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UPCOMING EVENTS FOR WPTLA

The **Annual Judiciary Dinner** will be held on **Friday, May 8, 2015** at **Heinz Field in Pittsburgh**. Cocktails will begin at 5:30 p.m. with the program and dinner beginning promptly at 7:00.

Our annual **Ethics Seminar / Golf Outing** is scheduled for **Thursday, May 21, 2015** at **Shannopin Country Club in Pittsburgh**. The CLE will be held from 11:30-12:30, and golf begins at 1:00.

A **3-credit CLE program** is being scheduled in **June** with **Business Partner Robson Forensic**.

Also in **June,** be on the lookout for information on a **Business Partner Happy Hour**, where we'll welcome our Business Partners and thank them for their investment in WPTLA with heavy hors d'oeuvres and cocktails.

HOW PRACTITIONERS SHOULD APPROACH FACEBOOK DISCOVERY

By: Maria Salvatori*

The use of Facebook discovery in litigation is a relatively new phenomenon. Frankly, many practitioners approach discovery of Facebook information improperly. Attorneys mistakenly view a person's Facebook account as one "piece" of information, as opposed to an entire source. Consequently, practitioners request total access to Facebook accounts, creating an overly intrusive discovery request for information that may be irrelevant to a claim. This is a burgeoning issue in the courts.[1]

In Pennsylvania, courts have yet to develop a consensus on the proper approach to Facebook discovery.[2] Pennsylvania practitioners' understanding of how Facebook technology works and how to both properly and effectively conduct discovery of Facebook information is especially important. There exist almost an equal number of trial courts granting unlimited Facebook access as those denying any access to Facebook information whatsoever.[3] The common thread among Pennsylvania courts regarding Facebook discovery, regardless of the outcome, is the public-to-private relevancy rationale.[4] Under this theory, the court will grant unfettered access to a party's account (the "only me" view) only when information available on a party's "public" profile indicates that more relevant information exists.[5] One Judge described the test as a gateway: "Essentially, viewing relevant information on the public profile acts as a gateway to the private profile."[6] This all-or-nothing method, however, produces unpredictable results for any practitioner, as it either allows intrusive, all-encompassing access to irrelevant information, or completely denies access to any and all Facebook information.

The Court of Common Pleas of Allegheny County has recognized the need to protect parties involved in litigation from overly intrusive Facebook discovery requests, yet still failed to recognize the need to apply traditional discovery methods[7] to social media discovery.[8] Traditional discovery methods include use of depositions, interrogatories and requests for production to obtain certain

* Maria Salvatori is a 2012 graduate of Saint Vincent College and a candidate for graduation from the University of Pittsburgh School of Law in May 2015. She hopes to pursue a career in immigration law.

[1] Desmond Hogan, Jennifer Brechbill, Hogan Lovells, *Status Update: Compelling Parties to Produce 'Private' Social Media,* THE UNITED STATES LAW WEEK, BLOOMBERG BNA, (July 1, 2014), (https://www.bloomberglaw.com/search/results/65f2e86510126562ae989e5ac7727976/document/X81I1624000000) "The tension between the broad relevancy standard for discovery and the fear that parties will use discovery requests to rummage at will through private social media accounts has created a new development in the law."

[2] Ben Present, *Pennsylvania trial courts yet to find consistency in Facebook decisions,* THE LEGAL INTELLIGENCER, (December 17, 2012, 12:00 AM), http://www.post-gazette.com/business/legal/2012/12/17/Pennsylvania-trial-courts-yet-to-find-consistency-in-Facebook-decisions/stories/201212170126.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.* (quoting Judge Douglas Herman of Franklin County).

[7] I use the term "traditional discovery methods" to mean those in accordance with the rules of civil procedure, where specific, narrowly tailored requests for production, interrogatories and deposition questions are used, as opposed to requests for entire sources of discoverable information.

[8] Trail v. Lesko, No. GD-10-017249, 2012 Pa. Dist. & Cnty. Dec. LEXIS 194, at *20-21 (C.P. Allegheny County July 3, 2012).

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President
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A Message from the President …

By: Christopher M. Miller, Esq.

2015 Supreme Court Election Could Impact Our Future

By now, we are all well aware that there will be three seats available on the Pennsylvania Supreme Court to be filled this fall. Presently, there are five Justices presiding. Under normal circumstances, there should be seven, which will be the case after the election this fall.

Tom Wolfe winning the race for Governor was a positive sign for pro-civil justice, as Tom Corbett clearly had an agenda that was not favorable to our clients, many of whom are victims of corporate wrongdoing and negligence. However, many representatives in the Pennsylvania House and Senate remain strongly anti-civil justice. I expect that future anti-civil litigation legislation will continue to be pushed.

The upcoming Pennsylvania Supreme Court election could help change the future. Not only will this election and the filling of the three vacancies affect future legal decisions on appeal, but the Pennsylvania Supreme Court also serves an important role in terms of drawing the boundaries for the various constituencies in future elections. Different boundaries translate into different constituencies, which could affect the outcome of future elections for the Pennsylvania House and Senate. This could, in turn, have a direct impact on the type of legislation that will be proposed within the Pennsylvania House and Senate moving forward.

Regardless of your political affiliation, I would encourage all of you to closely evaluate the candidates who are running to fill these vacancies. Please do your homework and choose wisely. This will be a very important election for all of us, one which could have a significant effect on many of your practices and the civil justice system in our Commonwealth for years to come.

With that in mind, I am very pleased to announce that a Judicial Candidates Forum will be held in Pittsburgh on April 23, 2015 from 6:00 P.M. - 7:30 P.M. A networking event will precede the Forum, beginning at 5:00 P.M. Both the networking event and the Candidates Forum will be presented by the Pennsylvania Association for Justice (PAJ) Future Leaders Section, and will be held at the Westin Hotel & Conference Center. **While this Forum is open to the public, PAJ has requested that anyone interested in attending RSVP directly to them.** I would like to extend a special thanks on behalf of WPTLA and our members to PAJ, PAJ's current President, Malcolm MacGregor and the PAJ Future Leaders Section for deciding to hold this Forum in Pittsburgh.

I hope that many of you will consider attending these events. **Please be sure to RSVP directly to PAJ should you decide to attend.** This will provide us with an opportunity to hear the candidates running for the three seats that are open on the Pennsylvania Supreme Court. It will also enable us to consider the various viewpoints of these candidates and to make an educated decision as to who will be receiving our votes in this critical election. I look forward to seeing you at the upcoming networking event and Forum.

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documents, photographs or individual pieces of information relevant to the claim or defense. *Trail v. Lesko* overlooked a key component of Facebook discovery: that while compelling a party's Facebook login information is overly intrusive, denying complete access to a Facebook account is also wrong. *Trail* both illuminates the Facebook discovery problem and demonstrates a need for practitioners' understanding of Facebook discovery to ensure efficient and pro-active litigation in accordance with the Pennsylvania Rules of Civil Procedure.

Courts generally handle discovery of Facebook information differently than other forms of discovery, as elucidated in *Trail*. Facebook discovery, however, should be conducted in the same manner as all other traditional discovery. Practitioners' should really view a person's Facebook account as an entire source of, not a piece of, discoverable information. The information discoverable should be only, and all, that which is relevant to the claim or defense, as is in accordance with the Rules of Civil Procedure. This will lead to more specific and relevant discovery requests, generating a higher probability of actually obtaining the information sought. Once practitioners begin to view discovery of Facebook information in this manner, courts' denial and grants of access to Facebook information during discovery will become much more predictable.

Facebook "Crash Course"

A Facebook user's profile functions as a personal web page and may include the following information, at the user's discretion: a vast array of photos, age, employment, education, relationship status, religious and political beliefs and recreational interests and hobbies.[9] A Facebook user's "recent activity" shows recent photos the user posted, the user's "likes" for things other Facebook users posted on the user's own "wall," or posts the user has "liked" on other Facebook users' walls or the general Facebook newsfeed, which is located in the Facebook user's "activity log."[10] Facebook also offers a vast array of technological uses to an individual.

Every Facebook user's profile is presented in three distinct settings or views. These views allow the Facebook user to utilize their individual account in several separate ways. The first Facebook profile view is the "public" setting, which makes accessible certain features on a user's profile to anyone who simply types a Facebook user's name into a Google or Facebook search engine.[11] The "friend" view is less restricted in terms of what information is revealed, but the information revealed is limited to fewer viewers. This view enables only those Facebook users whom you have "friended" to access certain information on your account.[12] This view provides access to more information than the "public view," as it allows the friend to see as much or as little information as the user permits through Facebook settings. A Facebook user's "friend" view is still somewhat private though, as the user may restrict information seen on the Facebook profile.[13] The last Facebook profile setting is the

[9] Trail v. Lesko, No. GD-10-017249, 2012 Pa. Dist. & Cnty. Dec. LEXIS 194, at *2 (C.P. Allegheny County July 3, 2012).

[10] *Activity Log*, FACEBOOK, https://www.facebook.com/maria.caterina.90/allactivity?privacy_source=account_cleanup (last visited December 4, 2014); *Timeline and Tagging Settings*, FACEBOOK, https://www.facebook.com/settings?tab=timeline, (last visited December 4, 2014). Note that these links may not be accessible to a non-Facebook user. The above-discussed settings are only accessible when logged into the Facebook account.

[11] *What does "Public Mean"?,* F*ACEBOOK*, https://www.facebook.com/help/203805466323736, (last visited December 4, 2014). Something that is "Public" can be seen by people who are not your friends, people who do not post on Facebook, and people who view content through different media (new and old alike) such as print, broadcast (television, etc.) and other sites on the Internet. When you comment on other people's Public posts, your comment is "Public" as well. *See also Appearing in Search Engine Results*, FACEBOOK, https://www.facebook.com/help/392235220834308/, (last visited December 4, 2014). People who do not themselves post to Facebook can still see things you have shared with the audience set to Public, as well as your public information (for example, your name, profile picture, cover photo, gender and networks). *See also Who Can Look Me Up. Privacy Settings and Tools*, FACEBOOK, https://www.facebook.com/settings?tab=privacy, (last visited October 9, 2014). A Facebook user can change privacy settings so as to be unsearchable on search engines such as Google.

[12] "*Who Can See My Stuff?" Facebook Privacy Settings and Tools*, FACEBOOK, https://www.facebook.com/settings?tab=privacy&section=composer&view, (last visited December 4, 2014).

[13] *Timeline and Tagging*, FACEBOOK, https://www.facebook.com/settings?tab=timeline, (last visited October 9, 2014). Using "Timeline" settings, a Facebook user chooses whether Facebook "friends" can post things to the user's Facebook profile and which "friends" have access to view those things posted by others.

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"only me" view, which provides the viewer with all of the same information included in the "pubic" and "friend" views, plus much more information and additional private features.[14] Under this setting, Facebook users may operate their account in a similar capacity to using a personal computer or cellular device. Ultimately, Facebook, viewed in the "only me" setting allows communication between "friends." A Facebook profile is an entire source of technology, as it serves both as a social media site and an electronic communications device.

II. Pennsylvania Facebook Discovery Rulings: Under inclusive or Overly intrusive

Pennsylvania courts view Facebook as one whole "piece" of information or discoverable material, which is improper when you understand the technology. *Trail v. Lesko* is a personal injury suit in which both the plaintiff and defendant filed cross motions for access to each other's Facebook accounts (the "only me" view).[15] While plaintiff sought access to defendant's Facebook account to help establish his liability, defendant sought access to plaintiff's Facebook account to undercut his damages claim. The court denied plaintiff's motion to compel access to defendant's Facebook profile on the basis that defendant conceded liability for plaintiff's injuries, the only issue left was punitive damages, and no relevant information could be found on defendant's non-public profile view.[16] Furthermore, the court found that because plaintiff did not allege that he was bedridden, the photographs found on his public profile of him socializing were not *inconsistent* with plaintiff's supposed injuries, and thus were not relevant to plaintiff's claim.[17] The *Trail* court denied both defendant's and plaintiff's cross motions seeking complete login access to one another's Facebook profile. In other words, neither party was permitted to obtain *any* information whatsoever from either litigant's Facebook profile.

Judge Wettick based his ruling on Pennsylvania Rule of Civil Procedure No. 4011(b), barring discovery that would cause "unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party."[18] In accordance with Rule 4011, the court ruled that an order compelling complete access to the plaintiff's Facebook account would be unreasonable because the relevance of the information contained within did not outweigh the level of intrusiveness that gaining access to the party's Facebook login information would cause.[19]

At first glance, this seems reasonable. However, *Trail* failed in two main respects. First, flirting with the possibility of granting access to an entire Facebook account is overly intrusive, as it allows access to a vast amount of irrelevant information. Granting total access gives admittance to an entire *source* of discovery, as opposed to a specific *piece* of discoverable information within that source. Second, the court in *Trail* failed to recognize the possibility that more relevant information may have existed in the plaintiff's non-public portion of his Facebook profile, and that the information provided within the parties' Facebook accounts was accessible through traditional discovery methods. That information could have then been used to determine the extent of the damages owed to the plaintiff. By implementing an all-or-nothing approach to the discovery of Facebook information, the court in *Trail* handicapped defendant's case, by barring access to possible relevant and valuable information existing within the plaintiff's Facebook profile. If plaintiff's Facebook photos showed that plaintiff was fully recovered in his injuries, that evidence would undercut plaintiff's claim for damages. Had the court in *Trail* simply utilized Rule 4003.1, recognizing the appropriate scope of discovery generally, defendant may have had access to additional, relevant evidence. Instead, however, *Trail* jumped straight to Pa. Rule of Civil Procedure 4011. The court saw only two options in *Trail*: either provide opposing counsel complete access to the parties' Facebook profiles, or completely deny Facebook discovery altogether in the litigation. This flaw in Trail embodies a major issue with Pennsylvania Facebook discovery law.

When practitioners draft Facebook discovery requests in an "all-or-nothing" approach, it leads to dissatisfying results. The court may view the request for unfettered access to the Facebook account as completely intrusive, providing opposing counsel to a vast amount of irrelevant information, and deny.

Various other courts have applied approaches consistent with *Trail*- requiring a predicate showing of relevant information on the party's public portion of the Facebook profile in order to determine whether access to further relevant information found on the non-public portion is appropriate.[20] Similar to *Trail*, these approaches either grant total access to the Facebook account, or none at all. This method of discovery- requesting complete access to a party's Facebook account- creates highly unpredictable results for obtaining Facebook material during discovery in Pennsylvania.

[14] More private information is accessible through the "only me" view, such as the Facebook user's private one-on-one messages between the user and certain other Facebook "friends" (including photos), all Facebook profile "posts" including those posted by the user's Facebook "friends," as well as the user's "newsfeed" (showing the user's friends' posts and status updates").

[15] *Id.* Trail requested complete access to Lesko's Facebook account, and vice versa. Thus, each party sought the other's login information, consisting of the party's username and password, which would have provided each party an "only me" view of the other's Facebook account.

[16] *Id.*

[17] *Id.*

[18] *Id*. *See also* Pa. R. CIV. P. No. 4011(b).

[19] *Id*. at *8-9.

[20] See Hogan, *supra* note 1, at 2. ("Many courts are requiring a 'threshold showing' that social media is reasonably calculated to lead to the discovery of admissible evidence before compelling the production of social media discovery.").

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A. The "Threshold Showing Test"

The "Threshold Showing" approach is similar to that used in *Trail*. Other Pennsylvania courts, when faced with motions to compel unrestricted access to a litigant's entire Facebook account (via the party's username and password), have either granted blanket access to the Facebook account or denied access altogether. All motion grants or denials were based on the same ideology: the need for opposing counsel to first demonstrate the existence of information relevant to the litigant's claim on the "public" portion of the Facebook profile.

In *Zimmerman v. Weiss Markets*, *McMillan v. Hummingbird Speedway*, and *Largent v. Reed,* each court granted complete, unfettered access to a litigant's entire Facebook profile content (via access to usernames and passwords) based on a predicate showing of relevant information found on the public portions of the plaintiff's Facebook profile.[21] Conversely, while utilizing the same "threshold showing" approach, in *Arcq v. Fields*, the Franklin County (Pennsylvania) Court of Common Pleas denied defendant's motion to compel access to the plaintiff's non-public portion of the Facebook profile.[22] The court held that since no relevant information was found on the "public" portion (such as photographs, posts or status updates), it was unlikely that relevant information would likely be found in the non-public portions of the account. [23]

B. In Camera Review

Another non-traditional discovery method of Facebook information is to order an in camera review of the sought after Facebook profile account. Here, a judge views the litigant's Facebook profile under an "only me" view. While this method is used to help protect a litigant's privacy, it is a burden on judicial resources and also inconsistent with the Rules of Civil Procedure and traditional discovery methods.[24]

In *Offenback v. L.M. Bowman, Inc.,* a personal injury case, District Court conducted a thorough in camera review to determine whether any information relevant to the claim existed.[25] The Judge determined that some relevant information did exist on the plaintiff's Facebook profile.[26] Thus, based on this in camera review, the District Court ordered the plaintiff to produce the relevant Facebook information.[27] Some courts have already noted that an in camera review is both inappropriate and a waste of judicial resources.[28] Instead, the movant should seek only the relevant information located in the Facebook account, and the responding party's attorney should download the relevant information and print it out or produce is on an ESI device, complying with the movant's requests for production. In camera review should only be employed when no other remedies exist.[29]

C. "Friends" View

Some attorneys have tried to deceptively "friend" an opposing party or witness to review the contents of a Facebook profile page.[30] This is morally repugnant, inappropriate, and inconsistent with the rules of civil procedure. It also likely violates numerous ethical rules, which will not be discussed herein. Alternatively, an attorney or Judge openly offering to "friend" a litigant allows for a more respectable route, but still poses other problems. While a "friend" view does protect the litigant's privacy, it is also bears risk of being under-inclusive. Whether opposing counsel or a Judge conducts discovery in the "friend" view, the information can be extensively limited, depending on the user's Facebook setting. Thus, relevant information is left out, making this an inefficient conduction of Facebook discovery.

III. How Practitioners Can Better Gain Access to Facebook Information During Discovery

A. Viewing Facebook Information Similarly to Traditional Discovery Information

How litigators view Facebook significantly contributes to the Facebook discovery problem. Practitioners must view Facebook as a source of information, from which further, relevant information can be discovered. In contrast to *Trail*, some case law has required the requesting party to proceed by using traditional discovery methods, requesting and receiving *only* those *relevant* pieces of information from a Facebook account. Traditional discovery methods include serving a request on the

[21] *See generally* Zimmerman v. Weis Markets, Inc., No. CV-09-1535, 2011 WL 2064510 (Pa. C.P May 19, 2011); McMillen v. Hummingbird Speedway, Inc. No. CV-113-2010, 2010 WL 4403285 (Pa. C.P. Sept. 9, 2010); and Largent v. Reed No. CV-2009-1823 WL 5632688 (Pa. C.P. Nov. 8, 2011).
[22] *See generally* Arcq v. Fields, No. CV-2008-2430 (Pa. C.P. Dec. 7, 2011).
[23] *Id.*
[24] Steven S. Gensler, *Special Rules for Social Media Discovery?*, 65 ARK. L. REV. 7, 25 (2012). ("Under standard discovery practice, a court generally should wait until the information holder makes his or her response after the initial review, and then get involved only if there is a dispute regarding objections to the request or the sufficiency of the production.").
[25] Offenback v. L.M. Bowman, Inc, No CV-1:10-1789 2011 WL 291371 at *2 (M.D. Pa. June 22, 2011).
[26] *Id*. at *2.
[27] *Id.*
[28] *See* Fawcett v. Altieri, 960 N.Y. S. 2d 592, 598 (Sup. Ct. 2013). *See also* Gensler, *supra* note 24, at 26 ("In the social media context, courts would have no reason to undertake an in camera review of a party's social-media content unless the requesting party had some specific, non-speculative grounds to argue that the account contained responsive materials that the account holder had failed to disclose.").
[29] Moore v. Miller, No. 10-CV-651-JLK, 2013 WL 2456114 (D. Colo. 2013) (holding that instead, defendant shall produce a hard copy of his entire Facebook history, including his activity log, from the date at issue forward).
[30] Barnes v. CUS Nashville LLC, No. 3:09-cv-0064, 2010 2265668 WL (M.D. Tenn. June 3, 2010); *see also* Piccolo v. Paterson, No. 2009-04979, 2011 Pa. Dist. & Cnty. (C.P. Bucks County, May 5, 2011). (order to "friend" opposing counsel denied, as prior discovery had already revealed numerous photographs of her facial injuries).

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opposing part seeking only the *specific, relevant* information located in an electronic source. The Pennsylvania Court of Common Pleas in Luzerne County denied a request for production of plaintiff's entire Facebook account, even though the "public" portion relevancy test was met. Thus the requesting party was not entitled to unencumbered access to the opponent's Facebook account.[31]

In *EEOC v. Simply Storage Management*, also cited in *Trail*, the court ordered plaintiff's counsel to gather and produce to opposing counsel *only* the relevant information from plaintiff's Facebook profile.[32] The *Simply Storage* court further explained that the main challenge in the case was not one unique to electronically stored information generally, or to social media sites, but was a challenge persistent in all discovery case law-defining appropriate limits.[33] The court emphasized that although discovery procedures may be broad, they are, nevertheless, limited.[34] Moreover, although the contours of social media communications relevant to a claim may be difficult to define, a litigant is not required to disclose everything from his or her social media account.[35] The *Simply Storage* court first ordered counsel to inquire further, through depositions, regarding information related to plaintiff's Facebook activity it sought, to determine what relevant Facebook information should be produced during discovery.[36]

Pennsylvania practitioners should also take advice from other district courts that have openly recognized and expressed the need to first use traditional discovery procedures when seeking information located within social media accounts. Recently, the Middle District Court of Tennessee, in *Doe v. Rutherford County, Tenn., Bd. of Education,* ordered plaintiff's counsel to personally review the restricted, non-public portions of plaintiff's social media account, including any deleted items that might be reasonably accessible, and produce any information from those accounts that was relevant to any party's claim or defense in this action.[37] Similarly, in *Thompson v. Autoliv ASP, Inc*., plaintiff was ordered to upload all information from the period at issue onward to an electronic storage device and produce a redacted index of social networking site communications, not to provide opposing counsel with Facebook login information.[38] In other words, the responding party was required to produce only the specific pieces of Facebook information relevant to the litigation, as opposed to providing opposing counsel with access to the entire source of the litigant's Facebook account.

Several courts have noted that Facebook should be viewed as a source of discovery, similar to an entire email account on an employee's computer, or a filing cabinet full of employment or medical records. In *Howell v. Buckeye Ranch Inc.,* an employment discrimination action where defendant asked for complete access to plaintiff's Facebook account based on the "public" portion of the account, the court held that defendant's discovery request was overly broad. The court stressed that the fact defendant sought information in electronic file format, as opposed to a file cabinet, did not establish a right to rummage through an entire file.[39] The court further noted that the same rules that govern discovery of information in hard copy documents apply equally to electronic files.[40] The court then advised counsel to serve interrogatories and requests for production, seeking information from the account relevant to the claims and defenses of the lawsuit, so that plaintiff's counsel could then access the private sections of the Facebook account and provide opposing counsel with the information relevant to defendant's discovery request.[41]

The aforementioned case law demonstrates that all discovery forms and sources really pose the same issues and require the same methods of procedure, from paper to electronic form. Regarding the comparison of Facebook accounts to diaries, the court in *Faragiano ex rel. Faragiano v. Town of Concord* denied production of the defendant's un-redacted diary, giving defendant time to redact the irrelevant, private information.[42] Further, in *Gill v. Beaver*, the United States District Court for the Eastern District of Louisiana ordered redacted portions of the diaries to be produced under the terms of a protective/confidentiality order in order to spare plaintiff unnecessary embarrassment.[43] In the email setting, the court in *Rozell v. Ross Holst*, denied plaintiff's motion to compel all private email communications, stating that it was plaintiff and her counsel's responsibility to conduct appropriate requests for production related to the lawsuit.[44] Similarly, the United States

[31] Kalinowski v. Kirschengeiter, No. 2010-06779 (Luzerne Cty. C.C.P. Aug. 8, 2011) (Unpublished).
[32] EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010).
[33] *Id.* at 434. See also Gensler, *supra* note 24, at 17. ("The court would have had to make exactly the same decision if it were a diary in question. Moreover, while the decision was perhaps difficult, it required only the application of existing principles to a new context.").
[34] EEOC v. Simply Storage Mgmt., LLC, 270 F.R.D. 430, 434 (S.D. Ind. 2010) (stating that a requesting party is not entitled to access all non-relevant material on a site).
[35] *Id.*
[36] *Id.*
[37] Doe v. Rutherford County, Tenn., Bd. of Educ., 3:13-0328, 2014 WL 4080159 (M.D. Tenn. 2014) (holding that discovery of nonpublic social media data may be obtained only upon an evidentiary showing that such private social media material is likely to contain information that will reasonably lead to the discovery of admissible evidence).
[38] Thompson v. Autoliv ASP, Inc., 2:09-CV-01375-PMP, 2012 WL 2342928 (D. Nev. 2012).
[39] Howell v. Buckeye Ranch Inc., CV No. 211-1014, WL 5265170 at *2 (S.D. Ohio 2012).
[40] *Id.*
[41] *Id.*
[42] 741 N.Y.S.2d 369, 370-71 (N.Y. App. Div. 4th Dept. 2002).
[43] CIV. A. 98-3569, 1999 WL 461821 (E.D. La. 1999).
[44] Rozell v. Ross Holst, 2006 WL 163143 (S.D.N.Y 2006).

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District Court of Nevada held, in *Mackelprang*, the proper method for obtaining relevant email communications related to plaintiff's emotional distress was to serve plaintiff with a request for production, properly limited in relevance.[45]

"Fishing expeditions" are not unique to Facebook discovery, and are disallowed in all discovery settings. Rule 34 does not grant unrestricted access to a respondent's database compilations.[46] Instead, Rule 34(a) allows a requesting party to inspect and to copy the material (whether it is a document, disk or other device) resulting from the respondent's translation of the data into a reasonably usable form.[47] If there is improper conduct on the part of the responding party, the requesting party may need to check the data compilation.[48] However, to gain direct access to the respondent's databases, the court must make a factual finding of some non-compliance with discovery rules and protect respondent with respect to preservation of his records, confidentiality of non-discoverable matters and costs.[49]

Therefore, making specific requests of relevant information located on a Facebook account is the proper solution to the Facebook discovery problem. Rule 34 allows parties to request documents and electronically stored information (ESI) either by identifying specific items or by describing categories of items sought.[50] A Rule 34 request allows a party to request documents and ESI by describing contents or characteristics, like "Please produce all Facebook photographs, Wall posts, status updates and messages that relate to Topic X, Y and Z."[51] Therefore, a party requesting access to an entire Facebook account must request the user to produce the entire contents of his or her account, by first establishing the relevance of the entire account.[52]

B. The Attorney's Role in Conducting Efficient Facebook Discovery in Litigation

While Pennsylvania courts are still determining how to approach Facebook discovery, practitioners can both protect and successfully advocate for their clients by utilizing traditional discovery methods. This will help ensure that information located on a Facebook account related to a claim or defense is not only efficiently produced, but also properly produced in accordance with the Rules. Attorneys on both sides should be aware, both when requesting discovery and in discovery production, of the sensitive nature the Facebook discovery issue presents; but also of the unpredictability of both the courts, and social media site policies, when ordering full Facebook discovery.[53]

Practitioners may consider first utilizing Interrogatories and Requests for Production in order to understand how the party actually uses their Facebook account prior to requesting access to the actual Facebook information. Knowing which information is available on a social media site, before making such requests, will also help minimize the worry of unpredictability in Judge's decision.[54]

Counsel should be as specific as possible in the request.[55] Attorneys should prepare reasonable and specifically tailored interrogatory questions related to the opponent's use of his Facebook account and possible information that could be found on the Facebook page, and through deposition testimony, again tailoring questions towards the use of and possible relevance of information contained on the opponent's Facebook profile. If the information portrayed on the "public" portion of the Facebook account appears relevant in itself, suggesting that more relevant information existed within the "private" portions Facebook user party's account, then counsel should conduct discovery by tailoring appropriately narrow questions for the production more relevant Facebook evidence.

For attorneys going through the second phase of discovery, take what you learned from the first set of discovery, and tailor your requests, and know exactly what you are seeking from a

[45] Mackelprang v. Fidelity Nat. Title Agency of Nevada, Inc., 2007 WL 119149 at *8.
[46] In re Ford Motor Co., 345 F.3d 1315, 1316 (11th Cir.2003).
[47] *Id.* at 1316-1317.
[48] *Id.* at 1317.
[49] U & I Corp. v. Adv. Med. Design, Inc., 251 F.R.D. 667, 674 (M.D. Fla. 2008).
[50] FED. R. CIV. P. 34.
[51] *Id.*
[52] Gensler, *supra* note 24, at 15.

[53] Hogan, *supra* note 1, at 3 ("For this reason, it is prudent to limit your request to only those documents that truly are relevant to the claims and defenses in your case. While it may be tempting to 'go fishing' in the opposing party's social media account, this approach rarely is successful. Courts have prohibited social media discovery when a party requests the opposing party's user name and password to her social media account, fails to limit requests by time frame or subject matter and where a person of reasonable intelligence would not know which social media posts would be responsive to a request. Avoid those elementary pitfalls."). *See also* Mallory Allen & Aaron Orheim, *Get Outta My Face(Book): The Discoverability of Social Networking Data and the Passwords Needed to Access Them*, 8 WASH. J. L. TECH. & ARTS 137, 153 (2012) ("Because data use and privacy policies on social networking sites are constantly evolving to comply with changing regulatory law and public opinion, litigants should be careful when relying on the precedential value of previous decisions. There very well may have been a wholesale upheaval of the social networking sites' policies since a prior decision.").
[54] Hogan, *supra* note 1, at 4 ("Because you will want to have whatever "private" social media information in hand before the deposition of a party, you cannot wait to that critical moment in the case to ask the foundational questions needed to get the documents… Ask for a description of the type of information the plaintiff posts, including comments, statuses or photographs or any other information that potentially could bear on a claim or defense in a case. In this way, you can establish a threshold showing necessary to compel the private posts in question.").
[55] *Id.* at 4 ("Even when you are able to establish a threshold showing of relevance, it still is important to craft requests for production that meet Rule 34(b)(1)(A)'s reasonable particularity requirement. Courts have shown a reluctance to compel the production of social media where the requests are overbroad, or where parties seek to gain unfettered access to a social media account.").

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HOW PRACTIONERS SHOULD…(*Continued from Page 7*)

litigant's Facebook account. Be aware of relevant time periods (date from which the action or claim ensued), the types of Facebook information available (Wall posts, photographs, status updates and messages), and the Facebook user's actual activity regarding those Facebook category sources.

To avoid ethical problems, attorneys should advise their clients to not delete any Facebook information that may be relevant to the case once the duty to preserve is triggered.[56] When the attorney receives the discovery request, it is then proper to obtain, by downloading from the Facebook site, a copy of the specific piece of sought-after information, such as a photograph, link or other content posted on the client's Facebook page in order to comply.[57] The responding party may screen shot the Facebook information displayed on the computer screen and print the photos out, or, better yet, should utilize Facebook's download feature- which allows Facebook users to transfer all aspects of their Facebook account to printable form or to be stored on an ESI device.

This will not only help the attorney avoid ethical sanctions, but also help protect the client's Facebook privacy. If the client's counsel is the one reviewing and producing all the relevant Facebook information located on the account, a smaller chance exists that a court will grant opposing counsel's unfettered access to the Facebook account.

Regardless of whether the attorney is representing the requesting or the producing party, the following tips are useful when dealing with Facebook discovery generally: 1) document the process in preparation to defend it through the dates and times the information was captured; 2) really understand how Facebook technology works; and 3) don't assume anything about the posts or pictures taken (always verify with your client).[58]

[56] Phila. Bar. Assn. Prof. Guid. Comm., Informal Op. 2014-5, 2014 WL 3548813 (July 1, 2014).
[57] *Id.*
[58] Peter Coons and Maureen Holland, *Social Media, Facebook and Discovery. Are You Prepared if Asked to Produce Content?*, EDISCOVERY (November 2012/January 2013), *available at* http://marketing.d4discovery.com/acton/attachment/8501/f-008b/1/-/-/-/-/SocialMediaandeDiscovery-Are-You-Prepared-if-asked-to-Produce-MHOLLAND_and_PCOONS.pdf, (last visited on December 4, 2014).

We Need Article Submissions!!

This publication can only be as good and the articles that are published, and those articles come from our members. Please contact our Editor, Erin Rudert with any ideas you have, or briefs that could be turned into articles. Erin can be reached at 412-338-9030 or er@ainsmanlevine.com

MEMBER PICTURES & PROFILES

Name: Eric J. Purchase

Firm: Purchase & George, P.C.

Law School: University of Pittsburgh School of Law

Year Graduated: 1991

Special area of practice/interest, if any: Personal injury, insurance claims and medical malpractice.

Most memorable court moment: In my first year of practice, I had a client who was sued by a former paramour for the value of certain home improvements she'd made to his house. We asserted a set-off for the fair value of the rent free living she'd enjoyed during their relationship. At the arbitration, opposing counsel approached me and said, "Listen, Eric. If you're going to claim the value of her living circumstances as a set-off then we're going to introduce evidence of those living circumstances. And that evidence includes a closet full of XL cocktail dresses and size 12 stiletto heels. Thought you should know." I told my client. He dropped the set off claim.

Most embarrassing (but printable) court moment: Friends and colleagues assure me there have been many but I don't recall a single one. I swear.

Most memorable WPTLA moment: When I think about that, Larry Kelly seems to figure prominently in those memories. Whether it's Putt-putt at Peak n' Peek or bowling in Erie, he adds a healthy dollop of personality to any event.

Happiest/Proudest moment as a lawyer: I'm proudest of my profession when I see the noble, self-sacrificing work of other lawyers. Sometimes I hear about it at WPTLA meetings, sometimes I see evidence of it in motions court. I see a lot of lawyers who contribute their labor and passion to help people who need help desperately and I know that what I'm seeing is just the tip of the iceberg. Those moments are when I'm proudest to be a lawyer.

Best Virtue: Patience.

Secret Vice: My secret vices have historically become public but I've recently had an embarrassing, private weakness for the video of Miley Cyrus' "We Can't Stop" with Jimmy Fallon and the Roots. But there I go again.

People might be surprised to know that: As a 12 year old, I became the youngest *novillero* (a semi-professional bullfighter) in the world. Ok, not true. But it sounds much cooler than, "I really like to cook." Which is true.

Favorite movie (non-legal): Casablanca

Favorite movie (legal): 12 Angry Men

Last book read for pleasure, not as research for a brief or opening/closing: John D. MacDonald's "The Quick Red Fox."

My refrigerator always contains: Sesame oil. Frank's Red Hot. Beer.

My favorite beverage is: These days there's nothing I like better than an aggressively bitter, citrusy IPA. Lavery's Dulachan is hard to beat.

My favorite restaurant is: Anyplace where the kitchen staff cares about getting it right and the front of the house is open and friendly.

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

ACHIEVING A BETTER LIFE EXPERIENCE: AN OVERVIEW OF THE ABLE ACT

By: Nora Gieg Chatha, Esq.

The preservation of means-tested public benefits like Supplemental Security Income (SSI) and Medical Assistance (Medicaid) is a common theme in my estates, trust, and special needs practice when consulting with litigation attorneys and their injured clients in settlement related matters. This goal is often accomplished by drafting a Special Needs Trusts to shelter litigation proceeds in an effort to secure such benefits. Special Needs Trusts are not appropriate for all clients or situations, particularly those unfortunate circumstances in which coverage or recovery is limited.

The Stephen Beck, Jr., Achieving a Better Life Experience (ABLE) Act of 2014 became law on December 19, 2014. The ABLE Act might also help litigation attorneys achieve a better settlement experience for certain clients.

The ABLE Act amended Section 529 of the IRC to add Section 529A, which provides for the creation of state-specific tax free savings accounts to cover "qualified" expenses for individuals with disabilities for tax years beginning 2015.

ABLE accounts are allowed a tax exemption similar to Qualified Tuition Program or Section 529 Plans. Non-tax deductible contributions may be made to an ABLE account by any person (the disabled account beneficiary, family, or friends), and income earned in the account is understood to be tax-exempt or in some instances tax-deferred.

Like Section 529 Plans, ABLE programs will be state-run with options presumably varying from state to state. Designated beneficiaries may be changed so long as a newly designated beneficiary is likewise eligible under the program and is a family member of the initially designated eligible beneficiary.

ABLE accounts are a work in progress. The Treasury Department is expected to draft regulations to define qualifying criteria. Agencies administering means-tested public benefits (primarily the Social Security Administration and State Medicaid Agencies) may also publish guidelines.

Pending further regulation, qualified expenses are understood to include education, housing and transportation, medical and dental care, community based supports, employment training, assistive technology, specialized housing and disability-related transportation.

Similar to a Special Needs Trust created under 42 U.S.C. § 1396p(d)(4)(A), ABLE accounts are designed to "supplement and not supplant" means-tested public benefits and will be subject to payback upon termination providing that:

> "upon the death of the designated beneficiary, all amounts remaining in the qualified ABLE account not in excess of the amount equal to the total medical assistance paid for the designated beneficiary after the establishment of the account, net of any premiums paid form the account or paid by or on behalf of the beneficiary to a Medicaid Buy-In program under any State Medicaid plan established under title XIX of the Social Security Act, shall be distributed to such State upon filing of a claim for payment by such State."

IRC Section 529A(e).

So will ABLE accounts replace our frequent use of Special Needs Trusts? Probably not in the majority of cases due to their notable funding limitations, which are understood to include at this juncture that:

- the ABLE account beneficiary must have significant disabilities meeting Social Security standards with a disability onset date prior to age 26;
- only one ABLE account may be established per disabled individual;
- total annual contributions to an individual's ABLE account by participating individuals may not exceed the applicable annual gift exclusion ($14,000 in 2015);
- total cumulative contributions to an individual's ABLE account over time may not exceed the state-specific limits for education-related 529 savings accounts;
- ABLE account beneficiaries who receive SSI may not have more than $100,000 in an ABLE account: anything over $100,000 may be considered an "available" asset that could cause a loss in SSI benefits.

Once they are fully instituted, ABLE accounts will be another great tool at our disposal to preserve means-tested public benefits for clients who meet these funding guidelines in cases of limited coverage or recovery. ABLE accounts may be used in lieu or in addition to "rapid spend-down" often necessary in such situations to again bring a client's resources within public benefits guidelines.

TRIAL COURT AFFIRMS DAMAGE AWARD OF $2.4 MILLION PLUS PUNITIVES TO EMPLOYER AGAINST EMPLOYEES FOR A BREACH OF DUTY OF LOYALTY

By: Rolf Patberg, Esq.

One of the most damaging events for a small business is misconduct by a former employee in stealing its customers and valued employees. Depending on the fact pattern, a business may have a civil remedy against former employees who have wrongfully stolen customers, employees, trade secrets, or customer lists. These are well-recognized business torts and remedies are available to employers even in situations where they do not have a written employment contract. This issue was addressed in detail in a recent lower court decision.

On December 10, 2014, in the matter of *Balmer Company, Inc., v. Frank Crystal and Company, Inc.*, the Honorable William P. Mahon of the Court of Common Pleas of Chester County, Pennsylvania, reaffirmed a compensatory award of damages to an employer in the amount of $2.4 million against its former employees for, among other claims, a breach of fiduciary duty of loyalty. In the *Balmer* case, former employees sought to solicit the Balmer employees, customers, and clients and to conspire with a new company to create a competing insurance agency by disparaging the employer and stealing its customers. Other former employees also conspired with the Defendants, which eventually resulted in a failed attempt to decimate the sales and marketing capabilities of the Plaintiff-Employer by soliciting its employees, customers, and clients and by breaching or interfering with both employment agreements and fiduciary obligations owed by these employees to the Plaintiff-Employer.

The Plaintiff-Employer filed suit for claims of breach of contract, breach of duty of loyalty, breach of fiduciary duties such as the duty of loyalty, unfair competition, and civil conspiracy. The Plaintiff-Employer also sought punitive damages. The court awarded $2,391,569 in compensatory damages for lost revenue based upon the Plaintiff-Employer's expert witness. These losses represented lost revenue as a result of the former employee-Defendants' conduct.

The court focused on the breach of contract action, breach of fiduciary duty of loyalty, and civil conspiracy claims. The breach of contract claim was based upon contracts that the former Defendant-Employees had signed, which were incidents of their employment relationship with the Plaintiff-Employer. There were certain restrictions imposed which were reasonably necessary for the protections of the Plaintiff-Employer. Such agreements must be reasonably limited in duration and geography, and the court found this to be the case in the *Balmer* case. Where a former employee breaches such an agreement, the Plaintiff-Employer may seek a preliminary injunction, permanent injunction, and damages. A preliminary injunction is a motion filed at the beginning of a case which essentially halts the Defendant's unlawful conduct based upon certain conditions that must be met and preserves the status quo. A permanent injunction permanently enjoins or stops former employees from taking actions such as soliciting customers, etc. Damages are monies awarded by a court or a jury for losses sustained by a Plaintiff-Employer.

As to the breach of fiduciary duties/breach of duty of loyalty, this is a recognized claim in Pennsylvania. Under Pennsylvania Law, employees of a business have a fiduciary duty of loyalty to their employer that arises out of the employer/employee relationship prior to the termination of that employment relationship. This has been recognized for some time in Pennsylvania, including the case of *Reading Radio, Inc., v. Fink*, 833 A.2d 199, issued by the Pennsylvania Superior Court in 2003. Individual Employee-Defendants violate these fiduciary obligations to the employer by using the employer's employment time, telephones, printers, fax machines, and/or trade secret information against the interest of their employer. Such was the case in *Balmer*, which lead to the decision in favor of the employer.

The court also found against the Defendant-Employees for the claim of unfair competition. Where former employees systemically induce employees to leave their employment when the purpose is to cripple or destroy their former employer, rather than to obtain their services of that particular skill of employee, such conduct constitutes unfair competition. In the *Balmer* case, the Defendant-Former Employees attempted to solicit the employer's sales/marketing force for the purposes of crippling the Plaintiff-Employer.

In addition, the court found that the Defendants had participated in a civil conspiracy. In order to prosecute a claim of civil conspiracy, Plaintiffs must show that two or more persons or entities combined or agreed to do an unlawful act or to do an otherwise lawful act by unlawful means. The Plaintiff must show proof of malice, must show that the malice is without justification, and that some overt act was done in furtherance of the common purpose or design and actual legal damages resulted. This has been long recognized in Pennsylvania, including the 1979 Pennsylvania Supreme Court decision *Thomas and Coal Company v. Pike Coal Company*, 412 A.2d 466.

WATCH OUT FOR THE FEDERAL WORKERS COMP LIEN AGAINST YOUR PI CASE!!

By: Brad Harris, Esq.

Picture this, you represent a person that was hurt in a car wreck (or any other incident caused by negligence of another person) which occurred while he was working for the federal government.

At first glance it appears to be a typical personal injury claim. You assume some kind of lien exists against your client's personal injury settlement in consideration of his receipt of the federal workers compensation benefits. You've settled car wreck cases with underlying workers compensation liens before, but that was done in accordance the laws of your state (because that was state law workers comp). You don't practice federal employee workers compensation and you don't know anyone that does.

Is it different to resolve the underlying lien with the federal government? Are there timing considerations which would work to maximize your client's overall benefits? Are there ways to avoid the lien altogether? What consequences may exist for both you and your client if you ignore it? These are the points that I will attempt to address in this article.

In nearly all legal matters I like to identify the other side's motivations. Usually it's financial, and that's the case here, too - even though we are dealing with the federal government. When a federal employee has a workers compensation claim it is adjudicated by the Department of Labor's (DOL) agency called the Office of Workers Compensation Programs (OWCP). Even though the claim is adjudicated by a different agency than the one that the employee is working for, the payments the OWCP makes on behalf of the injured worker is "charged back" against the particular government agency at which the worker are employed.

Therefore, each agency has a financial interest in not only the minimization of amounts paid out to its injured workers, but also in recouping funds from their injured workers' third party cases. In the fiscal year 2011 the federal government received over 8 million dollars in refunds on third party cases! Additionally, the federal government was able to reduce its future workers compensation obligations to the injured federal employees by over 22 million dollars by shifting responsibility for those benefits to the third party tortfeasors (more on this later).

The injured worker's immediate superior (or person at employing agency completing the agency's portion of the initial claim form) is required to identify possible third party cases on the initial workers comp claim form. If the workers comp claim is approved, 5 U.S.C. § 8131 requires recipients of federal workers comp to initiate a suit against a third party tortfeasor.

Under 5 U.S.C. § 8132, if there is a recovery from the third party tortfeasor, your client is required to reimburse the United States for the benefits paid. This reimbursement requirement can never be waived. Unless permission in writing is given by OWCP, the beneficiary may not settle or dismiss a case for any amount less than the refundable disbursements as defined in 20 C.F.R. § 10.714. See 20 CFR § 10.707. Claimants and their attorneys are required to provide periodic status updates and other relevant information in response to OWCP requests. See 20 C.F.R. § 10.707.

The §8131 requirement (to bring a claim against the third party) can be waived, but only under certain limited circumstances. e.g. Census workers injuries (due to privacy considerations). But, if the census worker does pursue the third party claim and receives a recovery, the government *still* has the §8132 statutory right of reimbursement.

According to §8131, the government can even require the employee to assign a right of action to enforce that liability to the United States. This is a strange concept to most attorneys who consider claims for personal injury to be unassignable.

After your client learns about the §8132 reimbursement right of the government, he may decide he does not want to pursue the claim against a third party. If so, he should make a written request to OWCP pursuant to 20 C.F.R.§ 10.709, to be released from § 8131's requirement.

If the government decides to purse your personal injury claim, it doesn't get more than its lien rights. Stated in another way; should the government's prosecution of claim result in a recovery from a third party, only the refund requirement imposed by § 8132 is still in effect.

So what happens if your client directs you to ignore the federal government's lien rights? You should advise him that decision could result in forfeiture of his rights to workers compensation benefits, 20 C.F.R. § 10.708, or the right to compensation may be suspended.

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You should also advise him that you can't place any funds into your operating account as "earned" if you should have reasonably believed that any part of them were are owed to the federal government. That's not to say you can't place such funds in escrow pending disbursement resolution. As in any case, you should fully explain to your client *before settlement* that there may be significant delays in funds availability pending disbursement resolution.

So the federal government has a § 8132 statutory right of reimbursement – *what does it include*? To begin with, we should identify what is or isn't included in the government's claim against the funds obtained from the third party tortfeasor.

1. Notice I said "from the third party tortfeasor," the government has no right to any of the funds received by the injured worker due to his own good decisions about obtaining insurance, e.g., un-insured or under-insured motorists insurance benefits, or a personal disability insurance (quack quack AFLAC). But beware – some states (Tennessee for example) allow their auto policies to be written in such a way that there is no uim/um benefit payable to the extent the policyholder receives workers compensation benefits.

2. If a federal employee has a traumatic injury (as opposed to repetitive – like carpal tunnel syndrome) he is entitled to 100% wage loss compensation for the first 45 days. This is called Continuation of Pay (COP). This amount *is not* included in determining amount of disbursements that OWCP has paid (it is excluded from reimbursement consideration)

3. If the OWCP claims examiner decides to do so, he may hire a third party vendor to help him in adjusting the claim. e.g. a nurse to follow the care process and report back to the claims examiner or doctors he hires to conduct independent medical evaluations. This is odd, but believe it or not, those expenses are included in the government's reimbursement consideration.

So, now that you have thought about what can and cannot be claimed by the government as within its rights to reimbursement, you might try your typical approaches to reimbursement reduction: identify specific subrogation language in the policy language and show that it is unenforceable in your state, or ask for a total waiver of reimbursement waiver due to the extenuating circumstances (your client is seriously injured and there is little liability insurance available) or perhaps a compromise of the reimbursement right in consideration of your client's comparative negligence.

Nope, none of this brilliance holds water. The government can't waive reimbursement regardless of the fact of comparative negligence (remember, the workers comp benefit obligation exists despite the negligence of the employee). The refund owed to the U.S. when a claimant achieves a recovery from a third party arises by operation of law under the specific language of § 8132.

The law of federal employee workers compensation is the Federal Employee Compensation Act (FECA). It places its final adjudications in its own administrative court; the Employees Compensation Appeals Board (ECAB). The Board has found no compromises are allowed. See *Willie E. Cantrell, 13 ECAB 490,492 (1962):*

> "terms of the [FECA] are specific as to what shall be charged against the proceeds of a third-party recovery and neither the Bureau (OWCP's predecessor agency) nor the Board has the authority to waive or compromise the requirements of the Act." See also Charles Howell, 38 ECAB 421 (1987).

Is the government reasonable about this? It may come as a surprise to you, but the answer is yes. As you might expect, they've got a form for that. It's an EN1108. You can easily find it on the internet in a format that you can complete on your computer, print out, and consider before you submit it with the payment.

And another nice thing; in all circumstances a portion of the recovery may be allocated for loss of consortium for the spouse and children of the injured employee, thereafter the client is entitled to retain a minimum of twenty percent of the tort recovery after expenses of suit and reasonable attorney's fees are deducted. So there's a formula to determine the government's recovery right (set forth in § 8132) which effects a reduction in the amount to be refunded by the FECA beneficiary and/or credited against that person's future FECA benefits.

Pay particular attention to the potential credit against your client's future workers compensation benefits. The number found at line 19 of the EN1108 is retained by your client - but it the amount against which OWCP will credit his future compensation, including wage loss compensation, schedule award benefits and medical expenses, on account of the same injury.

In other words, the OWCP will resume payment of compensation only after the awarded compensation exceeds the amount found in line 19. For this reason, after the closing of your personal injury claim, all medical bills related to the injury that the client pays should be submitted to OWCP, regardless of when payment was made. The client will not be reimbursed for these payments, but

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WATCH OUT FOR … *(Continued from Page 12)*

the amounts paid will be used to reduce the amount of his line 19 balance. Clients should be advised of this potential bad news before it exists.

Now that you have studied EN1108 and its effects upon the settlement of the personal injury claim, its just natural that you would look for possibilities to reduce the government's rights to your client's money.

The first thought is the allocation of the recovery into categories not subject to the lien. Like perhaps "pain and suffering" – besides, that's never a pain and suffering benefit under workers compensation, right? – so it follows there's no lien against it, right? Nope. The United States Supreme court said no. According to *U.S. v. Lorenzetti 467 U.S. 167 (1984)* the § 8132 statutory right of reimbursement attaches to the entire recovery, regardless of the elements of damages for which recovery is had.

Another case of interest is *Hedrington v. Golden Touch Transportation of NY, Inc. et al*, No. 1:2007 cv 00387 (E.D.N.Y. Dismissed Jun. 20, 2007). There, a TSA employee was injured at the LaGuardia airport while in an employee bus operated by Golden Touch. The bus made a sudden and abrupt stop causing Ms. Hedrington to be unseated and thrown to the floor of the bus. She was about the business of her employer (TSA) when the event happened, so she filed a federal workers comp claim and received $49,801.61 in wage loss and medical expense benefits.

She sued the bus company in state court. Her attorney sent notice to the OWCP four times without response. She then agreed to settle her claim for $18,500, holding the tortfeasor's insurer harmless from any and all liens and claims for reimbursement.

Before her lawyer could get the funds distributed to his client, he received a detailed lien from the OWCP. Her lawyer then obtained from the state court a show cause order to the DOL to show why the state court should not order the proceeds issued to her (and deny reimbursement for the workers comp claim).

Her lawyer complained that New York state law precludes injured parties from recovering the first $50,000 in first party benefits in personal injury actions. The insinuation is that federal workers comp benefits are first party benefits and, because injured parties can't claim those benefits in the action against the third party tortfeasor, there is no right of reimbursement for the first $50,000 in first party benefits under New York law.

Our federal government reimbursement attorneys promptly removed the state court action to the U.S. District Court and relied upon the Supreme Court's decision in *Lorenzetti*, for the proposition that any money received as a result of a third party action, regardless of whether the damages are the type covered by the FECA (wage loss) or not covered by the FECA (non-economic losses such as pain and suffering), is subject to the reimbursement provisions of § 8132.

There's no actual decision by this U.S. District Court, but the parties agreed that the show cause action would be dismissed with prejudice, the DOL would receive its $6,296.45 (the EN1108 calculation) and the personal injury case was remanded back to state court.

Some attorneys may want to decrease the government's recovery by claiming the recovery wasn't subject to a lien – it was all allowance for consortium. No, the ECAB found that that a settlement reached as a result of the third party action by husband and wife was a joint settlement, rejecting the assertion that the settlement was only for the husband's loss of consortium claim (which would not be subject to § 8132 reimbursement provision). The U.S. District Court for the District of Columbia agreed, and ordered wife to refund $152,000 to the DOL. *Gonzalez v. Dept' Of Labor*, 603 F. Supp. 2d 137 (D.D.C. 2009), *aff'd*, 609 F. 3d 451 (D.C. Cir. 2010)

Some attorneys may think the funds can be protected by placing them all into a structured settlement. No, this backfired on Attorney Richard Epstein. He settled his client's case by having the tortfeasor purchase a structured settlement on behalf of his client, retained $210,000 for his attorney fees and costs, and sent the DOL $7,000 for its reimbursement rights. The DOL sued Attorney Epstein, asserting that the attorney was jointly and severally liable because he failed to first satisfy the § 8132 right of reimbursement before distributing the proceeds of a settlement. The U.S. District Court entered judgment against the attorney in the amount of $114,000.

Some attorneys know that, in determining an income tax calculation, a credit is worth a lot more than a deduction, so they have tried to use that concept with regard to the costs of the suit. I call that "Is that net or net, net?" It doesn't work here.

In *Durand v. U.S. Department of Labor*, 662 F. 3d 1106 (9th Cir. 2011)**,** the attorney argued that the costs of suit should be deducted from the refund due to the United States, the Court of Appeals for the Ninth Circuit affirmed DOL's calculation of the refund due to the United States under the statutory formula set forth in § 8132. agreeing with DOL that there was no ambiguity in the language of §8132 - that the costs and expenses of suit were to be deducted from the gross recovery (as clearly set forth in line 10 of the long form statement of recovery, EN1108), not from the refund amount.

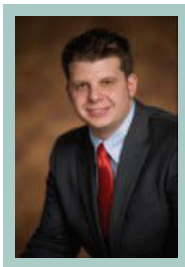
As I've stated above, you can go to the internet and run the calculations yourself to develop an appreciation for its effect on the settlement of your client's case. My takeaway from looking at various scenarios and my experience as a federal workers' comp practitioner is that it *Continued on Page 14*

WATCH OUT FOR … *(Continued from Page 13)*

always works in your client's best interest to obtain as many of his workers' comp benefits as possible (especially including his right, if any, to a schedule award) *before* the settlement of his third party personal injury claim.

What's your "take away" from this article? Follow Mark Twain's advice: "Always do what is right. This will gratify some people and astonish the rest." Got questions? Call me - we'll discuss them.

This article was written by attorney Brad Harris of the Harris Federal Law Firm. His contact information is telephone (877) 226-2723, Brad@HarrisFederal.com or see www.FederalDisability.com.



NATIONAL FINALS OF THE AAJ STUDENT TRIAL ADVOCACY COMPETITION - APRIL 16-19, 2015

By: Max Petrunya, Esq.

Each year, the American Association for Justice (formerly ATLA) hosts a National Student Trial Advocacy Competition (STAC). Beginning in early March, 14 regional competitions are held throughout the country with 224 law school teams squaring off for an opportunity to compete in the AAJ STAC National Finals. Over the past five years, Robert Peirce & Associates has had the privilege of hosting the Pittsburgh regional preliminary round of AAJ's STAC at the Allegheny County Courthouse here in Pittsburgh. This year, Robert Peirce & Associates is honored to host the 2015 AAJ STAC National Finals. This is a tremendous opportunity to make Western Pennsylvania's legal community and Pittsburgh shine on a national level.

One essential element to hosting any successful trial advocacy competition is judges. Without the gracious support of the local judiciary and legal community over the past five years, our firm would not have been able to successfully run AAJ's Regional Competition. We are asking all members of WPTLA to please set time aside in their schedules to assist with judging this competition. The AAJ STAC National Finals will run from Thursday, April 16, 2015 through Sunday, April 19, 2015.

Please support this very important cause. Many members of the WPTLA have competed in AAJ's and other mock trial competitions. I personally had the honor of competing in this competition in 2009 and 2010 when I was in law school. It is very important that the members of our WPTLA organization and the local judiciary give back to the students that work very hard to prepare for this competition.

Please consider volunteering to judge at least one round of the National Finals for AAJ's STAC. To reserve your spot now, please e-mail me at STAC@peircelaw.com or call at (412) 281-7229. As the competition draws closer, more information will be provided regarding times and location for judging. I hope to see all of you for the competition in April. If you have any questions about the competition please do not hesitate to contact me.

THE ADVOCATE

ARTICLE DEADLINES and PUBLICATION DATES

VOLUME 27, 2014-2015

	Article Deadline	Publication Date
Vol 27, No 4, Summer 2015	Jun. 5, 2015	Jun. 19, 2015

ANNUAL JUDICIARY DINNER

Friday, May 8, 2015

The following members of the judiciary who have retired or reached Senior Status during 2014 will be specially recognized:

The Honorable Alfred B. Bell
The Honorable Gary P. Caruso
The Honorable D. Michael Fisher
The Honorable Robert A. Kelly
The Honorable Donald E. Machen
The Honorable William R. Nalitz

Cocktails at 5:30 p.m.
Dinner at 7:00 p.m.

WPTLA President's Scholarship winners will be recognized, as well as the winner of the Daniel M. Berger Community Service Award.

A presentation to members of the Pittsburgh Steelwheelers will also take place.

Friday, May 8, 2015

East Club Lounge at Heinz Field

2015 President's Scholarship Essay Contest

SUBJECT: A non profit organization operating under the name "Hands Up 4 Peace" has filed application to participate in the Special Organization License Plate Program offered by the Department of Transportation of its home state. The Special Organization License Plate Program allows members of qualified organizations to purchase a uniquely designed license plate identifying the organization and bearing its logo. In order to qualify for participation in the Special Organization Plate Program, an organization must be nonprofit according to the Internal Revenue Service guidelines, and have as its primary mission service to the community and charitable purposes. The Department of Transportation prohibits Special Organization Plates it deems are "offensive in purpose" and reserves the right deny any application for plates designed to include the expression of ideas or points of view.

Hands Up 4 Peace describes its mission as "the promotion of peaceful conflict resolution and racial diversity awareness through community outreach and youth programs". Its logo includes a drawing depicting two (2) hands with palms facing out. Hands Up 4 Peace meets all criteria for participation in the Special Organization Program and submitted a proposed plate design that includes the organization's name and logo. The application was denied because the Department of Transportation determined that use of the organization name and logo were intended to express an idea or point of view and could be deemed as offensive in purpose. Hands Up 4 Peace has appealed the Department's determination in court.

ISSUE: Does the Department of Transportation's denial of the Hands Up 4 Peace Specialty Organization License Plate Program application violate the First Amendment or are such controls permissible in light of the State's role in issuing the license plates?

BY THE RULES

By: Mark E. Milsop, Esq.

Recent Decision Establishes an Exception to Certificate of Merit Requirement

The Pennsylvania Supreme Court has ruled that a certificate of merit is not required in a lawsuit against a professional when the plaintiff was not a patient or client in *Bruno v. Erie Ins. Co.*, 2014 Pa. LEXIS 3319 ___ Pa. ___, ____ A.3d ____ (Pa. Dec. 15, 2014). In *Bruno*, the Brunos were renovating their basement and removed some paneling and found black mold. They contacted their insurer to make a claim under the (limited) mold coverage under their policy. Erie brought an engineer to the property who assured Mr. Bruno that "the mold was harmless," that they should continue tearing out the paneling, and that health problems associated with mold were a media frenzy and overblown. As you may expect, these statements proved to be false, and the members of the Bruno family began to suffer respiratory problems.

The Brunos filed suit against Erie and the engineer, including a claim of professional negligence against the engineer. The engineer filed preliminary objections based upon a failure to file a certificate of merit. The preliminary objections were granted and the matter was affirmed by the Superior Court. However, the Pennsylvania Supreme Court reversed finding that pursuant to Rule 1042.1(a), the Brunos were not required to file a certificate of merit because the action was not filed "by or on behalf of a patient or client of the licensed professional agent."[1] In reaching this conclusion, Justice Todd, writing on behalf of the Court applied the Rules of Construction found in Pa. R.C.P. No. 127.[2] Accordingly, the Court applied the letter of the rule. In so doing, the Court rejected the argument of the Defendant and Amici, the Pennsylvania Defense Institute and the Insurance Federation of Pennsylvania,[3] that exempting the Brunos from the rule would defeat its purpose. In a footnote, the Court cited a recent decision by the Honorable J. Stanton Wettick explaining that where the plaintiff is not a patient or client, there may not be sufficient access to information to justify requiring a certificate of merit. See *Penn Dev. Servs., LP v. Chevy Chase Constr., Inc.*, 2010 Pa. Dist. & Cnty. Dec. LEXIS 17 (Allegheny County 2010).

Western Pennsylvania Local Rule Change Roundup

A number of counties have made changes in their local rules. What follows is a summary of the changes that I thought may be most pertinent to you:

Beaver County

Beaver County has amended a number of local rules to impose limits on the length of briefs. Generally briefs will now be limited to ten pages. The exception is where there is

[1] Rule 1042.1(a) provides:

> Rule 1042.1. Professional Liability Actions. Scope. Definition
> (a) The rules of this chapter govern a civil action in which a professional liability claim is asserted by or on behalf of a patient or client of the licensed professional against
> (1) a licensed professional, and/or
> (2) a partnership, unincorporated association, corporation or similar entity where the entity is responsible for a licensed professional who deviated from an acceptable professional standard, and

Pa. R.C.P. No. 1042.1

[2] Rule 127 Provides:

> Rule 127. Construction of Rules. Intent of Supreme Court Controls
> (a) The object of all interpretation and construction of rules is to ascertain and effectuate the intention of the Supreme Court.
> (b) Every rule shall be construed, if possible, to give effect to all its provisions. When the words of a rule are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit
> (c) When the words of a rule are not explicit, the intention of the Supreme Court may be ascertained by considering, among other matters (1) the occasion and necessity for the rule; (2) the circumstances under which it was promulgated; (3) the mischief to be remedied; (4) the object to be attained; (5) the prior practice, if any, including other rules and Acts of Assembly upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous history of the rule; and (8) the practice followed under the rule.

Pa. R.C.P. No. 127

[3] An Amicus Curiae brief was filed in support of the Plaintiff's position by the Pennsylvania Association for Justice. The Briefs of all of the Amici were referred to throughout by the Court. This underscores the importance of contacting the Pennsylvania Association for Justice in any appeal raising an important issue. Information about requesting Amicus assistance can be found at https://www.pajustice.org/PA/index.cfm?pg=AmicusCuriaePress or by contacting the undersigned. It cannot be stressed enough that you should request amicus assistance at the earliest opportunity due to time constraints in the appellate courts and the fact that the committee is comprised of volunteer attorneys.

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BY THE RULES … *(Continued from Page 16)*

an order of court or a stipulation of the parties. Similarly, Preliminary Objections, Motions for Judgment on the Pleadings and Summary Judgment are limited to 5 pages for the motion (in addition to the brief).

Also limited is the time for depositions. A deposition is not to exceed 1 ½ hours with an additional ½ hour for each additional party and the total allotted time for all discovery depositions is 5 hours. The rule does allow for exceptions by Court Order or upon agreement of the parties.

It should be noted that the rules already limited Interrogatories to 30 including subparts and provides for standard interrogatories in arbitration cases.

Washington County

Washington County has adopted a rule 1901 for the termination of inactive cases. The provision calls for a list to be prepared no less than once per year of cases inactive for more two years or more. A written objection to termination must be filed prior to a general call. If an objection is filed, a hearing is to be scheduled. Good cause is required to for the case to continue. Because the rule does not follow *Jacobs v. Halloran*, 551 Pa. 350, 710 A.2d 1098 (1998) (requiring actual prejudice for termination for inactivity), the rule may not survive an appropriate challenge. Anyone faced with a proposed termination under this rule which they intend to object to is advised to include and support an averment of a lack of prejudice in their objection so as to not waive *Jacobs*.

Allegheny County

Allegheny County has issued a fairly comprehensive update of its rules of civil procedure. However, the amendments are mostly technical in nature updating matters such as the address on the Notice to Defend, the location of arbitration hearings and changing references from the prothonotary to the Department of Court Records.The amendments should not change practice but practitioners are advised to make sure that the consult the November 2014 amendments to update their common forms.

Armstrong County

Armstrong is another county to address Rule 1901. Armstrong County's rule provides for a status conference 180 days after the filing of a Complaint to address deadlines, scheduling a pre-trial conference and trial or other actions to expedite the resolution of issues.

Mercer County

As an initial matter, the local rules concerning motions now require the filing of a motion no later than 4:30 the preceding Tuesday with the Court Administrator.

A more extensive Change is to L-317 which establishes a case management procedure. Cases are to be assigned to a judge on a rotating basis. A case is to be set for a status conference between 60 and 90 days of the filing of a Complaint. Cases are to be designated arbitration, regular or complex. Arbitration cases are to be afforded only 3 months for discovery and set for a hearing within 60 days thereafter. A regular case is allowed 6 months for discovery and trial within 10 months.

Review conferences are to be scheduled within 4 to 5 months of the initial conference, or earlier by request. Expert reports are due at the close of discovery.

Mercer County has also adopted Rule L-320 which provides that all cases over 2 years old as of December 31 of shall be sent notices under Pa.R.J.A. 1901 by March 31. If a hearing is requested it should be scheduled "in due course."

As to cases filed before December 31, 2014, which are more than 12 months old, they are to be scheduled for a review conference which may result in dismissal or the entry or amendment of a case management order.

Huntingdon County

Huntingdon County has adopted Local Rule 205 entitled Civil Case Management. Within 5 days after service of the Complaint, Plaintiff's Counsel must file an Initial Case Monitoring Notice and Order. The notice requires an election of an expedited track, with a trial within 6 months (suggested as examples by the rule are foreclosure, replevin and arbitration appeals), or a standard track. Standard Track cases should be tried in one year after service, on a date to be set at a status conference. Complex cases are to be set for trial in two years. Some difficulty of application of the time frames may occur where there are multiple defendants.

An additional aspect of the rule refers to Inactive cases. The rule allows the case to be reviewed by the President Judge who may "take action to dismiss or schedule additional proceedings …" The rule does not specify a procedure where the Court opts to take action to dismiss.

The rule also refers to an arbitration limit of $50,000.00.

COMP CORNER

By: Thomas C. Baumann, Esq.

WHAT'S GOOD FOR THE GOOSE MAY BE GOOD FOR THE GANDER

Recently, on the PAJ Workers Compensation List Server an inquiry was made regarding a Notice of Modification that had been filed with the Bureau on Workers' Compensation in a particular case. The Notification was unsigned and not notarized. The question raised was whether this rendered the Notification null and void.

There does not appear to be a case on point on this issue. However, practitioners may wish to review *McCaffrey v. WCAB* (Trial Tex., Inc.) 81 A.3d l6l. While this case involved an LIBC 760 Form and not the Notice of Modification under Section 413, the finding of the Court is instructive. In *McCaffrey*, the Claimant received an LIBC 760 Form from the worker's compensation carrier. The LIBC 760 Form was originally faxed back to the carrier by the Claimant's attorney. The insurer rejected the form indicating that it required originals and that the originals must be dated. Claimant then returned the original form by hand-delivery. It remained undated.

The carrier issued a Notice of Suspension for not properly completing the form. Subsequently, Claimant mailed a completed form with a date marked thereon. Benefits were then reinstated. Claimant sought penalty and the reinstatement of benefits for the period benefits were suspended.

The Workers' Compensation Judge determined that failing to date the form rendered the document deficient. With no date, the carrier could not determine the period of time covered by the form. Since the law permits the carrier to send these form no often than every six months, a date needed to be placed on the form in order to meet the calculation under the Act. The Penalty and Reinstatement Petitions were dismissed as a result. Claimant appealed to the Workers' Compensation Appeal Board which ultimately sustained the findings of the Workers' Compensation Judge.

On appeal to the Commonwealth Court, the Claimant raised the following issue. By faxing the LIBC 760 Form, a date is provided by the fax itself. Therefore, the LIBC 760 was not defective since a date had actually been provided.

The Court concluded that an LIBC 760 Form can be returned by facsimile. It then turned to the question of whether the forms must be dated. The Court looked to *Galloway v. WCAB* (Pennsylvania State Police, 756 A.2d 1209) (Pa. Cmwlth. 2000). There, Galloway returned the LIBC 760 Form but did not disclose her address. She included her attorney's address as her checks were being sent to the attorney under a Power of Attorney. The employer had suspended benefits alleging that the form was incomplete. The Commonwealth Court looked at Section 311.1 of the Workers' Compensation Act and determined that the Claimant's personal address did not have to be provided. Therefore, the employer was unable to suspend benefits as it did. The Court next considered *Varghese* v. *WCAB* (Ridgecrest Nursing Home) 899 A.2 1176 (Pa. Cmwlth. 2006). There, claimant indicated on the LIBC 760 Form that she was working. She did not include the wages that she earned on the form. The carrier suspended benefits for failing to include the earnings. Claimant filed a Penalty Petition, but the Workers' Compensation Judge and the Workers' Compensation Appeal Board found the suspension to be appropriate. The Commonwealth Court sustained this determination, finding that the carrier needed the information in order to calculate the proper partial disability payments.

The Court then considered the situation in the *McCaffery* case. It noted as follow: “What is clear is that the signature and date are essential to the unsworn statement to the Department of Labor and Industry. The date is needed to confirm the substance of the statements in the form LIBC 760 as of a date certain.” Because the form LIBC 760 submitted by the Claimant did not verify the Claimant's status *at the time* the form was completed, it was not 'completed accurately' pursuant to Section 311.1 (e) of the Act, an Employer's suspension was authorized.

While the Court's emphasis on the date of the LIBC Form is not terribly helpful to a situation involving the unsigned and unnotarized Notice of Modification, perhaps the general principles of the case can be applied. In each case a party charged with completing a document has failed to do so as prescribed under the Workers' Compensation Act. If a Claimant's benefits can be suspended because he/she failed to date an LIBC 760 Form, should a carrier or employer be permitted to reduce a Claimant's benefits through a Notice of Modification without signing same and having the signature notarized? In other words, if Claimants are to be held to certain standards for completing forms forwarded to them by employer/carrier, should not the more sophisticated actors in the workers' compensation system be required to properly complete forms which reduce or stop an injured worker's benefit? Ultimately, what is good for the goose should be good for the gander.

TRIVIA CONTEST

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

Trivia Question #2

What can travel around the world while staying in a corner?

Please submit all responses to Laurie at admin@wptla.org with "Trivia Question" in the subject line. Responses must be received by Friday, May 22, 2015. Prize for this contest is a $100 Visa gift card. Winner will be drawn the following week. The correct answer to Trivia Question #2 will be published in the next edition of The Advocate.

Rules:

- WPTLA Members only!
- One entry per member, per contest
- WPTLA 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!)

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 #1 - Based on current production standards, what non-food item costs $454 per pound? One dollar bills.

Congratulations to Question #1 winner Nathaniel B. Smith, of Goldstein, Heslop, Steele, Clapper, Oswalt and Smith

UPCOMING EVENTS

Friday, May 8 - Annual Judiciary Dinner - Heinz Field, Pittsburgh

Thursday, May 21 - Annual Ethics Seminar / Golf Outing - Shannopin Country Club, Pittsburgh

June - 3 credit CLE with Robson Forensic - Pittsburgh

June - Business Partner Happy Hour - Pittsburgh

Each year, WPTLA sponsors a Scholarship Essay Contest for high school seniors in the Western District of PA. Three winning essays are chosen by a committee as the best of those submitted. These winners are invited to attend the Annual Judiciary Dinner, where they are presented with a certificate of their achievement and a $1,000 scholarship award. Last year's high school students were asked to address whether it is a violation of the Constitution for two people, who committed the same crime and were both found guilty of the same crime, to receive different sentences for that crime based on a change in the sentencing guidelines that affects only one of the people. Below is the one of 2014's three winning essays.

Martin Luther King, Jr. once said, "Justice denied anywhere diminishes justice everywhere." In other words, without administering justice correctly, promptly, and consistently, the judicial system as a whole will be weakened. Although Bobby received life-without-parole for a murder he did not commit himself, he should be able to receive a resentencing. *Miller v. Alabama* should apply retroactively, because it set forth a substantive rule.

Before I begin to explain why *Miller v. Alabama* should apply retroactively, there are a few points that need to b e clarified. In the state of Bliss, a homicide committed during a robbery is a felony murder, which means an accomplice in the robbery is guilty of second-degree murder. When Bobby and his friend Mike were both seventeen, they robbed a warehouse. During the robbery, Mike, who brought along a gun without Bobby's knowledge shot a security guard. Bobby, however, was convicted of felony murder and received the mandatory sentence of life-without-parole. Mike's family could afford an attorney who prolonged the process by exhausting all the resources. When *Miller v. Alabama* was decided, Mike's case was still on appeal. Consequently, he received a lesser sentence than Bobby, It is not fair that Bobby received a harsher punishment because his case was closed and Mike's case was on appeal, but it was justice according the law. Bobby and the hundreds of other cases in the state of Bliss are entitled to have their cases reopened for a resentencing opportunity because *Miller v. Alabama* should apply retroactively.

If *Miller v. Alabama* should apply retroactively, it can only be through two ways. The first being that the new law would have to be a watershed rule, which means the change in procedural law would be a large enough change to implicate fairness and accuracy in criminal proceedings to validate retroactivity. In procedural law, the change in the law would be that the judge would need to evaluate contributing factors before sentencing a juvenile defendant to incarceration until death. The cases would be opened for resentencing if judge did not do so before the first sentence. The second way a law can be retroactive is it if is a substantive change in constitutional law. Substantive law is part of the law that creates, defines, and regulates rights. Because of *Miller v. Alabama's* Supreme Court decision, the government can no longer impose mandatory life-without-parole sentence on juveniles, and therefore protects the rights of a whole group of people. This is why *Miller v. Alabama* should apply retroactively as a substantive rule under the Constitution, because ultimately protecting the rights of a whole group of people is a greater change than an alteration in the procedure of the courtroom.

Before sentencing a juvenile to life-without-parole, a judge needs to take into account the age of the offender, the background of his or her family, the circumstances of the homicide, and the possibility for rehabilitation for a just trial. Giving a mandatory ife sentence without the possibility of parole to a child has been said to be as harsh as the death penalty to an adult. Since the defendant would be seventeen years old or younger, a larger percentage of his or her lifetime would be spent in prison compared to an adult who received the same sentence. This has been argued to be "cruel and unusual punishment." If a judge chooses to sentence a defendant to imprisonment for a lifetime without the possibility of parole, he or she is now asked to consider the humanity of doing so to a juvenile. (Juvenile Law Center)

It should not matter when any Supreme Court decision is made. If a punishment is ruled unconstitutional in the present, justice means that it is unconstitutional in the past, present and future, until ruled otherwise. This is the reason why substantive changes of law under the constitution apply retroactively. To be more specific, if a sentence is ruled as "cruel and unusual," then it would also make is "cruel and unusual" to the offenders serving the punishment at the time of the ruling. Additionally, it would be "cruel and unusual" for the government to continue to impose this punishment on an offender. (Juvenile Law Center) In a plurality opinion by Justice Sandra Day O'Connor, joined by three other justices, wrote in *Teague v. Lane*: "evenhanded justice requires that it [a new ruling] be applied retroactively to all who are similarly situated." (Teague) This quote indicated that in order to administer justice correctly, a new substantive ruling must apply retroactively.

Over twenty-five states had a mandatory life-without-parole punishment for juvenile offenders before *Miller v. Alabama*'s decision. As a response to *Miller v. Alabama*'s outcome, many of those twenty-nine states are deciding in courts whether or not it applies retroactively. California, Wyoming, and Delaware passed laws against sentencing juvelines to life-without-parole, where a youth after having served a certain number of years, usually fiftee, twenty, or twenty-five, in prison may be examined for possible sentence modification. North caroline, South Dakota, and Pennsylvania, just to name a few, are taking measures to make sure

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2014 ESSAY CONTEST SUBMISSION *(Continued from Page 20)*

in the future no sentenced youth dies in prison. In September 2012, the Pennsylvania Supreme Courts ruled in a 4-3 decision against *Miller v. Alabama*'s retroactivity in *Cunningham v. State*. The court decided that *Miller v. Alabama* involved procedural law, but the modification to Pennsylvania's law was not a large enough alteration to validate the watershed rule. Therefore, *Miller v. Alabama* would not be retroactive. If the court had decided that *Miller v. Alabama* was retroactive, there would be nearly 450 cases in Pennsylvania alone that would need to be opened for resentencing. (Mangino) Contrary to Pennsylvania, many other states, including Texas, Nebraska, and Ohio, within this past month have ruled that *Miller v. Alabama* should be retroactive. (The Campaign of the Fair Sentencing of Youth.) For example, on March 12th, 2014, the Ohio State Supreme Court ruled in favor of a resentencing in *State v. Long*. Two things should be noted in this case. Whether or not *Miller v. Alabama* applies retroactively was not argued. It was assumed to be retroactive. Secondly, in Chief Justice Maureen O'Connor's concluding opinion she admitted whether or not a juvenile's sentence remains the same does not matter, what matters is administering justice correctly. She said, "We simply insure that whatever sentence the judge imposes, even if the sentence remains the same, is imposed according to all protections the law affords the offender. Though 'appropriate occasions for sentencing juveniles to the harshest possible penalty will be uncommon,' they do arise." (*State v. Long)*

To decide a person's fate, especially the fate of a juvenile, requires wisdom in administrating justice. Although it may not have been fair that Bobby was sentenced to life-without-parole for a murder Mike committed, it was the law. But now, Bobby should be able to have his case reopened with a possibility of a modification in his sentence. Because *Miller v. Alabama* protects the rights of a whole group of people, it should apply retroactively under constitutional law because a substantive change was made. In the end, what matters is not whether Bobby's sentence is lessened, but that the right decisions were made, the Constitution was followed, the justice was administered promptly, correctly, and consistently.

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Submitted by:
Sarah Elizabeth Newborn, home educated in the Franklin Regional School District

Don't agree with what you've read?

Have a different point of view?

If you have thoughts or differing opinions on articles in this issue of The Advocate, please let us know. Your response may be published in the next edition.

Send your articles to er@ainsmanlevine.com

Do you feel like something is missing?

Are you searching for Hot Off the Wire?

If so, you're not alone! We are looking for a new contributing author to write our regularly featured column "Hot Off the Wire." The column provides summaries of the most important state and federal court opinions issued since the publication of the prior edition of The Advocate, with a focus on those issues that most affect our membership.

If you would like to become more involved in WPTLA, but don't have a lot of free time, this is the opportunity for you. On average, the Hot off the Wire column is 1-2 pages in length. The content is entirely gathered from court opinions, so you never have to think of a topic for the article!

Please contact Editor, Erin Rudert, at 412-338-9030 or er@ainsmanlevine.com, to discuss the possibility of becoming a regular contributing author.

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...Through the Grapevine

Member Joseph V. Luvara, of Flaherty Luvara Law Group, has changed his email address to joeluvara@flahertyluvaralaw.com

Member Stephen P. Drexler can now be reached through Drexler Law, LLC, at One Altoona Pl, Pittsburgh, PA 15228. P: 412-345-7480 F: 412-774-2800 Email: steve@drexlerlaw.net

Member Howard M. Louik, of Goldberg Persky & White, has changed his email address to hlouik@gmail.com

Member Robin S. Wertkin has retired, and moved to Sun Valley, Idaho.

Members David I. Ainsman, **G. Christopher Apessos**, **Richard C. Levine**, **Jepthah M. Orstein**, and **Board of Governors Member** and **Advocate Editor Erin K. Rudert**, have changed their firm name to Ainsman Levine, LLC. Their email addresses have changed as such:

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