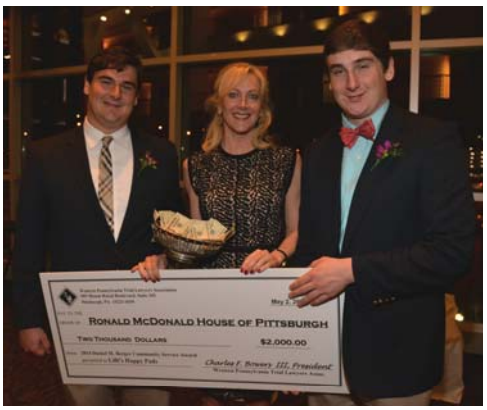
THE WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION'S

# THE ADVOCATE

Volume 26, No. 4
Summer 2014

## JUDICIARY DINNER RECAP

*By: Elizabeth A. Chiappetta, Esq.*




*Pictured above, from L to R; James Delligatti, Twilley Delligatti, Christian Delligatti, Judge John P. Dohanich, Judge Sean J. McLaughlin, Judge Judith K. Fitzgerald, Judge Terrence F. McVerry, Chad Bowers.*

The 2014 WPTLA Judiciary Dinner, held on May 2, 2014, at Heinz Field was a lovely evening and celebration of those members of our judiciary who retired or took senior status in the past year. The event began with a lively cocktail hour, with music provided by Keith Stebler, a friend of Past President Charles E. Evans. A delicious dinner was served during the program.

One of the highlights of the evening was the presentation of the Daniel M. Berger Community Service Award, given by Paul Lagnese, WPTLA Immediate Past President and founder of the Daniel M. Berger Community Service Award, to James Delligatti and Christian Delligatti for their work with Lilli's Happy Pads. Lilli's Happy Pads is a charity founded by the teenaged Delligatti brothers after their young cousin became ill. They noticed that hospitalized children would benefit from access to iPad devices and took it upon themselves to start the charitable organization to provide iPads to sick children. These young men should truly be an inspiration to all of us, and they represent what it is to be a charitable person in our society – what each and every trial lawyer should strive to be! One of the impromptu highlights of the evening came when honoree Judge Judith K. Fitzgerald accepted her recognition award and encouraged those of us in attendance to donate out of our pockets and handbags to Lilli's Happy Pads. She used her table's bread basket, which was joyfully passed around and became quite full with donations in minutes. Kudos to Judge Fitzgerald and her thoughtfulness!

The judges honored at this year's dinner included: Judge John P. Dohanich of the Court of Common Pleas of Beaver County; Judge Sean J. McLaughlin of the United States District Court, Western District; Judge Terrence F. McVerry of the United States District Court, Western District; and Judge Judith K. Fitzgerald of the United States Bankruptcy Court. The nicest moments of the evening came from the introduction of each one of the judges, as each presenter had a special, personal relationship with each of the honorees. It was so nice to hear anecdotes about each judge, which added a

*Continued on Page 3*

### UPCOMING EVENTS FOR WPTLA

The 14th annual **President's Challenge 5K Run/ Walk/Wheel** is set for **Saturday, Sept. 13** at the Riverwalk on Pittsburgh's NorthShore. Register on our website.

A **Board of Governors breakfast meeting** will take place on **Sept. 18** at the **Rivers Club**.

National author **Phillip Miller** will present a **3-credit CLE** on **Friday, Oct. 10** in Pittsburgh. Registration is available on our website.

A dinner meeting in Beaver County will be held at the **Wooden Angel Restaurant** on **Oct. 27**, with a 1-credit CLE to follow.



**The Advocate**
Vol. 26, No. 4, Summer 2014
Published quarterly by:

**WESTERN PENNSYLVANIA TRIAL LAWYERS ASSOCIATION**



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# *A Message from the President …*

*By: Charles F. Bowers III, Esq.*

Dear Fellow Members:

When I was very young, I can remember that to me the time period between Thanksgiving and Christmas seemed to take forever to pass. I felt as if time actually slowed down and those weeks lasted forever. I can remember my parents telling me wait until you get older and the older you get, time speeds up. I, of course, didn't believe them as the time between Thanksgiving and Christmas was proof that they didn't know what they were talking about. Now, as I get older, I realize that they were right: time does speed up and pass faster as you get older. With that in mind, I cannot believe that I have come to the end of my term as President of WPTLA. Where did the time go? It seemed to me that it was just yesterday that we had the Board Retreat at Peek 'N Peak in the Erie area to plan for the upcoming 2013/2014 year. I can honestly say that the time has flown by. I say with great pride that the past year has been extremely fulfilling, always exciting, and never a burden. I would encourage everyone to aspire to join the Board of WPTLA and to become President. It was a true joy and pleasure.

I was extremely pleased to accomplish a few tasks during my tenure that, with the Board's help, we had set out to perform. I was pleased to play a small part in strengthening our relationship with our business partners. We were able to continue to reach and include those counties outside of Allegheny County through meetings and additional CLE offerings. We continued to expand our CLE offerings overall, offering new and different educational opportunities in an effort to educate and support our membership. We have managed to save the Association considerable time, effort, and cost by moving the Advocate and its publication into the 21st Century by transitioning to an all-digital format for delivery to the membership. We have updated our website to make it easier to use and to inform the membership and community of our goals and mission.

However, I would be untruthful with you if I said that any of this was accomplished without significant help from the current WPTLA Board and from our Executive Director, Laurie Lacher, and her assistant, Maria Fischer. Thank you, Laurie and Maria. Without their help, dedication, and commitment, our organization would not be what it is today and the job of President would not be as fulfilling as it is. As for the future, I know that the Association is in great hands. President-Elect, Chris Miller, has put forth some amazing ideas and plans for 2014/2015 for the Association. I know that he has arranged a 3 credit CLE presentation for Friday, October 10, 2014. I urge everyone to attend. I am forever grateful for the help and support of my family and everyone who has helped me along the way.

## THE ADVOCATE - VOLUME 27, 2014-2015

### ARTICLE DEADLINES and PUBLICATION DATES

| NUMBER | ARTICLE DEADLINE | PUBLICATION DATE |
|---|---|---|
| Volume 27, No. 1 | September 19, 2014 | October 3, 2014 |
| Volume 27, No. 2 | December 2, 2014 | December 12, 2014 |
| Volume 27, No. 3 | March 6, 2015 | March 20, 2015 |
| Volume 27, No. 4 | June 5, 2015 | June 19, 2015 |

## JUDICIARY DINNER RECAP … (*Continued from Page 1)*

special touch to their award presentations. President Charles F. Bowers III introduced and spoke of his experience in front of Judge John P. Dohanich and the close-knit Beaver County legal community; Tim Riley, Past President, introduced Judge McLaughlin and spoke of him as a respected adversary from the defense bar as well as a judge on the federal bench in Erie; Paul Lagnese, Immediate Past President, introduced United States District Judge Terrence F. McVerry and spoke of Judge McVerry's mentoring of Paul as a young lawyer; and John Lacher, husband of our esteemed Executive Director, introduced the Honorable Judith K. Fitzgerald and anecdotally recounted his work with Judge Fitzgerald in Bankruptcy Court. One takeaway from the introduction of each judge – not only are they fair and intelligent jurists, but they are even better human beings.

Also honored at the evening's festivities were the three Essay Contest Scholarship winners – Lia Kopar of Hopewell High School, Sarah Elizabeth Newborn of Franklin Regional School District, and Derek Shaffer of Lakeview High School. Erin Rudert, Interim Chair of the 2014 Scholarship Committee, introduced the three winners and provided those of us in attendance with a synopsis of the essay contest and the case law that inspired the essay question. Thanks, Erin!

Christopher M. Miller, President-Elect, presented the proceeds of the 5K Run/Wheel/Walk to several members of the Steelwheelers who were in attendance. This year's 5K proceeds totaled $34,500, and we are so honored, yet again, to support the Steelwheelers and all they represent.

And, last, but certainly not least, President Charles F. Bowers III was honored for his service to our organization as his presidency ends. Chad has served the organization as a true gentleman, with a calm and reasoned demeanor. He has worked hard over the last several years on the Executive Board to act with professionalism, and in the name of social and civil justice. To top it off, he is just a super nice fellow. In Chad's parting remarks, he reminded us to never give up on our attempts to seek justice on behalf of our clients. Our organization is lucky to have you, Chad. Chad passed the torch onto Christopher M. Miller, as President, who is eager to make our organization even better and stronger. We all look forward to working with Chris as President, and will enjoy his leadership.

The evening was a great tribute to our respected jurists but did not end as we had hoped – the Penguins lost to the New York Rangers in Game One of the NHL Eastern Conference Second Round playoffs!

*Pictured above, from L to R; Laura Phillips, Jason and Jennifer Schiffman, Liz Chiappetta. Pictured below, from L to R; Eve Hagerty, Brendan and Lacey Lupetin, Helen Sims. Abe Mulvihill.*

*Pictured right, from L to R; Sarah Newborn of Franklin Regional School District, Derek Shaffer of Lakeview High School, Lia Kopar of Hopewell High School. Pictured below, from L to R; Bryan Neiderhiser, Don Kirwan, Jay Jarrell.*

*Pictured below right, from L to R; Pittsburgh Steelwheeler Lee Tempest and Chris Miller.*

## In This Issue

### Features



### News



### Columns

# E-Discovery Special Master (EDSM) Program:

In 2011, the U.S. District Court for the Western District of Pennsylvania became the first federal court in the nation to create an E-Discovery Special Master (EDSM) Program. After three years of implementation, the judges share the experience of lawyers, judges, and the EDSMs who have participated in the program, the benefits received, "lessons learned," and their expectations for the program going forward, for consideration by lawyers and judges from other jurisdictions.

*By Hon. Joy Flowers Conti, Hon. Nora Barry Fischer, and Richard N. Lettieri, Esq.*

*Reprinted with Permission from the April 2014 Edition of The Federal Lawyer*

## Progress Update

In May 2011, the U.S. District Court for the Western District of Pennsylvania established the first E-Discovery Special Masters (EDSM) [1] program in the nation to aid the court and the local bar in resolving issues in cases involving electronically stored information (ESI). This program was created to provide technical expertise to the local federal court and bar in light of evolving ESI case law, constant changes in technology, and the belief that ESI is a continually evolving area that requires the application of specialized knowledge.

**Brief History**

The program involved the selection, training, and maintenance of a panel of qualified EDSMs that the parties and the court could use to address ESI issues that may arise during the course of litigation. The court determined that this resource was necessary based upon the dramatic increase in electronic evidence, including social media, and the slow but steady increase in ESI issues arising in litigation. Hence, the court appointed a subcommittee to delve into these issues, and the EDSM program was developed. The February 2011 issue of *The Federal Lawyer* highlighted the creation of this program in "Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court."[2]

The selection of EDSMs was based upon their (1) knowledge of e-discovery, (2) experience with e-discovery, (3) relevant litigation experience, and (4) training and experience in mediation. After completing a detailed application process, the candidates were evaluated, and those who qualified were required to complete a court-approved training session prior to being admitted to the program. After an individual who became a panel member was selected to serve as an EDSM in a particular case, the court considered various factors and used an order that clearly defined the duties and responsibilities of the EDSM in that case.[3]

Since the inception of the program, the subcommittee of the court, comprising judges, court staff, and local practitioners,[4] has monitored and directed its implementation. As part of this process, the subcommittee undertook a number of specific activities in 2013 to assess (1) the effectiveness of the program, (2) suggested improvements in its implementation, and (3) "lessons learned," for our use and the benefit of others.

This article describes each of these activities, shares the data or anecdotal information resulting from each, and attempts to assess the progress made toward the objectives listed above. More detailed information concerning each activity is provided in three brief appendixes at the end of the article, so that readers can review the data from which the authors' conclusions are drawn.

While the EDSM program has been a helpful tool to the court and many litigants, the data and observations illustrate its "work in progress" nature. Final conclusions regarding the ultimate utility and value of the EDSM program may still be several years off.

**Hard Data from Reports**

In 2009, the court modified its local rules to reflect changes in the Federal Rules of Civil Procedure (FRCP). One of those changes added section 11 to the form of the Rule 26(f) report to be filed with the court.[5] That section requires participants to discuss key ESI issues at the Rule 26(f) "Meet and Confer" and report the progress of their discussions to the court.

The subcommittee believed that the Rule 26(f) reports that had been filed with the court might contain valuable information which could be studied to determine how often ESI issues arise in cases in this district. After assessing the capabilities and resources available, the subcommittee agreed on a modest effort to review two sets of section 11, Rule 26(f) report data as submitted. Data from 54 reports from March 2010 were compared with data from 68 reports from March 2012.[6] While by no means scientific or statistically valid, the subcommittee believed that this method of reviewing the comparative data provided a snapshot to consider possible changes that might have occurred regarding ESI in litigation filed in the court over the two-year time period. The key questions that the subcommittee expected the data to address were:

1. Had there been any noticeable changes relative to ESI recorded in these reports over the two-year time period?
2. If so, how might any changes be interpreted?

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## E-DISCOVERY … *(Continued from Page 4)*

**Interpreting the Data**

Appendix A at the end of this article highlights the data from the analysis of the reports. The response to Question 2 provides the answer to one of the subcommittee's fundamental questions. In answer to the question: "Of the lawyers using the correct form that included the Section 11 related to ESI, is either party seeking ESI?" there was a slightly greater than **24 percent increase** (from 50 percent in 2010 to 74.07 percent in 2012) in the number of parties who were seeking ESI during this two year period.

It is difficult to draw conclusions based upon so little data, but the opinions of the members of the subcommittee were mixed regarding the relatively small increase. It appeared to be inconsistent with the active educational role assumed by members of the subcommittee and the judges. Their active participation in the Federal Bar Association (FBA)-sponsored "E-Discovery Series" of quarterly ESI educational sessions initiated in 2007, as well as other ESI education sponsored by the local and state bars, had led them to believe the increase in ESI awareness among litigators would be higher. The expectation of several of the subcommittee members was that more than 74 percent of the litigators in federal court would be seeking ESI in their cases.

While it was important to interpret correctly the significance of the 24 percent increase in cases in which the parties indicated that ESI was an issue, the subcommittee was also interested to learn whether there was a corresponding increase in EDSM appointments, and if so, whether there was a correlation between the two increases. It reported that since the program became operational in May 2011, 13 EDSMs had been appointed. While there had been a gradual year-to-year increase in appointments over this period, the total number was small. Since usage is one reasonable factor in assessing the value of the program, the subcommittee wondered why the parties did not request, or the court appoint, EDSMs more often. Was it reasonable to assume that a 24 percent increase in awareness might result in a corresponding increase in the number of appointments?

Assuming that the number of Rule 26(f) Reports the court reviewed for 2010 and 2012 (54 and 68 respectively) were typical, the number of annual reports submitted would range from approximately 600 to 800,[7] making the small number of EDSM appointments statistically insignificant. Using the limited data available, the subcommittee concluded that based upon usage alone, the EDSM program had minimal impact in most cases, but in cases where an EDSM was appointed, the court and parties found significant benefits.

Since the inception of the program, the appointment of an EDSM has been considered the exception, not the rule. Clearly, all cases do not lend themselves to the appointment of an EDSM. Resolution of ESI issues by agreement of the parties is not only preferred but encouraged. Only after it is clear that resolution is not possible is the EDSM option to be considered. Judicial discretion is also important. While usage is important to measure, and will provide a baseline for continued measurement over time, other factors like the benefits received from the appointment of an EDSM by the parties and the court are viewed as more important indicators of effectiveness. So much for the hard data. Hence, the subcommittee questioned: was there any other evidence upon which a reasonable evaluation might be based?

**Progress and Perspectives**

On Sept. 12, 2013, members of the subcommittee participated in an FBA-sponsored, "E-Discovery Series" luncheon event entitled, "E-Discovery Special Master (EDSM) Program: Progress and Perspectives." The panel was organized with the goal of sharing firsthand experiences from attorneys and judges who had participated in cases involving the appointment of an EDSM.

Appendix B lists the participants, the questions, and a summary of the responses provided. To a large extent, the two lawyers who participated in the session felt that the EDSM appointment in their individual cases was effective, saved money for their clients, and reduced the time required to resolve ESI issues. These views were further confirmed in confidential surveys received by the court from EDSMs who had been appointed.

From a judicial perspective, the EDSM appointments were also deemed highly successful. In cases where counsel had experience with ESI, it was reported that the parties appreciated the knowledge and experience of the EDSM, which led to more focused discussions, less contention, and faster resolution of ESI issues. It was also recounted that less experienced counsel welcomed a knowledgeable EDSM who, in some instances, served as an e-mediator tasked with resolving issues in a neutral environment of cooperation and trust. The judges commented that sometimes these e-discovery counsel are being hired as co-counsel or to provide discrete advice to one party, and that litigants often forgo e-discovery based upon the small size of the case. A recurring theme of participants at this session was the realization that the EDSM, serving as an e-mediator early in the discovery process, can be very effective.

As a result of this session, an effort to incorporate e-mediation into the well-established alternative dispute resolution program in the court is now being evaluated. A pilot program utilizing EDSMs as e-mediators is expected to be launched in 2014.

This input was pivotal in confirming the value to the parties and the court of the EDSM program. Although it remains unclear how widespread the usage of EDSMs might become, experienced litigators have reported that the appointment of an EDSM in an appropriate case is a more

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## E-DISCOVERY … *(Continued from Page 5)*

efficient and cost-effective way to resolve e-discovery disputes than litigating ESI issues using traditional motions practice.

**EDSM "Town Hall" Meeting**

Additional anecdotal feedback regarding the EDSM program was provided on Oct. 12, 2013, when the 49 members of the EDSM panel were invited to hear a report from the judges[8] regarding the status of the program. Twenty-one EDSMs were able to attend. Specifically, the judges' report consisted of factual data, including a summary of the number of appointments, the kinds of cases where appointments were made; and the judges who had made the appointments. The court also invited three EDSMs to provide specific information about their respective experiences and each shared the nature of the ESI issues in the case, the kind of services provided (e-mediation or a report and recommendation), and the time involved in the appointment. There was also time allotted for the EDSMs to provide feedback to the judges in attendance regarding the program.

Of significance was the stated preference of the EDSMs, who participated in the panel discussion as part of the session, regarding the superior results that they achieved in resolving ESI issues through e-mediation. They agreed that since resolution of ESI technical issues required some level of cooperation, mediating agreement between the parties with the help of a technically astute and experienced EDSM generally led to a technically sound and mutually accepted resolution. In several instances, technical problems that sometimes lend themselves to objective resolution were more easily achieved with a higher satisfaction level because the parties were encouraged to seek mutually beneficial alternatives fostered by the mediation process.

The EDSMs who had been appointed also shared the advantages of the program that they had experienced, or had been shared with them by lawyers who had participated in the cases. First, they observed that the appointment of an EDSM was a cost-effective means of resolving ESI disputes. Far from increasing costs, overall costs were reduced by a faster resolution of the issue. Second, the EDSM was able to resolve issues more informally through the exchange of e-mails or conference calls rather than formal motions to the court, at a savings of time and money. Third, because the EDSMs were distanced from the merits of the case, counsel for both sides were less concerned about sharing documents with the EDSM, helping speed up the process.

**Lessons Learned**

2013 was an ESI learning year for the lawyers, judges, and EDSMs of the court. The EDSM program has provided the judges and lawyers with a valuable resource to help resolve disputed ESI issues early in the litigation, with greater speed and reduced cost. The experiences of 2013, outlined in this article, allow us to reach these following preliminary conclusions:

- In appropriate cases,[9] appointment of an EDSM saves the court and parties time and speeds up the proceedings by not permitting the case to get "bogged down" in e-discovery issues.
- Overall, the parties indicated that the appointment of EDSMs was cost-effective and reduced the length of the discovery process.
- E-mediation is a successful and preferred approach to resolving ESI issues due to the technical and objective nature of ESI and the fact that cooperation of the parties is paramount to the discovery process.
- In the face of continued reduction of financial resources, and the continued growth of ESI-related issues, judicial appointments of EDSMs provide a cost-effective means of leveraging judicial resources, speeding the judicial process, and reducing costs in cases with moderate to heavy ESI content.

**Conclusion**

The court and its subcommittee are not attempting to increase the appointment of EDSMs *per se.* Instead, the court is attempting to address the impact that technology is having on the litigation process in an effective manner that benefits the litigants, the court, and the public. Thus far, the program has shown promise as a useful resource in this effort.

The subcommittee will continue its efforts to provide ESI training to the legal community in Western Pennsylvania (like recent programs on the significance of metadata and a comparison of the advantages and disadvantages of predictive coding), as well as to monitor the effectiveness of the EDSM program in the future. Of special interest will be the potential use of an EDSM as an e-mediator.

Mindful of the proposed revisions to the FRCP now being contemplated and the need to achieve enhanced proportionality (i.e., the reduction of the cost and scope of ESI, consistent with the value of the case), as well as the budgetary constraints imposed on the court, the court will continue its efforts to innovate, assess, and report how its EDSM program can achieve these purposes for its benefit and for possible adoption by other federal courts facing the same challenges.

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## E-DISCOVERY … *(Continued from Page 6)*

*Hon. Joy Flowers Conti is chief judge for the U.S. District Court for the Western District of Pennsylvania. She is a past president of the Allegheny County Bar Association, a former law professor at Duquesne University School of Law, and a frequent speaker on e-discovery. Hon. Nora Barry Fischer is a judge on the U.S. District Court for the Western District of Pennsylvania. She is a graduate of Notre Dame Law School, Fellow of the American College of Trial Lawyers, and past president of the Academy of Trial Lawyers of Allegheny County. Richard N. Lettieri, is a technologist and a lawyer who limits his practice to electronic evidence and e-discovery. He serves as co-counsel in litigation, and is an E-Discovery Special Master. A frequent writer and speaker on ESI, read his complete bio at www.lettierilaw.com.*

**Endnotes**

[1]*See* www.pawd.uscourts.gov.

[2]For a complete description of the program read: Hon. Nora Barry Fischer and Richard N. Lettieri, *Creating the Criteria and the Process for Selection of E-Discovery Special Masters in Federal Court,* The Federal Lawyer (February 2011).

[3]Two examples of court orders appointing EDSMs are *UPMC, et al v. Highmark Inc., et al* (ECF No. 77, civil No. 12 -cv-692) and *Seymour et al v. PPG Industries, Inc.* (Civil No. 09-cv-1707).

[4]Members of the subcommittee include David R. Cohen, Melissa Evans, Jay Glunt, Steve Silverman, Jennifer Mason, Susan Ardisson, Dave Oberdick, Carole Katz, Colleen Willison, Brian Kravetz, Hon. Joy Flowers Conti, Hon. Nora Barry Fischer, and Richard N. Lettieri.

[5]*See* www.pawd.uscourts.gov/Documents/Forms/lrmanual.pdf.

[6]*See* Appendix A.

[7]The total number of cases filed in the Western District of Pennsylvania is significantly higher than this number. However, Rule 26(f) reports filed with the court are not required in all types of proceedings. These exceptions are listed in Local Rule 16.1 A.6 and can be found at www.pawd.uscourts.gov/Documents/Forms/lrmanual.pdf.

[8]Appendix C provides a brief summary of this report. Special thanks to Brian Kravetz, senior law clerk to the Hon. Nora Barry Fischer, for his help in summarizing this report and other data used in this article. www.uscourts.gov/RulesAndPolicies/rules/proposedamendments.aspx

[9]*See* Appendix C.

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## 2014-2015 CALENDAR OF EVENTS

| | |
|---|---|
| **Sat, Sept 13, 2014** | WPTLA President's Challenge 5K Run/Walk/Wheel, Riverwalk on the NorthShore, Pgh<br>Registration 8:00 a.m. -- Race Start 9:00 a.m. |
| **Thurs, Sept 18, 2014** | WPTLA Breakfast Board of Governors Meeting, Duquesne Room, River's Club, Pgh, 9:00 a.m. |
| **Fri, Oct 10, 2014** | 3 Credit CLE featuring Phillip Miller, Monongahela Rm, Omni William Penn Hotel, Pgh<br>9:00 a.m. – 12:30 p.m. |
| **Mon, Oct 27, 2014** | WPTLA Board/Dinner Meeting/ CLE, Wooden Angel Restaurant, Beaver<br>4:30 p.m. Board Meeting -- 5:30 p.m. Cocktails -- 6:15 p.m. Dinner |
| **November, 2014** | WPTLA Board Meeting & Comeback Award Dinner, Pgh<br>4:30 p.m. Board Meeting -- 5:30 p.m. Cocktails -- 6:15 p.m. Dinner |
| **Thurs, Jan 22, 2015** | WPTLA Board/Dinner Meeting/CLE – Jr. Members Welcome, LeMont Restaurant, Pgh<br>4:30 p.m. Board Meeting -- 5:30 p.m. Cocktails -- 6:15 p.m. Dinner |
| **March 2015** | WPTLA Board/ Members Dinner Meeting, Westmoreland County<br>4:30 p.m. Board Meeting -- 5:30 p.m. Cocktails -- 6:15 p.m. Dinner |
| **April 2015** | WPTLA Board/Members-Only Dinner Meeting, Rivers Casino, Pgh<br>4:30 p.m. Board Meeting -- 5:30 p.m. Cocktails -- 6:15 p.m. Dinner |
| **May 2014**5 | Annual Judiciary Dinner, Heinz Field, East Club Lounge, Pgh<br>5:30 p.m. Cocktails -- 7:00 p.m. Dinner |

**E-DISCOVERY** … *(Continued from Page 7)*

**Appendix A : Rule 26 (F) Report Study: Comparison of Responses (March 2010—March 2012)**

1. Did the parties use the correct Rule 26(f) report (containing the full ESI question 11)?

| | *Number of Reports* | *Correct Form* | *Percentage* | *Incorrect Form* | *Percentage* |
|---|---|---|---|---|---|
| 2010 | 54 | 30 | 55.56% | 24 | 44.44% |
| 2012 | 68 | 54 | 79.41% | 14 | 20.59% |

2. Of the parties using the correct form, is either party seeking ESI in this case?

| | *Number of Reports* | *Correct Form* | *Percentage* |
|---|---|---|---|
| 2010 | 30 | 15 | 50.00% |
| 2012 | 54 | 40 | 74.07% |

3. Of the parties using the incorrect form, is either party seeking ESI in this case?

| | *Number of Reports* | *Yes* | *No* | *Percentage Yes* | *Percentage No* |
|---|---|---|---|---|---|
| 2010 | 24 | 7 | 17 | 29.17% | 70.83% |
| 2012 | 14 | 2 | 8 | 14.29% | 57.14% |

4. Of the parties using the correct form, is either party seeking metadata?

| | *Number of Reports* | *Yes* | *No* | *Percentage Yes* | *Percentage No* |
|---|---|---|---|---|---|
| 2010 | 30 | 5 | 21 | 16.67% | 70.00% |
| 2012 | 54 | 10 | 32 | 18.52% | 59.26% |

5. Of the parties using the correct form, have the parties agreed on a production format?

| | *Number of Report* | *Yes* | *No* | *Percentage Yes* | *Percentage No* |
|---|---|---|---|---|---|
| 2010 | 30 | 11 | 18 | 36.67% | 60.00% |
| 2012 | 54 | 32 | 12 | 59.26% | 22.22% |

6. Of the parties using the correct form, will the parties be using the standard clawback?

| | *Number of Reports* | *Yes* | *No* | *Percentage Yes* | *Percentage No* |
|---|---|---|---|---|---|
| 2010 | 30 | 20 | 9 | 66.67% | 30.00% |
| 2012 | 54 | 44 | 6 | 81.48% | 11.11% |

7. Of the parties using the correct form, have the parties agreed on an ESI search protocol?

| | *Number of Reports* | *Yes* | *No* | *Percentage Yes* | *Percentage No* |
|---|---|---|---|---|---|
| 2010 | 30 | 11 | 18 | 36.67% | 60.00% |
| 2012 | 54 | 14 | 28 | 25.93% | 51.85% |

8. Of those using the correct form, have they agreed on what is "reasonably assessable"?

| | *Number of Reports* | *Yes* | *No* | *Percentage Yes* | *Percentage No* |
|---|---|---|---|---|---|
| 2010 | 30 | 8 | 20 | 26.67% | 66.67% |
| 2012 | 54 | 16 | 27 | 29.63% | 50.00% |

9. Of the parties using the correct form, did they report an unresolved preservation issue?

| | *Number of Reports* | *Yes* | *No* | *Percentage Yes* | *Percentage No* |
|---|---|---|---|---|---|
| 2010 | 30 | 0 | 30 | 0.00% | 100.00% |
| 2012 | 54 | 2 | 34 | 3.70% | 62.96% |

10. Of the parties using the correct form, did they identify any outstanding ESI issues?

| | *Number of Reports* | *Yes* | *No* | *Percentage Yes* | *Percentage No* |
|---|---|---|---|---|---|
| 2010 | 30 | 1 | 26 | 3.33% | 86.67% |
| 2012 | 54 | 2 | 28 | 3.70% | 51.85% |

*Continued on Page 9*

## E-DISCOVERY … *(Continued from Page 8)*

**Appendix B: Excerpt from the FBA E-Discovery Series Event "E-Discovery Special Master Program (EDSM): Progress and Perspectives" held Sept. 12, 2013, at the Federal Courthouse in Pittsburgh.**

*Participants*

- Two federal judges: Hon. Joy Flowers Conti, U.S. District Court for the Western District of Pennsylvania, and Hon. Nora Barry Fischer, U.S. District Court for the Western District of Pennsylvania
- Two experienced attorneys who served in cases where an EDSM was appointed: Robert W. Pritchard, Shareholder, Littler Mendelson, and Robert J. Ridge, Partner, Clark Hill Thorp Reed
- Two e-discovery special masters: David R. Cohen, Partner, E-Discovery Practice Leader, Reed Smith and EDSM, Western District of Pennsylvania, and Richard N. Lettieri, E-Discovery Counsel, Principal, Lettieri Law Firm, LLC and EDSM
- Moderator: Rich Ogrodowski, Principal at Goldsmith & Ogrodowski

*Was the EDSM successful/helpful in resolving the ESI issue(s) for which he/she was appointed?*

Bob Ridge: "E-discovery can dwarf everything else including the substance of the case, if you let it. We couldn't have resolved the technical issues without the EDSM. Dave Cohen was fluent and facile technically and very responsive."

Rob Pritchard: "We had a lot of sophisticated technical people involved in the process. They discovered early that they had to abandon extreme positions and get down to business. Rick Lettieri demonstrated an expertise not only in ESI, but as an experienced and effective mediator. He listened well, but kept the process moving forward. As a result, we resolved the issues a lot faster than we would have otherwise."

Chief Judge Conti: "From a judicial perspective, the appointment of an EDSM in certain cases is very efficient. It is not meant for routine matters. Every case will not have an EDSM assigned. However, there are certain kinds of cases where it makes sense to consider an EDSM:

- Large, complex cases, where it may become the norm to consider the early involvement of an EDSM
- Asymmetrical cases where one side is very ESI knowledgeable and the other side is not; here, trust becomes an issue and the involvement of an e-neutral can help overcome the trust issue.
- In cases where both parties are technically sophisticated but are locked in a technical disagreement, a technically competent e-mediator can be very helpful; instead of having to prepare a full-blown presentation to the court, the EDSM can use a less formal process that is faster, more efficient, and ultimately costs the client less money."

Dave Cohen: "Parties appearing before me expressed appreciation that I could suggest some cost-saving technical resolutions and compromises based on my e-discovery experience, but another important benefit was the opportunity to quickly and efficiently address discovery issues that otherwise would have required much more time-consuming and expensive formal motions practice. We were able to quickly achieve mediated resolutions with regard to most issues raised, but even where it was necessary for me to issue proposed rulings, those matters were promptly addressed through e-mail 'briefs' and telephone arguments, rather than requiring more expensive, time-consuming, and difficult to schedule formal briefing and court hearings. In addition, since I was only helping with discovery issues and not the merits, the parties did not have to worry about my seeing documents (e.g., to help resolve privilege issues) that there were concerns about showing to the judge."

*Who pays for the appointment of an EDSM, and is it considered cost-effective from the client perspective?*

Chief Judge Conti: "Typically, costs are split 50/50 between the parties, subject to review. If there is a wide disparity between the resources of the parties, this split may be adjusted by the court, or by motion of the parties. A party's conduct relative to ESI may also impact cost allocation."

Judge Fischer: "I echo Chief Judge Conti's comments and add that some judges have threatened cost shifting in the face of unreasonable e -discovery requests."

*What's the threshold to appoint an EDSM?*
Chief Judge Conti: "Usually the parties have a technical issue involving ESI that they can't resolve. Special expertise is required and the court doesn't have the time or technological background to research the technical issues. The court will attempt to get the parties to resolve the technical issues and resist a 'knee-jerk' appointment. Sometimes the court will recommend that one or both parties seek the help of an EDSM or an E-Discovery Counsel who can help."

Judge Fischer: "I have found that getting involved early in the process, identifying if ESI will be an issue and asking questions of the parties at the Rule 16 Scheduling Conference, has avoided some potential ESI disputes later in the process."

*Was the EDSM introduced into the dispute at the optimal time? Could it have been sooner?*

Bob Ridge: "Ours was a technology-driven case. At the case management conference, the judge asked counsel if an EDSM should be appointed and both sides responded, 'Yes.'"

Judge Fischer: "The optimal time to bring up ESI is at the Rule 26(f) Meet and Confer. Our Report to the Court had a section 11 on ESI added in 2009 to help facilitate this discussion. If the parties don't raise the issue there, I usually raise it at the Case Scheduling Conference."

*Thus far, EDSMs have been used sparingly in the Western District of Pennsylvania. Based upon your experience, do you expect their usage to increase? Why? Why not?*

Chief Judge Conti: "I've been very pleased with the EDSM program thus far. I'm told there have been 13 appointments made thus far. When used, it has been very helpful to the parties and the court. While every case will not have an EDSM appointed, I anticipate a modest increase in appointments resulting from the continued evolution and complexity of the technology, as well as the

*Continued on Page 10*

## E-DISCOVERY … *(Continued from Page 9)*

increased complex litigation in our court, primarily complex patent litigation."

Judge Fischer: "I agree with Chief Judge Conti's comments and would add that I see an uptick in the use of EDSMs in Bankruptcy Court, because of an increase in data in these cases and the downsizing of court resources because of budgetary constraints."

Rick Lettieri: "Yes. Appointments of EDSM are up nationally and I anticipate a slow, but steady increase in their use. In addition to providing benefits to our local court and bar, this initiative of our local district court may serve as a model for other courts addressing the same issues."

**Appendix C: Summary of the information shared by the judges and EDSMs at the Oct. 10, 2013, Town Hall Meeting, which 21 EDSMs attended.**

**Types of Cases:** Mostly Complex Civil Litigation
- Patent infringement (Maxim MDL/*Sightsound v. Apple*)
- Class actions (FLSA/G20 civil rights cases)
- Antitrust (UPMC/Highmark cases)
- False Claims Act (*U.S. v. Education Management*)
- Trade secrets
- Criminal – *U.S. v. Misquitta* – mail/wire fraud
- Bankruptcy court – Garlock access to records

**Types of Appointments to Date:**
- ESI protocol/search terms/custodian issues
- Forensic investigation
- Hybrid EDSM and discovery special master (Maxim MDL/ education management)
- Bankruptcy court redaction of judicial records
- 1 pure e-mediation
- Criminal case—costs of search and retrieval of documents sought by criminal defendant

**The following notes were received in response to the Annual Judiciary Dinner, held on May 2, 2014.**

*Thank you to the Western Pennsylvania Trial Lawyers for your kind recognition upon my retirement. Best wishes to your Association as you continue your work to protect the legal rights of all Pennsylvanians.*

*~ Judge John E. Blahovec*

*Please accept my sincere thanks to the members of the Western Pennsylvania Trial Lawyers Association for the enjoyable evening at the Annual Judiciary Dinner on May 2, 2014. I was pleased to renew acquaintances and visit with many friends.*

*The Association's recognition of the retiring members of the bench was very much appreciated. Best wishes to all.*

*~ Judge John P. Dohanich*

# SPONSOR SPOTLIGHT

**Name**: Rodney Troupe

**Business/Occupation**: Finley Consulting & Investigations: Licensed Private Detective, Investigations Manager

**Family**: My wife Emily, daughter Jill & two Jack Russell Terriers

**Interests**: I love to spend weekends outdoors and camping with the family

**Proudest Accomplishment**: Without question, my family

**Funniest/Weirdest Thing to Happen on the Job**: While on surveillance, I was in a crowded bar in Cranberry Twp when my subject and his "girlfriend" sat directly beside me. The bartender approached the three of us thinking we were all together when my subject, who was cheating on his wife, told the bartender jokingly that I was the one buying. The joke was on him, he was actually the one who was going to pay!

**Favorite Restaurant**: Nakama

**Favorite Movie**: Forrest Gump

**Favorite Sports Team**: Pittsburgh Steelers, of course

**Favorite Places to Visit**: Smoky Mountains, Tennessee

**What's on my car radio**: Anything that sounds good

**People may be surprised to know that**: Believe it or not, I completed a frame up restoration on a classic pickup, which I still have and enjoy driving in the summer

**Secret Vices**: Surfing the web (with or without a glass of whiskey)

# BY THE RULES

*By: Mark E. Milsop, Esq.*

## RULE 4003.5 AMENDED

An amendment to the Rules of Civil Procedure appears to mark the final chapter of the fallout from *Barrick v. Holy Spirit Hosp. of the Sisters of Christian Charity*, 91 A.3d 680 (Pa. 2014). That case arose when the defendants served a subpoena but were denied certain communications between plaintiff's counsel and the treating orthopedic surgeon, who was also an expert for the Plaintiff. Although the trial court enforced the subpoeana, the matter was appealed. That appeal was closely watched by the bar. Although a Superior Court panel decision affirmed the trial court, the Superior Court reheard the appeal en banc and reversed the trial court. Upon allowance of appeal, the Pennsylvania Supreme Court was evenly divided 3-3 on the issue, with the seventh Justice abstaining. The Superior Court's *en banc* decision therefore remained good law, but with significant question as to its continued validity. Justice Saylor filed a dissenting opinion finding that the rules did not contain a prohibition against such discovery.

The Supreme Court has now amended Rule 4003.5 by Order dated July 10, 2014. The amendment adds to the rule section (a)(4) which provides:

> A party may not discover the communications between another party's attorney and any expert who is to be identified pursuant to subdivision (a)(1)(A) or from whom discovery is permitted under subdivision (a)(3) regardless of the form of the communication except in circumstances that would warrant the disclosure of privileged communications under Pennsylvania law. This provision protects from discovery draft expert reports and any communications between another party's attorney and experts relating to such drafts.

An Explanatory Comment notes that the federal rules have also been recently amended to prohibit communications between an attorney and an expert (Rule 269b)(4)(C)). Although there are three exceptions to the federal rule,[1] the Pennsylvania drafters did not deem them necessary. The Court found that compensation is generally dealt with at trial on cross examination, and the Court believed this was working. In addition, the facts, data, and assumptions relied upon by the expert already must be disclosed in the report.

[1] The federal exceptions go to (1) compensation, (2) facts or data provided to the expert by Plaintiff's counsel and (3) assumptions provided to and relied upon by the expert.

Interestingly, Justice Saylor noted his dissent to the amendment.

## UNITED STATES SUPREME COURT FINDS STANDARD FOR SUMMARY JUDGMENT MISAPPLIED IN A CIVIL RIGHTS CASE

For those of us who occasionally find ourselves in federal court, there is often concern that the facts will be viewed in a manner in which summary judgment will be granted in a case that would surely overcome summary judgment in state court. I was rather happy to see the United States Supreme Court was recently willing to rule on such a case in *Tolan v. Cotton*, 572 U.S. ___, No. 13-551 (May 5, 2014).

*Tolan* is a civil rights case in which a young man who did nothing wrong was shot and seriously injured by a police officer. Apparently, the police officer saw a vehicle quickly turn into a residential street. The officer errantly entered the wrong license plate number into a computer in the squad car and it came back as stolen. The officer then ordered two men (Tolan and Cooper) who had exited the vehicle to the ground. Tolan's parents then came out of their home, attempted to explain to the officer it was their vehicle and that Tolan was at their home. When the mother attempted to explain this a second time, the responding officer grabbed the mother and slammed her against the garage door. (Photographic evidence showed bruises which lasted for days.) Tolan then exclaimed "get your f___ing hands off my mom." Officer Cotton then shot Tolan in the chest.

A Civil Rights action was filed by Tolan pursuant to 42 USC §1983. Upon a motion for summary judgment, the action was dismissed on the basis of qualified immunity.[2] The District Court found the use of force not unreasonable, and hence not a Fourth Amendment violation. The Fifth Circuit affirmed on the "not clearly established" prong of qualified immunity.

[2] The qualified immunity defense will justify dismissal of the action where:

> The [Court] first asks whether the facts, "[t]aken in the light most favorable to the party asserting the injury, . . . show the officer's conduct violated a [federal] right[.]" *Saucier v. Katz*, 533 U. S. 194, 201 (2001). . . . The second prong of the qualified-immunity analysis asks whether the right in question was "clearly established" at the time of the violation. *Hope v. Pelzer*, 536 U. S. 730, 739 (2002). Governmental actors are "shielded from liability for civil damages if their actions did not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Id.* "[T]he salient question . . . is whether the state of the law" at the time of an incident provided "fair warning" to the defendants "that their alleged [conduct] was unconstitutional." *Id.,* at 741.

*Tolan*, slip op. at 6.

*Continued on Page 13*

## BY THE RULES … *(Continued from Page 12)*

On certiorari, the entry of summary judgment was reversed in a per curiam opinion by the United States Supreme Court. The Court did so because the entry of summary judgment was based upon error in finding the absence of an issue of fact as to certain propositions. The Court explained:

> In holding that Cotton's actions did not violate clearly established law, the Fifth Circuit failed to view the evidence at summary judgment in the light most favorable to Tolan with respect to the central facts of this case. By failing to credit evidence that contradicted some of its key factual conclusions, the court improperly "weigh [ed] the evidence" and resolved disputed issues in favor of the moving party, *Anderson*, 477 U. S. at 249.

*Tolan*, slip op. at 8.

In reviewing the record, the Court found that the analysis below failed to view the following facts in the light most favorable to *Tolan*.

- Whether or not the porch on which Tolan was at the time he was shot was "dimly lit";
- Controverted testimony as to whether or not Tolan's mother remained calm;
- Whether or not Tolan was shouting and verbally threatening the officer. (Although Tolan admitted making the statement to the officer to get his hands off of Tolan's mother, Tolan disputed that he was screaming. The Court also found that a jury could infer that the words did not communicate an intent that Tolan would inflict harm. The words could have been construed as a plea to not continue any assault on Tolan's mother.)
- The inference that Tolan was moving to intervene was subject to dispute. The officers testified that Tolan was abruptly approaching the officer or that Tolan was on his feet in a crouch or charging position. Tolan and his mother testified that Tolan was on his knees when he was shot.

It is worth noting that with respect to each of the foregoing propositions, there was testimony of record which could support the defendant's position. The key here is that the testimony was controverted; and that fact could not be ignored. Moreover, the propositions cited included not only straight facts, but the inferences which could be drawn therefrom and the construction that a fact finder could give to the evidence.

Hence, the Court found that:

> The witnesses on both sides come to this case with their own perceptions, recollections, and even potential biases. It is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system. By weighing the evidence and reaching factual inferences contrary to Tolan's competent evidence, the court below neglected to adhere to the fundamental principle that at the summary judgment stage, reasonable inferences should be drawn in favor of the nonmoving party.

The net result was that the case was remanded to review the record with the disputed facts properly credited.

It is noteworthy that Justices Alito and Scalia concurred in the judgment but criticized the Court acting as an error correction Court. The concurring judges believed that certiorari should have been denied since the Courts below cited the correct standard of review.

For the time being, this is a feel good opinion, wherein the Supreme Court has sent a message to the Federal Judiciary that it must give due regard to testimony propounded by plaintiffs in opposition to summary judgment.

### DEFENDANTS ARE NOT ENTITLED TO TWO DEFENSE MEDICAL EXAMINATIONS IN THE SAME SPECIALTY

The practice of defendants to request two defense medical exams seems to be becoming slightly more common.[3] Fortunately, at least one well respected trial judge has limited this practice. In *DiGiacinto v. Obelinas*, No. 09 CV 8058 (Lackawana County 2014), the Honorable Terrence Nealon denied a defense request for two medical exams.[4] In *DiGiacinto*, the plaintiff sustained cervical disc injuries as well as carpal tunnel syndrome, both of which required surgery. The two procedures were performed by two separate surgeons.

In analyzing the issue before the Court, Judge Nealon cited *Lodolce v. Township of Roaring Brook*, 99 Lacka. Jur. 54, (1998), for the propostion that "a defendant bears a heightened burden of demonstrating good cause for a supplemental medical examination." *DiGiacinto*, slip op. at 6 citing *Ladolce*, 99 Lacka. Jur at 57.[5] Hence, the Court determined that the request for two exams was based upon a faulty premise that the same doctor cannot treat and evaluate both the neck and wrist injuries. The Court concluded that the defense had not established good cause for the two examinations. In so holding, Judge Nealon recognized that the two injuries in question were not "the sole province of discrete medical specialties." *DiGiacinto*, slip op. at 15.

[3] Requests for defense medical exams are governed by Pa.R.C.P. No. 4010 which provides:

> **(3)** The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

[4] The defense had actually request a third exam by a mental health provider. That request was not contested.

[5] In *Lodolce*, the Court found that a second exam is justified where the plaintiff alleges a new injury since an original examination or has deliberately concealed an injury at the time of the first exam.

# COMP CORNER

*By: Thomas C. Baumann, Esq.*

**COMMONWEALTH COURT REFUSES TO SUSPEND BENEFITS WHERE EMPLOYER ALLEGES REMOVAL FROM WORK FORCE**

The Commonwealth Court has recently reached a decision in *Keene vs. WCAB (Ogden Corporation),* 1421 C.D. 2010. Claimant was originally injured in 1989, having experienced a significant injury to the right knee which ultimately required knee replacement surgery. She has been limited to sedentary work.

Claimant looked for work on her own but was unsuccessful in obtaining employment. She returned to a light duty job with the time of injury employer for two (2) years. After the employer chose no longer to provide modified duty, it provided her with no other opportunities. Claimant continued to apply for some positions on her own.

In 2007, the employer sought to suspend the Claimant's benefits alleging she had voluntarily removed herself from the work force. In response to that petition, the Claimant applied for jobs at two (2) companies but was not hired.
Claimant testified regarding her attempts to obtain employment. She established that she does not receive a pension. The Judge denied the Suspension Petition.

On appeal to the Workers' Compensation Appeal Board the employer continued to maintain that Claimant had voluntarily removed herself from the work force and argued that the WCJ had erred. The Appeal Board reversed, placing the burden on the Claimant to prove she had not voluntarily left the work force. In her testimony, the Claimant had admitted that she had not applied for work for two (2) years because it was "very depressing." The Appeal Board seized on this testimony finding "she withdrew from the work force by choice." (WCAB's Decision, 6/29/10 at 4-5).

The Claimant sought review by the Commonwealth Court and was successful in what we will refer to now as Keene 1. See, *Keene vs. WCAB (Ogden Corporation),* 21 A.3rd 243 (Pa. Cmwlth. 2011). The Commonwealth Court in Keene 1 reversed the WCAB. However, that Order was vacated by the Pennsylvania Supreme Court and remanded for the Court to consider *City of Pittsburgh vs. WCAB (Robinson),* 67 A.2d 1194 (Pa. 2013). (Hereinafter referred to as *Robinson.*)

In *Robinson,* the carrier placed the burden of proof on the employer to establish that Claimant had left the work force. Prior to the *Robinson* case, employers typically filed a petition and forced the Claimant to prove a negative. *Robinson* ended that strategy once and for all.

On remand from the Supreme Court, employer again argued that by not looking for work for two (2) years she had removed herself voluntarily from the labor market. The Commonwealth Court stated as follows in response to this argument: "An employer cannot rely solely on a Claimant's failure to seek work to prove voluntarily retirement from the work force, as an employer has a duty to make job referrals until a claimant voluntarily retires." The Court summed up as follows: "Claimant has disputed that she is retired, has not accepted a retirement pension, has looked for suitable work, and has not refused any suitable work." The Court concluded that based on *Robinson,* employer had not met its burden of proof.

Perhaps, practitioners may now see the last nail in the coffin for these types of Suspension Petitions. The Commonwealth Court had always been the main repository for the jurisprudence that encouraged the theories espoused by employers in such cases. Until the Supreme Court addressed the issue in the *Robinson* case, employers had carte blanc under the Commonwealth Court case law to pursue these types of cases. Now, an employer will actually have to produce some evidence to support its contentions. If a claimant has occasionally applied for work and is not taking a pension, employers are likely to have a very difficult time supporting the burden of proof. Now that the Commonwealth Court is forced to follow *Robinson,* there may be fewer and fewer of these petitions filed.

**The following notes were received in response to the Annual Judiciary Dinner, held on May 2, 2014.**

*To the members of the WPTLA, Thank you for the Scholarship. It is much appreciated and will help me very much in the future. I felt honored to receive it.*

*~ Derek J. Shaffer, Lakeview High School*

*WPTLA Members, Thank you for the wonderful experience of having my essay honored for your scholarship. I will continue to pursue academic excellence through college.*

*~ Sarah Elizabeth Newborn, Franklin Regional School District*

# HOT OFF THE WIRE!

*By: Chris Hildebrandt, Esq.*

**SUPREME COURT OF PENNSYLVANIA**

*"Psychological stigmas," such as a murder/suicide, are not "material defects" of property which must be disclosed prior to sale of the property.*

**Milliken v. Jacono**, 2013 Pa. LEXIS 1770 (July 21, 2014)

In 2006, Konstantinos Koumboulis shot and killed his wife and himself inside his house. The murder/suicide was highly publicized in the local media and on the internet. The Jaconos purchased the property from the Koumboulis estate at auction for $450,000, invested "thousands" in renovations, and then listed the property for sale. They informed Re/Max, their listing agents, of the murder/suicide, but did not disclose the murder/suicide on the Seller's Property Disclosure Statement.

Milliken, who lived in California, entered in to an agreement of sale for $610,000. Milliken became suspicious of the sale when she read the title report, which noted that Jacono purchased the property from the Koumboulis Estate as well as the significant difference between the $450,000 purchase price and the $610,000 sale price. Milliken, after moving into the house, learned of the murder/suicide from a neighbor and subsequently filed suit, claiming that she would not have purchase the property had she known of the murder/suicide.

The Supreme Court concluded that "psychological stigmas," such as the occurrence of a murder/suicide inside a house, do not constitute a material defect of the property. The Court reasoned that the "implications of holding that non-disclosure of psychological stigma can form the basis of a common law claim for fraud or negligent misrepresentation, or a violation of the UTPCPL's catch-all, even under the objective standard posited by appellant, are palpable, and the varieties of traumatizing events that could occur on a property are endless. Efforts to define those that would warrant mandatory disclosure would be a Sisyphean task. One cannot quantify the psychological impact of different genres of murder, or suicide — does a bloodless death by poisoning or overdose create a less significant 'defect' than a bloody one from a stabbing or shooting? How would one treat other violent crimes such as rape, assault, home invasion, or child abuse? What if the killings were elsewhere, but the sadistic serial killer lived there? What if satanic rituals were performed in the house?" The Court ultimately noted that it was "not prepared to set a standard under which the "visceral impact an event has on the populace serves to gauge whether its occurrence constitutes a material defect in property. Such a standard would be impossible to apply with consistency and would place an unmanageable burden on sellers, resulting in disclosures of tangential issues that threaten to bury the pertinent information that disclosures are intended to convey."

**Wayne M. Chiurazzi Law Inc. v. MRO Corp.,** 2014 Pa. LEXIS 1525 (June 16, 2014)

*A medical records reproduction company is limited to the reproducer's "actual and reasonable expenses," but subject to the statutory cap set forth in the Medical Records Act.*

MRO is a medical reproductions company that has exclusive agreements with certain Pennsylvania hospitals and hospital systems to provide medical records to requestors. This case stems from a class action suit filed in 2009 alleging that MRO overcharged for the reproduction of medical records, based upon the premise that MRO is statutorily limited by the Medical Records Act ("MRA") to certain charges for the production of medical records.

The Supreme Court concluded that "the expenses chargeable for medical records are the reproducer's actual and reasonable expenses, but subject to a statutory cap." The Court also held that the analysis is the same regardless of whether medical records are requested pursuant to § 6155 of the MRA (rights of patients) or via subpoena pursuant to § 6152(a) of the MRA.

The Court also addressed the concept of "actual and reasonable expenses" by simply relying on Judge Stanton Wettick's explanation: "*actual expenses* means expenses existing in fact, and *reasonable expenses* means that the costs are not padded." (Emphasis in original).

**SUPERIOR COURT OF PENNSYLVANIA**

*The sudden emergency doctrine is applicable to a plaintiff who, while attempting to overtake a slower vehicle, is struck by the slower vehicle while in the passing lane.*

**Drew v. Work**, 2014 PA Super 13 (June 30, 2014)

Drew and Stutts (Defendant, Work, is the administrator of Stutts' estate) were involved in a motor vehicle collision. According to an independent witness, Drew was following Stutts in the right lane of travel, and when Drew moved into the left lane of travel to pass Stutts, Stutts' vehicle also moved into the left lane, impacting Drew's vehicle.

*Continued on Page 17*

## HOT OFF THE WIRE … *(Continued from Page 16)*

During trial, Drew submitted proposed points for charge, one of which was a jury instruction on the sudden emergency doctrine. The Court of Common Pleas of Elk County declined to charge the jury on the sudden emergency doctrine, reasoning that "Stutts' vehicle was travelling in the same direction as [Drew's] van when the collision between the parties occurred." A jury found that Drew was 60% responsible and Stutts was 40% responsible for the collision. Drew then appealed the trial court's decision not to charge the jury on the sudden emergency doctrine.

On appeal, the Superior Court rejected the trial court's analysis of the sudden emergency doctrine. The Court noted that "a jury should not be instructed on both the assured clear distance ahead rule and the sudden emergency doctrine since the two are mutually exclusive. This is based on the rationale that the assured clear distance ahead rule applies to essentially static or static objects including vehicles moving in the same direction, while the sudden emergency doctrine applies only to moving instrumentalities thrust into a driver's path of travel." The Court then recited a four-part test for the applicability of the sudden emergency doctrine enunciated in *McKee by McKee v. Evans*, 551 A.2d 260, 272-73 (Pa. Super. 1988): "A jury instruction on the sudden emergency doctrine is available to an individual "[(1)] who suddenly and unexpectedly finds himself confronted with a perilous situation[, (2)] that permits no opportunity to assess the danger[, (3) if he] respond[s] appropriately[, and (4)] . . . . proves that he did not create the emergency." The Court concluded that based upon this test, Drew was entitled to a sudden emergency charge, reasoning that the testimony "could establish that the initial leftward movement of Stutts' vehicle unexpectedly presented [Drew] with a perilous situation that permitted [Drew] little or no time to rationally contemplate a response . . . the testimony does not suggest that [Drew's] operation of his vehicle caused or contributed to the emergency," and Drew's movement of his vehicle "could rationally be explained as an unconscious reflex undertaken to avoid further contact with Stutts' car." The Court thereafter concluded that the error was not harmless, and Drew was entitled to a new trial.

**COURT OF COMMON PLEAS**

*A defendant driver's mere use of a cell phone during a collision does not give rise to a claim for punitive damages, absent additional allegations of misconduct.*

**Pietrulewicz v. Gil**, 56 Leh. L.J. 1 (June 6, 2014)

Pietrulewicz was operating a three-wheeled motorcycle when Gil turned left in front of him, colliding with the motorcycle. Plaintiff alleged that Gil was speaking on a cell phone at the time of the collision, thereby justifying a claim for punitive damages. Gil filed preliminary objections seeking to strike the claim for punitive damages.

The trial court noted a "paucity of case law regarding the question of whether cell phone usage while driving may give rise to allegations of reckless misconduct and a claim for punitive damages." However, the trial court found "two persuasive cases on point": *Xander v. Kiss*, 2012 WL 168326 (Northampton Co.) and *Piester v. Hickey*, 2012 WL 935789 (E.D. Pa.).

Relying on these two opinions, as well as opinions from foreign jurisdictions cited in the two opinions, the trial court concluded that "use of a cell phone, absent additional, well-pled allegations of misconduct, does not give support to allegations of recklessness or corresponding claims for punitive damages." The trial court reasoned that "[w]hile it is undisputed that the distraction of the cell phone caused Defendant's failure to yield when she was required to do so, the Court finds that this does not give rise to an evil motive or a conscious indifference to Plaintiff's rights."

## *Friday Oct 10, 2014*

3 Credit CLE Seminar, featuring

**Phillip Miller,** co-author of
*Advanced Depositions Strategy and Practice*

"This ... is a must-have in any plaintiff lawyer's library. Phillip and Paul are masters at the art and science of deposition taking, and this ... DVD with video examples teaches time-proven techniques that lead to killer depositions. And we all know killer depositions lead to better settlements and verdicts!"

—Mark R. Kosieradzki, past chair, AAJ Nursing Litigation Group; faculty member, AAJ Advanced Deposition College

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### 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.

Also, if you would like to write an article about a practice area that you feel our members would benefit from, please submit it to our Executive Director, Laurie Lacher, at admin@wptla.org.

Contact our Editor Erin Rudert directly at erin@lawkm.com.

## PICTURES & PROFILES QUESTIONNAIRE

Name: Elizabeth Chiappetta

Firm: Robert Peirce & Associates, P.C.

Law School: Duquesne University

Year Graduated: 2007

Special area of practice/interest, if any: Nursing Home Abuse

Most memorable court moment: Hung jury in a civil trial – re-trial is in December!

Most embarrassing (but printable) court moment: I forgot to introduce myself to the court prior to speaking at a summary judgment argument. The court reporter was a friend of my boss and mentioned it to him next time she saw him!

Most memorable WPTLA moment: It happens once a year – the Comeback Award Dinner. Such a wonderful thing…

Happiest/Proudest moment as a lawyer: Defense counsel hugged my client following a successful mediation and expressed genuine sympathy. I teared up!

Best Virtue: Thoughtfulness

Secret Vice: Real Housewives of _____ (fill in any state/city/town)

People might be surprised to know that: I have never been to Kennywood!

Favorite movie (non-legal): Sixteen Candles

Favorite movie (legal): Everyone always says My Cousin Vinny, which I do love, but I'll go with Erin Brockovich.

Last book read for pleasure, not as research for a brief or opening/closing: Currently reading The Goldfinch

My refrigerator always contains: Parmesan cheese and beer in the fruit crisper

My favorite beverage is: Arnold Palmer or Diet Pepsi. I do also love a good red wine.

My favorite restaurant is: Arlecchino

If I wasn't a lawyer, I'd be: Interior Decorator

# 2014 CLE & GOLF OUTING RECAP

On an overcast and windy Friday in late May, 24 gentlemen ventured to the New Castle Country Club for a CLE program, lunch, and golf.

Past President Rich Schubert presented a 1-hour ethical program entitled *Ethics 2014*. There was much audience participation, and most of the comments from the attendees noted Rich's professionalism.

After paperwork was cleared away, the NCCC staff brought out a tasty and filling lunch buffet of soup, salad, entrees, and desserts. No one walked away hungry!

At 1:00, it was time to golf. Good thing everyone wore slacks and brought their jackets, as it turned out to be a chilly afternoon on the course. Thanks to the following golfers for their participation:

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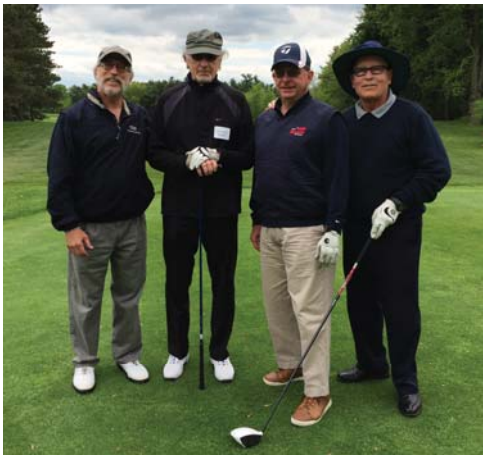
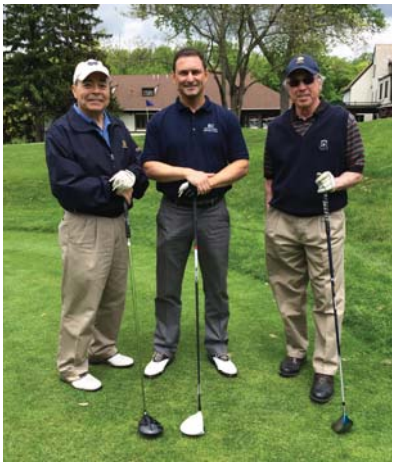
| Chuck Alpern | John Becker | Rich Catalano | Larry Chaban | Bill Chapas |
| Phil Clark | Tim Conboy | Bill Flannery | Chuck Garbett | Joe George |
| Mark Homyak | Larry Kelly | Drew Leger | Jim Monohan | Carl Moses |
| Greg Rosatelli | Brian Scanlon | Gene Scanlon | Rich Schubert | Stuart Setcavage |
| John Zagari | | | | |

Hope to see you all in 2015!





*Pictured above, from L to R; Past President Rich Catalano, Past President John Becker, Tim Conboy, Larry Chaban, Board of Governors Member Chuck Alpern, Past President Rich Schubert, Bill Chapas, Board of Governors Member Chuck Garbett, Stuart Setcavage, and Carl Moses.*

*Pictured below from L to R; Jim Monohan, Bill Flannery, Past President Mark Homyak, Phil Clark, Brian Scanlon, Business Partner The Honorable Eugene Scanlon, (Ret.), Joe George, Vice President Larry Kelly, Greg Rosatelli, John Zagari, and Board of Governors Member Drew Leger.*

**Western Pennsylvania Trial Lawyers Association**
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# *...Through the Grapevine*

Congratulations to **Past President Richard J. Schubert**, recipient of PAJ's Milton D. Rosenberg Award, and member **Thomas C. Baumann**, recipient of PAJ's George F. Douglas Jr. Amicus Curiae Award.

Congratulations to **Board of Governors Member Eve S. Hagerty**, on the birth of her second child, daughter Elsy Margaret, born on Aug. 2. Mom and baby are doing well.

Member **Mark A. Smith** has moved his office to 215 E 8th Ave, Homestead, PA 15120. P: 412-995-3277 F: 412-368-8952.

Member **Karesa M. Rovnan** is now working at Biancheria & Maliver, P.C. She can be found at Ste 1600, Arrott Bldg, 401 Wood St, Pittsburgh, PA 15222. P: 412-394-1001 F: 412-394-1331 email: krovnan@bem-law.com

Member **Lauren M. Kelly** has also moved to a new firm. Lauren can be reached at Dickie McCamey & Chilcote, P.C., Two PPG Pl, Ste 400, Pittsburgh, PA 15222. P: 412-392-5518 F: 412-392-5367 Email: lkelly@dmclaw.com

Member **Sheila M. Burke** can now be found at Burke Cromer Cremonese. The address is 517 Court Pl, Pittsburgh, PA 15219. P: 412-940-3360 F: 412-904-3799 Email: sburke@bccattorneys.com

Congratulations to member **Nora Gieg Chatha** on the birth of her second child, daughter Aiya Chatha. Baby and mom are doing well, as well as Dad Omar and big brother Anwar .