their education for Kindergarten through 12thgrade. The statue gave a tax credit to individuals and businesses who donated to non-profit scholarship organizations. The organizations then gave scholarships to parents who wished to send their children to private schools. Montana excluded any school that was "owned or controlled in any part by any church, religious sect, or denomination." Three families filed suit alleging that the act violated the Religion and Equal Protection Clauses of the US Constitution.**

The students were asked to respond in essay form to the following question:

> **Does a state student aid program violate the Religion and Equal Protection Clauses of the United States Constitution if it allows students the choice of attending a religious school?**

The committee had 19 entries from the participating school districts. From those 19 essays, three winners were chosen. Those winners are as follows:

- Caroline Lucas - North Allegheny Senior High School

  Ms. Lucas intends to attend DePaul University for her undergraduate degree and major in journalism. She does intend to attend law school after obtaining her undergraduate degree. Her favorite activities are theater and music.

- Vienna O'Brien- Greensburg-Salem High School

  Ms. O'Brien plans to attend Cornell University where she will study industrial and labor relations. This is a major unique to Cornell that comprises the study of law, social justice, and public policy. After obtaining her undergraduate degree she does intend to continue on to law school. She has participated in a Pennsylvania Bar Association Mock Trial Program. She is a member of Greensburg-Salem's debate team which has competed at both the state and national level. She loves dance and is a member of the National Honor Society.

- Nathaniel Lerch - Clarion Area Junior Senior High School

  Mr. Lerch intends to attend Pepperdine University as a chemistry major. He plans to compete on Pepperdine's cross county and track teams and upon graduation hopes to attend veterinary school. He is a member ofClarion's cross country and track team and has been a member of the marching band, concert band, and jazz band.

This year is the first time that we have had a winner from Clarion Area Junior Senior High School. It is the fourth time in four years that we have had a winner from the North Allegheny Senior High School.

Normally the winners are invited to our Annual Judiciary Dinner to be recognized by the association. Unfortunately, this year the winners were contacted and their scholarship checks and certificates were sent by mail. I would like to thank the members of my committee for their hard work in coming up with the topic and scoring the essays. Thanks to Philip Clark, Brittani Hassen, Mark Milsop, Erin Rudert, Nat Smith, James Tallman, and Kelly Tocci. I would also like to thank Laurie Lacher. As always, without her help, dedication, and hard work this essay program would not be possible. If anyone has any interesting topics for a potential essay in the future, please contact me, a member of my committee, or Laurie Lacher at the association office.

2020's winning essays will be printed in the next 3 issues of The Advocate.

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PRESIDENT'S MESSAGE ... FROM PAGE 1

I would like to thank Laurie and Lorraine for all of their hard work this year, especially during the coronavirus situation. I would also like to thank the Executive Officers and the Board of Directors for their continuing support.

As I write this, we are still in the Yellow Phase of Pennsylvania's reopening plan. As Sergeant Esterhaus used to say after roll call on Hill Street Blues, one of my favorite TV shows, let's be careful out there.

By: David M. Landay, Esq. of

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THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 33, 2020-2021

	ARTICLE DEADLINE DATE	TARGETED PUBLICATION
Vol 33, No 1 - Fall 2020	Sep 11	Sep 25
Vol 33, No 2 - Winter 2021	Nov 27	Dec 11
Vol 33, No 3 - Spring 2021	Feb 26	Mar 12
Vol 33, No 4 - Summer 2021	May 21	Jun 4

The Editor of The Advocate is always open to and looking for substantive articles. Please send ideas and content to er@ainsmanlevine.com

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Columns

Consider Yourself Persuasive? Consider Image Induction

Do you consider yourself an intellectually curious person? If so, then you'll want to read this article about the persuasive power of image induction.

Take a moment and think back to a time in your life when someone asked you a question about yourself. Maybe it was an upset parent asking, "did I raise you to be respectful of others?" Or maybe it was a coach trying to motivate you, "do you believe you are a winner?"

Now imagine where your mind went as you contemplated such an introspective question.

If you are like most people your mind searched out and found examples in your life consistent with the question label. You remembered those prior lessons your parent taught you about being respectful to others. You found examples of being a winner who didn't give up. In doing so, you labeled yourself "respectful," "winner."

These introspective questions conjured up images in your mind that induced an intended label.

This powerful method of persuasion is called "image induction. Image induction has been proven effective in several research studies.

How Does Image Induction Work?

Image induction works similarly to the autonomous power of "But You Are Free," by allowing the request recipient to reach a conclusion on their own rather than being compelled or forced to think something.

Using the above examples, while a parent could tell a child "you will be respectful," it is more effective to allow the child to see an image of themself as a respectful person. Similarly, do you think it is more effective to tell someone "you are a winner" or allow them to find examples in their memory bank that proves to them that they are a winner?

Typically, the parent or coach, who is trying to influence the child or athlete is also the one providing the label. But with image induction it is the very person targeted by the social influence effort, the child or athlete, who comes up with the label for herself.

What is the Science Behind Image Induction?

So, let's look at the science behind image induction.

Researchers San Bolkan and Peter Andersen conducted a simple experiment to test the power of image induction.The scientists asked each participant in the experimental group whether they felt they were a helpful person. Everyone asked this question responded in the affirmative ("yes, I am a helpful person!"). The researches did not ask the control group this image inducing question.

Next, the experimenter asked all of the participants to volunteer to take part in a 30-minute communication survey at a later date.

In the control conditions where no image induction took place, only 29% of participants consented.

But in the experimental group, who had been induced to imagine themselves as helpful people, 77% of participants agreed to volunteer!

In a second experiment, participants were first asked, "Do you consider yourself to be somebody who is adventurous and likes to try new things?" The control group was not initially asked this question.

The experimental and control participants were then asked to provide an e-mail address in order to receive information about a new brand of soft drink.

Bolkan and Andersen found that of the control group participants, only 33% gave their address. When the image induction question preceded the request, however, 75% of participants agreed to provide their email address.

Because the first two experiments were done face to face, the researchers conducted two additional experiments that removed this variable.

In a third experiment, participants completed a questionnaire. The experimental group was asked whether they viewed themselves as helpful. The control group was not asked this question.

Next, participants were asked if they would help the experimenter with his work on survey studies. While only 32% of the control group participants agree to help, 50% of the experimental participants agreed to assist with the surveys.

In another version of these image induction experiments, a portion of people were first asked if they were adventurous, and then asked to give their e-mail address in order to forward them information about a new brand of soda. In this experiment, 30% of the control participants gave their emails compared to 55% of those participants who had previously defined themselves as adventurous.

How Can You Apply Image Induction?

So how can we apply the image induction strategy to increase our persuasiveness? Bolkan and Andersen, recommend using "a single question that causes the recipient to apply a label to themselves that is consistent the request."

Here is the basic format that will help you quickly and easily apply image induction

(Continued on Page 5)

IMAGE INDUCTION ... FROM PAGE 4

1. Determine your persuasion goal (e.g. I want to convince my friend to try and new restaurant with me)

2. Determine the self-image or personal label that is consistent with your persuasion goal (i.e. trying something new is an adventure so you want to request recipient to realize they are adventurous)

3. Pose an introspective question that focuses their memory search on the label that is consistent with your request goal (e.g. “Do you consider yourself an adventurous person?”)

4. Once they find the memory examples that confirm the label, make your pitch! (e.g. “I thought you were. So you will love this new restaurant we are going to go to.")

For example, a trial lawyer representing an injured plaintiff could pose a question in closing argument like, “Ladies and gentlemen, do you think of yourself as courageous? Are you someone who stands up for the little guy?” Undoubtedly most people will imagine themselves as a courageous person who stands up for what is right. Then you can link that belief to your request. “It takes courage to stand up for someone else and enter a large verdict in that person’s favor. And that is exactly what is called for. Mrs. Jones needs you to stand up for her and enter a verdict that fully compensates for everything the defendant has taken from her.”

Or think about using image induction during a deposition instead of the standard force question, “you understand you're under oath and have to tell the truth right? ”With image induction you might instead ask the witness whether they think of themselves as someone who will always tell the truth when under oath.

In a different setting, imagine that you are hoping to convince a hesitant friend to try a new restaurant.Consider first asking them, “do you consider yourself an adventurous person?” More often than not, people will find examples in their past where they were adventurous.This leads them to confirm that, “yes, I am an adventurous person.” Which makes them more open to venturing out with you to the new restaurant.

Now let me ask you dear reader, do you consider yourself someone who tries new things?If so, I encourage you to experiment with image induction!

If you’d like to learn about other powerful persuasion techniques that will rev up your advocacy, email Brendan at blupetin@meyersmedmal.com to sign up for his bi-weekly newsletter that discusses the current cognitive behavioral research and how to apply it to your practice and life.

By: Brendan Lupetin, Esq. of

Meyers Evans Lupetin & Unatin, LLC

blupetin@meyersmedmal.com

UPCOMING EVENTS

KICK OFF EVENT

Mon-Tue, Aug 24-25, 2020

Erie

LEGISLATIVE MEET & GREET

Sep, 2020

Pittsburgh

PRESIDENT'S CHALLENGE 5K RUN/WALK/WHEEL

Sat, Oct 3, 2020

Virtual

BEAVER DINNER & CLE

Mon, Oct 26, 2020

Wooden Angel Restaurant, Beaver

COMEBACK AWARD DINNER

Thu, Nov 19, 2020

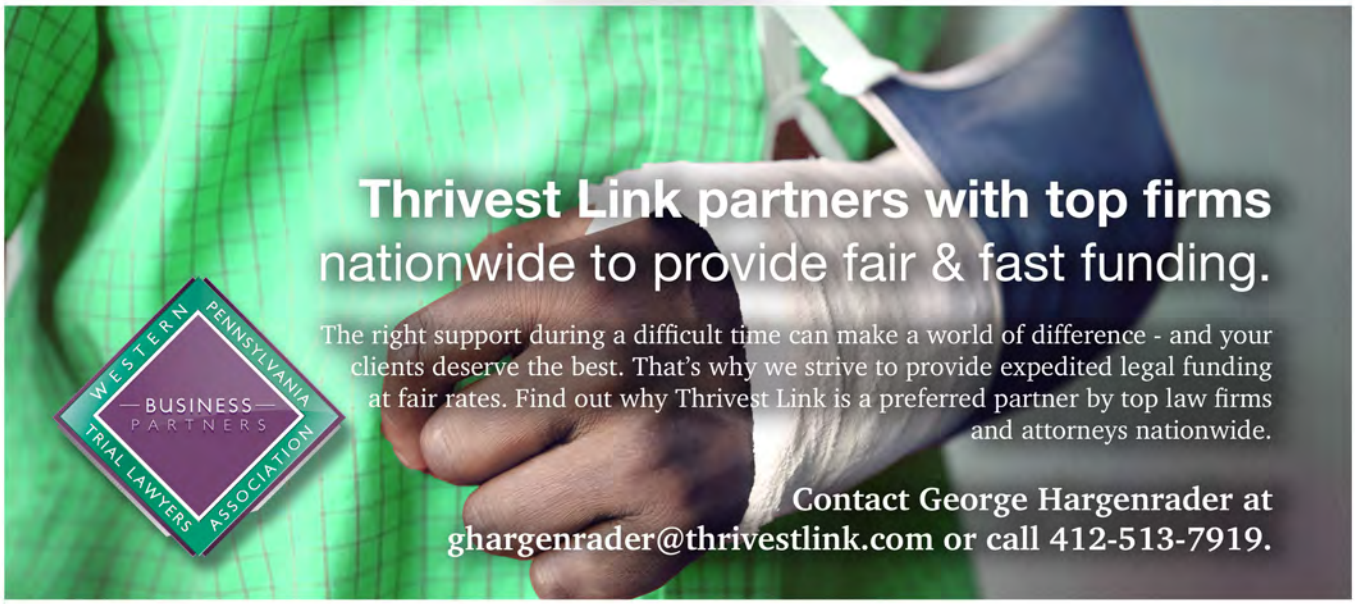
Duquesne Club, Pittsburgh

ETHICS LUNCH 'n LEARN CLE

Dec, 2020

Pittsburgh

All events above are tentative, based on the progression of the coronavirus pandemic and guidelines from local and state government.



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PARTICIPATION REQUIREMENTS

The Board of Governors of the WPTLA is an active board. In an effort to formalize their commitment to the organization, members of the board of governors in 2009 agreed to participation requirements. These requirements included a commitment by Board members to, at a minimum:

· To attend at least 7 Board of Governors meetings over a two-year period

· Attend at least 3 signature events over a two-year period

· Attend at least four dinner meetings over a two-year period.

Under the revised policy adopted by the Board at its April 15, 2020 meeting, Board members are now allowed to substitute CLE credits for one signature event over a two-year period. This was done in recognition of the importance of the CLEs offered by WPTLA.

The executive board does review members' compliance with those policies. Board members who do not comply with good reason are gently reminded of their commitment and generally come into compliance.

During the 2020-21 fiscal year, WPTLA will again host an impressive array of CLE opportunities and we hope that all members will join us as these quality CLE events are one of the hallmarks of WPTLA. You can attend up to 3 credits of CLE for free if you are a President's club member. With membership renewals coming out soon, this is a great reason to consider upgrading to President's club membership if you have not already done so.

By: Mark Milsop, Esq. of

Berger and Green

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UPCOMING CLE SERIES

Stay tuned for a new series of CLE programs featuring WPTLA members who have tried landmark cases.

War Stories: A Series

Be on the lookout for details on when and where you can attend one.

MEMBER PICTURES & PROFILES

Name: Lawrence M. Kelly

Firm: Luxenberg Garbett Kelly & George, P.C.

Law School: Akron University

Year Graduated: 1983

Special area of practice/interest, if any: Personal Injury, Medical Malpractice, Workers' Compensation

Tell us something about your practice that we might not know: I have been with the same law firm since 1984 and my legal assistant, Cheryl, has been with me for 31 years.

Most memorable court moment: When my brain damaged client laid his head on my wife's shoulder and started crying during my closing argument.

Most embarrassing (but printable) court moment: I got into a heated discussion outside of the courtroom with a Philadelphia lawyer. During the discussion, the tipstaff came out of the courtroom and asked if they needed to call the Sheriff. I told them it was probably a good idea.

Most memorable WPTLA moment: Presenting Phillip Macri and Joseph Sarandrea as Comeback Award winners.

Happiest/Proudest moment as a lawyer: Presenting my 3 daughters, Lauren, Erica and Gianna, for admission to the Bar before the Supreme Court of Pennsylvania and obtaining a 7 figure verdict for a 6 year old girl who lost her fingers as a result of a medical error.

Best Virtue: Loyalty.

Secret Vice: Playing baseball.

People might be surprised to know that: I am the varsity baseball coach at Shenango High School.

Favorite movie: It's a Wonderful Life.

Last book read for pleasure, not as research for a brief or opening/closing: Their Life's Work: Brotherhood of the 1970 Steelers.

My refrigerator always contains: Beer

My favorite beverage is: Coffee.

My favorite restaurant is: Mary's Middle Eastern Restaurant, New Castle, PA.

If I wasn't a lawyer, I'd be: A journalist.

CHAMPION OF JUSTICE

It is not the critic who counts. The credit belongs to those who are actually in the arena.– Teddy Roosevelt

It was those words spoken by the 26th President of the United States, Teddy Roosevelt, which best describes a trial lawyer.

I have come to recognize that trial lawyers are a special breed. They go into the arena to fight for people who can't fight for themselves. They go into the arena to champion the cause of those who have no other voice.

In his speech as a member of the Bull Moose Party in 1910, President Roosevelt pointed out, that those who venture into the arena often leave it with their face marred in sweat and blood.

The trial lawyer, even though he/she strives valiantly and spends themselves totally for a worthy cause, often fails to obtain the sought after justice they pursued for their client.

When they succeed in their cause, the trial lawyer can bask in the triumph of high achievement. However, if they fail, the badge, that only the trial lawyer can wear, is to know that they have dared greatly. The trial lawyer will know that their place shall not be with those cold and timid souls who know neither victory nor defeat.

The Western Pennsylvania Trial Lawyers Association recognizes one of our own with the Champion of Justice Award. It is the highest recognition given by this organization. It is an award that cannot be bought, but must be earned. It is reserved for a trial lawyer who has spent their careers in pursuit of worthy causes; who left the arena with blood on their face and sweat on their brow.

This year we recognize the career of Louis M. Tarasi, Jr.

Louis M Tarasi, Jr., Esq., of Tarasi Law Firm,

and WPTLA Past President 1974-1975

Attorney Tarasi, graduated from the University of Pennsylvania Law School in 1959. He was elected to the positions of President of WPTLA and Pa Association for Justice.

He served as Editor of the Barrister, the official publication of PaJ. He also served as a member of the Amicus Curiae Committee for PaJ and as a Governor for the American Association for Justice.

The National Board of Trial Advocacy has certified him as a Civil Trial Advocate. He has been selected as one of the top 100 lawyers in the state of Pennsylvania.

The prestigious Melvin M. Belli Seminar has asked him to present and lecture on several occasions.

He has been counsel in class actions involving the Ashland and Exxon Oil Spills where he obtained a 5 billion dollar verdict against Exxon.

Attorney Tarasi practices in the Pittsburgh Law firm of Tarasi & Tarasi.

Attorney Tarasi is being presented the Champion of Justice Award because for 60 years he has championed the cause of those who had no other voice. He has fought for those who could not fight for themselves.He has sought justice and equality for the most vulnerable of our society.

WPTLA gives you this award so that you know that your efforts have not gone unnoticed. Your determination has not been without reward.

We give you this award so that you know, that we know, that every time the cause was just you stood tall.

As President Roosevelt said, "The credit belongs to those who are actually in the arena."You're the epitome of a trial lawyer and the credit, now, belongs to you.

By: Larry Kelly, Esq. of

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5K Run/Walk/Wheel going virtual for 2020

Because of the restrictions in place due to the COVID-19 pandemic, the 5K committee has chosen to make the 2020 event a virtual race.

Look for registration and sponsorship information coming soon!

The NFP Structured Settlements team hope you and your loved ones are healthy and safe.

The COVID-19 pandemic is a cold reminder to the importance of steady, reliable income – and the necessity of offering to structure a portion of your client's settlement. Structuring not only helps to offer financial security and peace of mind, but also maximizes their yield through tax-free payments with no investment expenses or fees. Structured settlements offer stability that a lump-sum payment simply cannot compete with. Warren Buffett recently said, "Structured settlements can stretch settlement funds…for lost income, medical bills or other future needs, which delivers tremendous long-term security for injured people and their families." Thankfully, a structured settlement annuity remains consistent no matter the state of the economy. The life insurance companies that provide structured settlement annuity payments have been around for over 100 years and have weathered many storms from stock market crashes to wars – and now the COVID-19 pandemic – while maintaining the highest level of financial security.

During these uncertain times, the stability of structured settlements is holding strong due to the strength of corporate investment-grade bond yields. Investment-grade bonds are the main asset that life insurance companies purchase to back structured settlement annuities. While there has been panic in the market, structured settlements continue to make payments and provide injured parties the ability to receive guaranteed income to meet their financial needs. The Bloomberg graph below shows the spread widened in March between the 10-year treasury yield and the 10-year JPMorgan US Liquid Index (JULI). We saw yields over 4% in March compared to yields around 3% for the previous six months.

As you continue to work hard for your injured clients, know that we continue to work remotely and remain committed to serving your needs through contactless forms of communication, including virtual meetings and mediations. We are proud to say that our team is still able to provide the highest level of client service that you've come to expect from NFPSS. We are passionate advocates with a proven approach – at work and outside of it. That's why co-founder Billy Goodman donated 50,000 masks and provided meals to hospital frontline physicians and medical staffs.

With over 29 years of experience in the industry, Billy is confident in his continued efforts to deliver *(Continued on Page 10)*

WPTLA BY-LAWS AMENDED

Several amendments to WPTLA's By-Laws were adopted at the general membership meeting on April 15, 2020. The amendments become effective July 1, 2020.

Membership requirements have been liberalized. Any attorney in good standing admitted to practice in Pennsylvania may be awarded membership, per approval of the Board of Governors. Members whose offices of practice are not located within the Western District of Pennsylvania will be non-voting members.

Eligibility for service on the Board of Governors has also been revised. In addition to officers and past presidents of the Association, the board is now to consist of at least ten other attorneys. Any member of the Association in good standing who is licensed in Pennsylvania and has their primary practice location in one of the counties encompassed by the U.S. District Court for the Western District of Pennsylvania is eligible to serve on the board. The amended By-Laws state that to the extent there are willing and eligible members available, the board shall include at least two attorneys from each county of the Western District.

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WE'RE HERE FOR YOU ... FROM PAGE 9

on the long-term promises he's made to his clients: recommending a well-designed structured settlement as part of an overall plan that protects them against market volatility. If we can support you or your business in any way, please do not hesitate to reach out.

NFP Structured Settlements

www.nfpstructures.com

800-229-2228

By: Bill Goodman, of
NFP Structured Settlements,
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VIEW OUR
Upcoming CLEs

Aug 25, 2020 - 2 hour program as part of the Kickoff Event. Program speaker is John Allin, of John Allin Consulting, Inc.
Sheraton Bayfront Hotel, Erie

Oct, 2020 - 1 hour credit after dinner. Potential panel of area judges.
Wooden Angel Restaurant, Beaver

Dec 2020 - Ethics Lunch 'n Learn featuring past members of the disciplinary board of the Supreme Court of PA
Pittsburgh

Feb 2021 - War Stories: A Series - CLE program featuring landmark cases from WPTLA members

COMP CORNER

Troublesome Statute of Limitations Case in *Dickerson v. WCAB (A Second Chance, Inc.)* No. 1218 C.D.. 2019, Filed April 15, 2020

The Commonwealth Court has concluded that Dickerson's Claim Petition was time-barred under §315 of the Workers' Compensation Act as the petition was filed more than three years from the date of the injury.

Dickerson worked for A Second Chance, Inc. and suffered an injury in a work-related motor vehicle accident on May 15, 2014. Initially, a medical only Notice of Temporary Compensation Payable was issued. Medical bills were paid pursuant to this document. Payments continued for about six weeks from the date of injury. A Notice Stopping Temporary Compensation Payable and a Notice of Denial were issued on July 31, 2014. Dickerson later filed a Claim Petition more than three years from the date of the injury, but within three years plus the period in which medical treatment was received and paid for by the Employer.

The Employer raised a statute of limitations defense before the workers' compensation judge. The judge ultimately concluded that Dickerson's petition was untimely filed. Dickerson appealed to the Workers' Compensation Appeal Board which affirmed the judge. A Petition for Review was then sought with the Commonwealth Court.

At Commonwealth Court, Dickerson argued that § 315 was tolled because she demonstrated (1) the injury was work related, and (2) the Employer made payments for medical expenses with the intent that they be "in lieu of workers' compensation." (*Schreffler v WCAB (Kocher Coal),* 788 A.2d 963, 971 (Pa 2002).

Dickerson demonstrated that the Defendant was aware of the work-related injury by issuing the various compensation documents. Medical treatment was paid for by the workers' compensation carrier. A medical printout from the carrier was submitted into evidence by the Claimant which documented the payments made and which demonstrated payments made under the claim number duly noted on all compensation documents. Under *Schreffler*, when the Claimant demonstrated "actual or constructive knowledge of a work-related injury" (*Id*. 971), the burden shifts to the Employer to prove the injury is not work-related or to rebut that the payments were made in a manner as not being a workers' compensation benefit.

Unfortunately, the Commonwealth Court engaged in an abstruse analysis based on *Sloane v. WCAB (Children's Hospital of. Philadelphia),*124 A.3d 778 (Pa. Cmwlth. 2015). In *Sloane*, a medical-only Notice of Compensation Payable was issued by Employer. Sloan determined that where a medical only NCP is filed, the § 315 statute of repose is not tolled. The Commonwealth Court applied *Sloan* to the incident despite the fact that the controlling documents were the Notice Stopping Temporary Compensation and the Notice of Denial. The Court dismissed this argument in footnote 7 in a rather unsatisfactory manner. It claims that the controlling document is irrelevant; rather whether the payments were made in lieu of compensation was determinative. However, in the Opinion, the Court blithely dismissed the documentation that the bills were paid as part of the employer's workers' compensation coverage and process.

Under the Commonwealth Court's analysis in *Dickerson*, practitioners may have significant difficulty establishing that medical payments are made in lieu of compensation without a direct admission by representatives of the Employer/carrier. Even though *Dickerson* demonstrated that compensation documents were issued, the payments were made by the workers' compensation carrier, that the payments were made pursuant to the claim number noted on the compensation documents and presumably paid at the statutory allowance of 113% of Medicare payments for the relevant procedures, one questions what would meet the Commonwealth Court's rather amorphous burden.

Petition for Allowance has been sought. The author will further update the reader in the event of a Supreme Court decision in the matter.

By: Tom Baumann, Esq. of

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The Pennsylvania Supreme Court Weighs in on Jury Selection In Allegheny County but Reverses Superior Court's Grant of New Trial

Jury Selection in Allegheny County

Although most readers are familiar with the jury selection process in Allegheny County, a brief explanation remains appropriate. Under the Allegheny County system, prior to *Trigg*, civil cases appear on a published list of the cases to be called on each date during a civil trial term. On the day listed, assuming a court room is available (which it usually is) the Calendar Control Judge sends the parties to the Jury Assembly room where a clerk is assigned to the case. This clerk is not a judge, or even a lawyer or law clerk. That clerk then conducts jury selection without the presence of either the calendar control judge or a trial judge[1]. With limited exception the clerk conducts all of the questioning and entertains challenges for cause.[2] If the parties do not agree with the clerk's decision the aggrieved party must either acquiesce or request the opportunity to be heard by the calendar control judge.

The Trigg Case

Trigg v. Children's Hosp. of Pittsburgh, No. 3 WAP 2019, (Apr. 22, 2020) arises out of a medical malpractice case wherein it was alleged that a minor had sustained a fall from an adult hospital bed post-operatively sustaining an injury to the cranium which had been the subject of the surgery.

The case proceeded to trial in Allegheny County. During Jury selection Juror 29 was asked about her feelings on Medical Malpractice cases. She was asked if she had any feelings about medical malpractice cases which would make her favor one party over another. She responded by referring to family members working in the medical profession. During follow up, she stated, "I would like to think I would be fair and impartial, but I mean, it just depends on the facts and everything presented. *Trigg* , at *7. Upon even further questioning the juror reported that she sees what the medical providers in her family go through and she "knows they would never do anything wrong."

As is common, the clerk attempted a "cure question" which elicited the desired response. The parties were then taken to see the calendar control judge who by agreement of the parties made his decision based upon the transcript. The decision was not to strike the juror for cause and the plaintiff indicated on appeal that striking Juror 29 exhausted peremptory challenges.

After a defense verdict, the plaintiff appealed to the Superior Court which granted a new trial based upon the failure to strike Juror 29. In so doing, the Superior Court found that because the trial judge was not present, the Court should not apply a deferential standard of review but should apply a *de novo* standard. By applying such a standard, the Court found that the trial court erred and that the error was not harmless. In so doing, Judge Kunselman, author of the Superior Court's lead opinion stated, "the slightest ground of prejudice is sufficient" to justify disqualification of a potential juror. *Trigg v. Children's Hosp. of Pittsburgh of UPMC*, 2018 PA Super 129, 187 A.3d 1013, 1019 (citing *Shinal v. Toms*, 640 Pa. 295, 162 A.3d 429, 439 (2017)).

The Superior Court also found that the issue was not waived by the failure to recreate the question and answers in person before the trial judge.[3] *(Cont. on p. 13.)*

Allegheny County has now added Local Rule 212.2(d) which became effective as of February 1, 2020. The new rule provides:

(d) Should a party, parties, or the Calendar Control Judge request that a Judge preside over voir dire and jury selection, the Judge presiding over the voir dire and jury selection shall have complete discretion over the voir dire and jury selection process, notwithstanding the preceding subsections of this local rule.

[1] *A court reporter is also not a given.*

[2] *A reading of the decision in Trigg discusses the process a little differently. In theory, the clerk notes objection for cause and relies on the calendar control judge to make a ruling. The undersigned's personal experience is slightly different. Indeed, things work a little bit differently from clerk to clerk. However, generally the clerk will state an opinion of whether a juror should be stricken for cause. If the parties agree, the juror is excluded. Judicial intervention usually occurs only if the parties disagree. Likewise, if both parties agree that a juror should be stricken for cause, the clerk will often agree, and usually, no judicial intervention is required. The one exception here is if it appears that the panel may be exhausted, under which circumstance, the clerk is more likely to consult the judge. It is not a criticism that strikes can occur without judicial intervention.*

[3] *At the Supreme Court level, the concurring opinions of Justices Donohue and Justice Wecht seem to agree that an attempt to re-enact the subject questions and answers in the judge's presence would likely not be productive, the opinions do not say that a litigant would be safe in passing on the opportunity to bring the potential juror before the judge.*

Allowance of Appeal was subsequently granted; and the Pennsylvania Supreme Court reversed the Superior Court finding that in failing to object to proceeding with jury selection without a judge present, the plaintiff waived the issue. Despite the finding of a waiver, the case generated three opinions, two of which were critical of Allegheny County's jury selection procedure. This criticism would also be equally applicable to any other county where a judge does not preside over voir dire.

Justice Donohue[4] offered the following observation:

> This problem strikes at the heart of my reservations about voir dire procedures that permit questioning potential jurors outside of the presence of a trial judge. Voir dire is an essential component of our constitutional right to trial by jury. Article 1, Section 6 of the Pennsylvania Constitution provides the citizens of this Commonwealth with the right to a trial by an impartial jury. PA. CONST. art.1, § 6; *see also Bruckshaw v. Frankford Hosp. of City of Philadelphia*, 619 Pa. 135, 58 A.3d 102, 108-09 (Pa. 2012) (("[T]he right to a trial by an impartial jury is enshrined in the Pennsylvania Constitution, which guarantees that 'trial by jury shall be as heretofore, and the right thereof remain inviolate.'"). This constitutional right extends to both criminal and civil trials, and accordingly, the fairness and impartiality requirements for juries "are as scrupulously protected in a civil case as in a criminal case." *Bruckshaw*, 58 A.3d at 109. Indeed, we have recognized the fair and impartial jury as the "keystone" of our legal system. *Colosimo v. Pennsylvania Elec. Co.*, 513 Pa. 155, 518 A.2d 1206, 1209 (Pa. 1986); *see also Bruckshaw*, 58 A.3d at 109 ("One of the most essential elements of a successful jury trial is an impartial jury.").

Trigg v. Children's Hosp. of Pittsburgh, No. 3 WAP 2019, at *27-28 (Apr. 22, 2020)

Justice Wecht[5] further observed:

> Although this Court can provide no relief in this case, Allegheny County's civil jury-selection process gives cause for serious concern.

Trigg v. Children's Hosp. of Pittsburgh, No. 3 WAP 2019, at *38 (Apr. 22, 2020).

In the Court's majority opinion, Justice Todd did note the concerns over Allegheny County's procedure raised in Judge Bowes', concurring opinion which had been joined by Judge Olson.

Despite the finding of waiver, the case has been remanded to address other issues which had not been addressed.[6]

Going Forward

As recognized by the *Trigg* Court, Allegheny County has now added Local Rule 212.2(d) which became effective as of February 1, 2020. The new rule provides:

> (d) Should a party, parties, or the Calendar Control Judge request that a Judge preside over voir dire and jury selection, the Judge presiding over the voir dire and jury selection shall have complete discretion over the voir dire and jury selection process, notwithstanding the preceding subsections of this local rule.

In the undersigned's opinion, this change does represent some progress, but does not go far enough. Under the new rule, a judge will not automatically preside over voir dire. Indeed, although the rule envisions that a judge may preside, it does not even guarantee that. The rule does not require the presence of a court reporter. In addition, the rule does not offer any guidance as to the proper use of "cure questions" (they should not be leading questions and should not signal an expected response to the potential jurors). Finally, there should be room to allow counsel, when appropriate, to propose more than five questions.

A Word about Waiver

In finding a waiver, the Supreme Court has set a precedent that if a procedure set forth in a rule may result in error or deprive a litigant of a right, the party must make an objection in order to later challenge that rule. This is a broad view of waiver. The Superior Court's approach involved a much narrower concept of waiver, which if followed by the Supreme Court probably would have resulted in a different outcome.

One may also question whether the Court should have still addressed the standard of review issue even if the right to challenge the procedure itself was waived.

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[4] Justice Donohue's concurrence was joined by Justices Baer, Dougherty, Wecht and Mundy.

[5] Justice Wecht's concurrence was joined by Justice Dougherty.

[6] Those issues center on certain voir dire questions that plaintiff's counsel was not allowed, limitations on follow up and the clerk's "rehabilitative questioning".

(Continued on Page 16)

Erie Insurance Exchange v. Moore, No. 20 WAP 2018 (April 22, 2020 Supreme Court of Pennsylvania), ----A.3d ---- (Pa. 2020)

Pennsylvania Supreme Court holds that Plaintiff's allegations of negligence were sufficient to trigger Erie's duty to defend an insured home-owner in a shooting case.

In this case, the liability carrier, Erie, sought a declaration that it did not have to defend or indemnify its deceased insured, Harold McCutcheon Jr., who was the alleged shooter in a murder-suicide who also caused severe injuries to a third person, Richard Carly (Plaintiff).

According to the allegations in the Complaint, after McCutcheon allegedly killed his wife but before he killed himself, Plaintiff arrived on the scene. Plaintiff, who had been dating McCutcheon's wife approached the front door of her home, rang the doorbell and received no answer. Plaintiff became concerned, placed his hand on the doorknob and the door was suddenly pulled inward by McCutcheon. A fight ensued while McCutcheon continued to have the gun in his hand. Importantly, the Complaint alleged that during this struggle McCutcheon was "knocking things around, and in the process [he] negligently, carelessly, and recklessly caused the weapon to be fired, which struck [Plaintiff] in the face," causing severe injuries. In addition, the Complaint alleged that "other shots were carelessly, negligently and recklessly fired" by McCutcheon during the struggle, striking various parts of the inside of the home.

The language in the Erie homeowner's policy for Mr. McCutcheon defined an 'occurrence' as "an accident including continuous or repeated exposure to the same general harmful conditions." The parties engaged in discovery and eventually filed cross-motions for summary judgment. The trial court agreed with Erie and granted summary judgment in its favor, holding it had no duty to defend the estate against Plaintiff's complaint. The Superior Court reversed the trial judge's decision finding that because the Plaintiff's Complaint alleged that the shooting was "accidental," the events fit the definition of "occurrence" in the homeowner's policy with Erie.

On appeal, the Supreme Court compared the allegations in the Plaintiff's Complaint against the policy language. The Court rejected Erie's contention that McCutcheon's conduct was deliberate and therefore not covered by the policy. The Court's finding resulted in a holding that the carrier had a duty to defend the claims against the alleged shooter and, possibly a duty to indemnify the Plaintiff for his injuries. The Court held that, contrary to Erie's view, this surprise encounter with the Plaintiff was not part of the insured's other intentional conduct for purposes of insurance coverage. It was also pointed out that the Complaint was not seeking damages for the fistfight or shoving match but instead was seeking damages for Plaintiff being accidentally shot by Erie's insured.

The Court theorized that had the policy's exclusion expressly stated coverage would not apply to incidents involving firearms, or during the commission of a crime, then perhaps there would be no duty to defend the Plaintiff's claims. However, the language in the policy at issue only excluded from coverage bodily injury that was 'expected or intended' by the insured. The Court found that to the extent this language was ambiguous it must be construed in favor of coverage.

Finally, the Court rejected Erie's argument that finding a duty to defend under these circumstances ignored the basic principle of "fortuity" and providing coverage for criminal conduct like McCutcheon's would incentivize insureds to engage in criminal activity. The Court found that this argument was "beside the point" because, the Complaint's allegations did not preclude the possibility McCutcheon accidentally shot Plaintiff, despite the fact he intentionally shot his wife or intentionally pulled Plaintiff into the house before the shooting. The Court determined that denying a duty to defend under such circumstances would not serve as a crime deterrent and would unnecessarily withhold compensation to tort victims.

Based on the foregoing, the Supreme Court held that Plaintiff's allegations were sufficient to trigger Erie's duty to defend and the order of the Superior Court was affirmed.

Rolon v. Davies, Pa. Super. 106 (April 28, 2020)

Pennsylvania Superior Court provides guidance on the required elements for the admissibility of expert testimony at trial

In this medical malpractice action, Plaintiff's Estate alleged, *inter alia*, that the negligence of a doctor with Surgical Specialists of Lancaster (Defendant) led to the death of Maria Sanchez-Rodriguez. At trial, Plaintiff's presented Dr. David Campbell as an expert witness on alleged negligence. At the close *(Continued on Page 15)*

of Plaintiff's case, Defendant moved for a nonsuit, claiming Dr. Campbell did not offer his opinion to a "reasonable degree of medical certainty" as required under Pennsylvania law. The trial court granted Defendant'smotionand the jury subsequently returned defense verdicts in favor of the other Defendants. The trial court denied Plaintiff's post-trial motion to remove the nonsuit.

On appeal, the Pennsylvania Superior Court reserved the trial court's grant of a nonsuit finding that the record confirmed Plaintiff's medical expert stated he was certain of his opinion despite not using the phrase "to a reasonable degree of medical certainty." The Court's opinion provided an analysis of prior precedential cases, which set forth the requirements needed for the admissibility of expert testimony into evidence. First the Court reiterated that an expert need not use "to a reasonable degree of medical certainty" ("magic words") for testimony to be admissible.Instead, the Superior Court held that if the remainder of the expert's opinion confirms that the expert expressed his opinion with reasonable certainty, then the opinion should be allowed into evidence.

The Court analogized the facts of the instant case to *Vicari v. Spiegel*, 936 A.2d 503, 509 (Pa.Super.2007), a case where the "magic words" were not used but the expert testimony was permitted. The Court noted that in both of these cases the expert used conditional language such as "more likely than not" and "much, much, much less likely" in places because it was impossible to state with certainty that a particular event would have occurred. The Court found, that when viewed in its entirety, the expert testimony from Dr. Campbell evidenced a breach of the applicable standard of care, which increased the risk of harm to the Plaintiff decedent.The Court also found that Dr. Campbell expressed his opinion with "certainty" and gave a detailed analysis of the facts that he believed supported his opinion even though the "magic words" were not used. The Superior Court concluded that Dr. Campbell's testimony was more than sufficient to create a jury issue and the trial court had erred in denying Plaintiff's motion to remove the nonsuit.

Keesee v. Dougherty, 2020 Pa. Super. 64 (March 16, 2020)

In a case of first impression the Superior Court, adopts a test for determining when to stay a civil case pending resolution of a related criminal matter.

This civil action was brought by a nonunion electrical contractor against a union boss and other defendants. Plaintiffs' claims in this civil action sounded in both tort and contract. They also sought punitive and other damages stemming from personal injuries, the subsequent loss of his reputation and income, and the value of a terminated contract.

During the course of litigation, it was determined that Defendants in this case were the subject of federal and state criminal investigations. Defendants filed a Motion to Stay Proceedings on the grounds that active litigation of Plaintiffs' civil action imperiled Defendants' privileges against self-incrimination, the trial court denied the motion and Defendants' subsequent motion for reconsideration.

On appeal, and as a matter of first impression, the Pennsylvania Superior Court formally adopted a six-factor test, which had been previously established by the federal courts in determining whether to stay a civil case pending the resolution of a companion criminal case. *See In re Adelphia Communications*, No. 02-1781, 2003 WL 22358819 (E.D. Pa. 2003). The Superior Court held that the six factor balancing test set forth in *Adelphia* should be used by trial courts to determine this issue moving forward. The six-factors to be balanced are as follows:

1. The extent to which the issues in the civil and criminal cases overlap;

2. The status of the criminal proceedings and whether any Defendants have been indicted;

3. The Plaintiff's interests in an expeditious civil proceeding weighed against the prejudice to the Plaintiff caused by the delay;

4. The burden on the Defendants;

5. The interests of the court; and

6. The public interests;

After formally adopting the six-factor balancing test, the Superior Court vacated the order denying Defendants' motion to stay and remanded the case for further proceedings consistent with their opinion.

Slupski v. Nationwide Mut. Ins. Co., No. 19-2279 (United States Court of Appeal for the Third Circuit March 3, 2020) – Non-Precedential Opinion

Third Circuit holds Commercial Policy Limitation for UIM Coverage invalid under the PA MVFRL

This case arises from a motor *(Continued on Page 16)*

HOT OFF THE WIRE ... FROM PAGE 15

vehicle accident where an employee, Frank Slupski ("Plaintiff") was injured while occupying a customer's vehicle. Plaintiff made a claim for the third party coverage and upon resolution of that claim he sought underinsured motorist coverage ("UIM") on his employers' commercial policy with Nationwide, which had 1 million in liability and 500 thousand in UIM. The policy language stated that liability coverage applied to "any auto" but the UIM coverage only applied to the "company auto". On this basis, Nationwide denied UIM coverage to the Plaintiff.

Plaintiff filed a complaint against Nationwide arguing that the insurance company took the "legally erroneous and bad faith position" that only liability coverage but not UIM coverage was extended to him under the policy and Nationwide had incorrectly deemed him ineligible for UIM coverage. Nationwide filed a motion to dismiss, arguing that Plaintiff was not an insured because an insured under the policy was defined as one in a "covered motor vehicle," and a covered motor vehicle for UIM purposes was only an employer owned car.The District Court agreed with this reasoning and granted Nationwide's motion.

On appeal, the Third Circuit reversed the District Court's decision finding that the Nationwide policy did not adhere to the strict provisions of the MVFRL. First, the Court found that the policy did not adhere to the requirement that UIM coverage had to be provided coextensively with liability coverage. Second, the Court found that Nationwide did not adhere to the requirements of either § 1731 or § 1734 regarding the proper rejection or reduction of UIM coverage in Pennsylvania. During this portion of the analysis, the Court determined that symbols appearing on a declaration sheet do not constitute a written request for lower coverage under § 1734.

The Third Circuit determined that the Nationwide policy was void and unenforceable to the extent it conflicted with the MVFRL. The Court further held that the default provision—providing UIM coverage equal to that of liability coverage—made the Plaintiff an insured for purposes of his suit. The District Court's Order was reversed and the case was remanded for further proceedings.

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BY THE RULES ... FROM PAGE 13

A word of caution is in order, this is another recent case where an appellate court has found a waiver. It seems that the trend is toward disposing of more appeals based on waiver. The Courts seem to have moved beyond finding waiver only where the waiver is obvious. Instead, waiver may be found in ways that trial counsel would not ordinarily anticipate. As such, there is an increasing need to be vigilant about putting matters on the record and trying to anticipate where a waiver could be found to exist. Conversely when defending a verdict, it may be fruitful for plaintiffs' counsel to closely review the record to see if any grounds for appeal may have been arguably waived.

By: Mark Milsop, Esq. of

Berger and Green

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Kick Off Event Scheduled in Erie

Save the date to attend this fun event!

Monday, Aug 24, 2020

4:00pm - Board of Governors Mtg
First one of 2020-2021
Sheraton Bayfront Hotel, Erie

6:30pm - Reception with heavy Hors D'oeuvres and Cocktails
Sheraton Bayfront Hotel, Erie

8:30pm - Bowling
Greengarden Lanes, Erie

Tuesday, Aug 25, 2020

10:00am - 2 hour CLE w/ Breakfast
featuring John Allin, of John Allin Constuling, globally recognized snow and ice consultant
Sheraton Bayfront Hotel, Erie

Greater Pittsburgh
community
food bank

1 North Linden Street
Duquesne, PA 15110
Phone: (412) 460-3663
Fax: (412) 460-0418
pittsburghfoodbank.org

April 30, 2020

Western Pa Trial Lawyers Association
909 Mt Royal Blvd, Ste 102
Pittsburgh, PA 15223-1030

Dear Friends,

Thank you for your online gift to Greater Pittsburgh Community Food Bank. Your partnership helps ensure that all of our neighbors have enough food to eat each and every day.

Together, we are providing food assistance to working families, veterans and seniors, while making sure our youngest neighbors receive the proper nutrition they need. Thank you for your generosity!

With your help, we will be distributing food for eight million meals in the next three months. Your donation will provide healthy meals for growing children to help them focus and learn, meals that address the specific dietary needs of seniors, and food that offers warmth and hope at a homeless shelter or meal program. You are making a real difference in the lives of our neighbors who are struggling.

Your generous gift is especially important today, as our community faces the COVID-19 outbreak. With many families out of work or facing increased child-care expenses, your support means more than ever. The Food Bank is committed to continuing our services during this difficult time, and we are working to adapt our distributions in order to best keep our community safe. To stay updated on the Food Bank's response and how you can help, you can visit pittsburghfoodbank.org. Thanks again for your care and concern for our neighbors in need!

Warm Regards,

Thank you!

Charla Irwin-Buncher
Chief Development Officer

Please retain this letter for tax purposes. No goods or services were received in exchange for this donation.
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TRIVIA CONTEST

Enter for a Chance to Win a $100 Visa Gift Card

Trivia Question #24

Of the original six NASA space shuttles, which one never flew a space mission?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by September 11, 2020. Prize for this contest is a $100 Visa gift card. Winner will be drawn the week of September 14, 2020. The correct answer to Trivia Question #24 will be published in the next edition of The Advocate.

Rules:

- Members only!
- One entry per member, per contest
- Members must be current on their dues for the entry to count
- E-mail responses must be submitted to admin@wptla.org and be received by the date specified in the issue (each issue will include a deadline)
- Winner will be randomly drawn from all entries and winner will be notified by e-mail regarding delivery of prize
- Prize may change, at the discretion of the Executive Board and will be announced in each issue
- All entries will be considered if submitting member's dues are current (i.e., you don't have to get the question correct to win – e-mail a response even if you aren't sure of your answer or have no clue!)
- There is no limit to the number of times you can win. Keep entering!

The correct answer to each trivia question will be published in the subsequent issue of The Advocate along with the name of the winner of the contest. If you have any questions about the contest, please contact Erin Rudert – er@ainsmanlevine.com.

Answer to Trivia Question #23 – **What Super Bowl occurred between two NFL teams that do not field a cheerleading squad, making it the first Super Bowl with no cheerleaders? Answer: Super Bowl XLV, between the Green Bay Packers and the Pittsburgh Steelers.**

There were no entries for Trivia Contest #23, so unfortunately, there is not a winner.

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Through the Grapevine....

Young Lawyer Bianca DiNardo has a new email address: biancad@goodrichandgeist.com

Congratulations to **Presidents' Club and Board of Governors Member Karesa Rovnan** on the recent birth of her youngest son, Maddox. Both Maddox and mom are doing well.

Member Doug Olcott can be found at his new position with Edgar Snyder & Associates, US Steel Tower, 600 Grant St, 10th Fl, Pittsburgh, 15219. P: 412-394-1000 dolcott@edgarsnyder.com

Congratulations to **Past President and Presidents' Club Member John Gismondi** on receiving the Catholic Diocese of Pittsburgh's 2019 "Change Through Service Award" for his charitable work through his Gismondi Family Foundation. Recently, the foundation partnered with Neighborhood Allies and Computer Reach to make laptops available to Pittsburgh Public School students through the "Beyond the Laptops" program.

Hats off to **Past President and Presidents' Club member Jerry Meyers** on receiving the Best Lawyers' Lawyer of the Year Award for 2020 in Personal Injury Litigation - Plaintiff for Pittsburgh, PA.

Cheers to **Past President and Presidents' Club member Tim Riley** on being named PAJ's Champion of Justice for 2020.

A belated job well done to former member **Laura Tocci** on being elected to the Beaver County Court of Common Pleas. Congratulations, your Honor!