

PBA 2018 Public Education Campaign Focuses on Custody Rights for Grandparents

PBA seeks to be a vital, independent organization representative of and for Pennsylvania lawyers to enhance the practice of law and ensure access to justice for all persons. One of the strategic goals is to educate the public about the judicial system and the role of the legal profession in society.

In support of that goal is the biannual statewide public education campaign conducted under the direction of the PBA Community and Public Relations Committee. Co-sponsored by the PBA, the Pennsylvania Bar Insurance and Trust Fund and 27 county bar associations across the state, the 14th campaign, launched Oct. 1, is “Understanding When Grandparents and Others Can Seek Custody.” The campaign provides basic information about Act 21 of 2018 that went into effect in Pennsylvania on July 3, 2018, and expands custody rights for caregivers, especially grandparents and great-grandparents.

As part of the Oct. 1-15 informational campaign, newspaper ads under an agreement with the Pennsylvania NewsMedia Association are being placed in more than 80 newspapers across the state. In addition, in partnership with the Pennsylvania Association of Broadcasters, a 30-second television and radio spot is airing statewide. An informational brochure is being distributed to participating county bar associations and is available, along with other resources,

at www.pabar.org.

Christina M. DeMatteo, Law Office of Christina M. DeMatteo LLP in Blue Bell, and Lawrence J. Persick, Lamb McErlane PC in West Chester, are PBA Family Law Section members who developed the informational brochure, “Understanding When Grandparents and Others Can Seek Custody,” for the campaign. DeMatteo said, “We wanted the brochure to be helpful to those individuals who are helping to care for children whose parents are unable or unwilling to do so. Our goal was to provide clear, basic information about the new law so that individuals could assess whether the new law might impact their situation. We also explained that there are certain situations where the new law doesn’t apply, such as when the child has been determined to be dependent by the juvenile court.”

DeMatteo said PBA members take their role in educating residents seriously. “As practicing lawyers, PBA members are uniquely situated to alert the public to important legal changes and provide information about the impact of those changes. By providing information in the form of brochures and public service announcements, we can ensure that individuals affected by new laws understand their rights and have information about how to obtain additional information.”

At an Oct. 2 news conference in

Harrisburg to announce the campaign, PBA President Charles Eppolito III said, “By educating residents across the state, we are hoping to play a role in connecting caretakers with the information and support they need to be able to make the right decisions for their grandchildren.”

Joining Eppolito at the news conference were Sen. Donald White (Armstrong, Butler, Indiana and Westmoreland), primary sponsor of the legislation, and Rep. Eddie Day Pashinski (Luzerne), sponsor of pending legislation aimed at helping grandparents.

As a result of the opioid epidemic sweeping the state, more and more grandparents and other family members are becoming primary caregivers of minor children when parents are absent. White said, “My legislation gives grandparents or other relatives the ability to file for legal custody if they can show they have a sustained,

substantial and sincere interest in the welfare of the child.”

Recent statistics from Grandfamilies.org show that 103,000 children in Pennsylvania live with a relative with no parent present, and more than 88,000 grandparents are householders responsible for their grandchildren who live

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New Law Expands Custody Rights for Grandparents

An increasing number of Pennsylvanians are taking on the role of primary caregivers for their grandchildren, in large part because of the opioid epidemic.

There is new hope for grandparents and other caring individuals who want custody of kids whose parents are unable or unwilling to raise them.

Learn more about the new Pennsylvania custody law by getting a free copy of the brochure, “Understanding When Grandparents and Others Can Seek Custody,” by visiting www.pabar.org.

A project in the public's interest from the Pennsylvania Bar Association, the Delaware County Bar Association and the Pennsylvania Bar Insurance and Trust Fund

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with them. Act 21 of 2018 removes roadblocks and barriers to allow grandparents to provide the appropriate nurturing and care for their grandchildren, White said.

DeMatteo said family lawyers expect Act 21 to have a substantial impact in Pennsylvania. “First, in custody cases where the parents do not have custody of the children, the new law will open the door for individuals who have sustained, substantial and sincere interest in the welfare of the child to ask the courts to award them custody. Under prior laws, those individuals may not have had standing at all and would not have been able to seek relief in court. By permitting these individuals to come to court and seek relief, Act 21 benefits these children by ensuring that the court can consider all willing caregivers when determining who should have custody of the child.

“Second, the new law ensures that grandparents will have the right to seek partial or supervised physical custody of their children in cases where the parents have commenced a proceeding for custody of the child and the parents do not agree as to whether the grandparents should

have custody time with the child. This ensures that in high conflict custody cases, where one parent tries to interfere with the relationship between the grandparents and the child, the grandparents will have direct access to the court to request relief.”

She said that the PBA members who developed the campaign hope it will help the greater community “understand that there are legal options available to those who believe they need to step in to care for a child whose parents are unable or unwilling to do so. We also want grandparents to be aware that they may have the right to seek relief in custody cases if there is a dispute between parents about whether the grandparents should be seeing the children.”

Previous campaigns conducted by the PBA Community and Public Relations Committee have addressed issues such as expungement of criminal records, reporting child abuse, education rights of exceptional children, child support, wills and estates, identity

theft and credit issues.

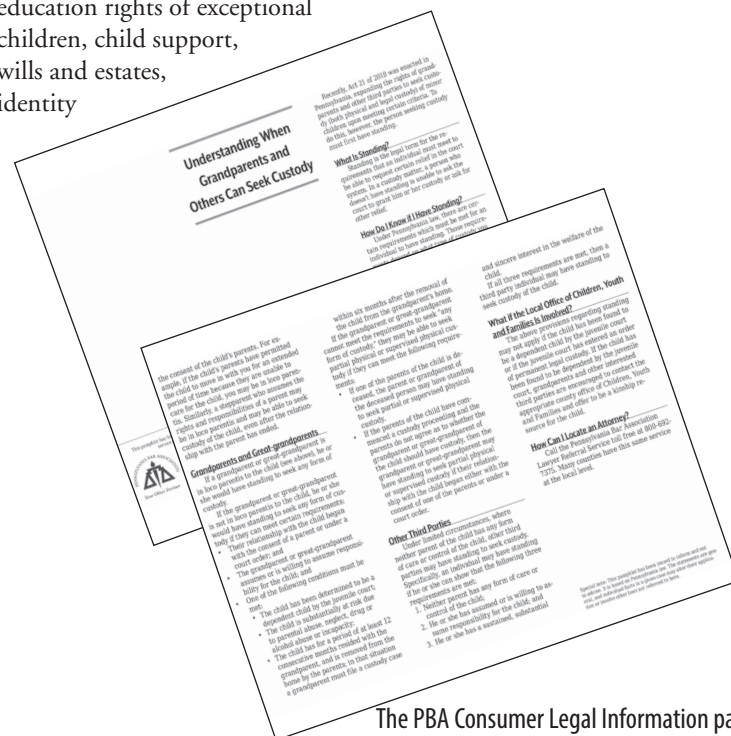
The campaign is funded by the PBA and a grant from the Pennsylvania Bar Insurance and Trust Fund with informational support from the PBA Family Law Section and the Elizabeth Loranzo iCare Foundation.

Local bar associations participating in the campaign are as follows: Allegheny, Blair, Beaver, Berks, Bucks, Butler, Cambria, Carbon, Centre, Dauphin, Delaware, Erie, Franklin, Lawrence, Lebanon, Mercer, Monroe, Northampton, Pike, Schuylkill, Washington and York county bar associations, the Lancaster, Lycoming, Montgomery and Westmoreland bar associations and the Wilkes-Barre Law & Library Association.

Statewide LRAP Application Deadline Oct. 15

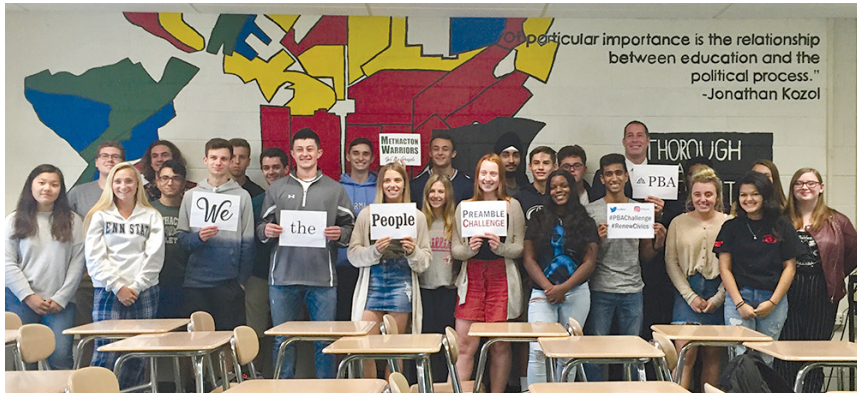
Lawyers employed by IOLTA-funded civil legal services organizations have until Oct. 15 to apply for student-loan repayment assistance from the Pa. Bar Foundation (PBF)/Pa. IOLTA Loan Repayment Assistance Program (LRAP).

Go to <http://www.pabarfoundation.org/what-we-do/pa-iolta-loan-repayment-assistance-program/> for more information and application instructions.



The PBA Consumer Legal Information pamphlet “Understanding When Grandparents and Others Can Seek Custody” was published for the campaign launch

Celebrate the Constitution Program Held in Montgomery



Students at Methacton High School with PBA President Charles Eppolito III marked Constitution Day with discussions and activities.

Most high school students rarely think about the relevance of a document created 231 years ago. But by examining the origins, the endurance and the impact the U.S. Constitution has on their daily lives, they understand their roles in preserving it.

As part of PBA President Charles Eppolito's public education project, he spoke to students at his alma mater, Methacton High School in Fairview Township, Montgomery County, on Constitution Day, Sept. 17.

After showing the first segment of the video "Many People. Many Beliefs. One Constitution," Eppolito and PBA Pro Bono Coordinator David K. Trevasakis, PBA Director of County Bar Services/Education and Special Projects Susan Etter, Pennsylvania Bar Institute Media Services and Technology Manager Mark Shuey, and Senior Media Technician Hortencio Perez videotaped a small group of students answering questions, asking questions, recording the preamble and completing "I am" statements to demonstrate diversity. Their edited responses will be incorporated into a series of videos focusing on constitutional rights and responsibilities.

With a larger group of students, Eppolito led "The Constitution is Everywhere," an interactive discussion that challenged students and the educators and lawyers working with

them to explore how the Constitution still impacts every aspect of daily lives. Students were asked about the things they do each day and the constitutional connections to each activity. They were then challenged to come up with an activity that is not connected in some way to the Constitution.

Another part of the Constitution project is a challenge to Pennsylvania students to take videos and photos, create artwork, write songs or design T-shirts to express their ideas about how the preamble to the Constitution is important to the nation, relevant to them, their families and their futures. Student are encouraged to post about their ideas on Twitter or Instagram using #PBACHallenge and #RenewCivics.

Once completed, the videos and related lesson plans will be available for teachers to incorporate into their civics curriculum, Eppolito said.

Information about other PBA educational programs such as Celebrate the Constitution, the Statewide High School Mock Trial Competition and Project Peace, as well as lesson plans for teachers, can be found at www.pabar.org/site/For-the-Public/Education-for-Students.

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Ruling Adverse to Client in Underlying Matter Has No Preclusive Effect in Subsequent Malpractice Claim

By Jeffrey P. Lewis

Trial courts on occasion will rule that a client as a party in the underlying action has waived a legal issue. Obviously, it is the client's lawyer who has waived the issue on his or her client's behalf. This has raised the question of whether this ruling has preclusive effect with respect to the question that client will raise in the subsequent malpractice action, to wit, whether that lawyer had breached the duty of care in allowing waiver of that issue in the underlying matter. That issue was visited by a three-judge panel of the Superior Court in *Ammon v. McCloskey*, 655 A.2d 649 (Pa. Super. 1995) back in 1995, where the underlying matter was a criminal prosecution against the client wherein the trial judge had held that an argument on behalf of the client had been waived. The client in the subsequent malpractice action argued that the issue of whether his lawyer in the underlying matter had been negligent in allowing the waiver was settled as a matter of law pursuant to the principle of collateral estoppel. In a unanimous decision, the Superior Court affirmed the finding of the trial court that no principle of issue preclusion applies because the lawyer is not deemed to "stand in the shoes" of his client, i.e., does not stand in privity for purposes of applying any principle of issue preclusion. Stated differently, the court recognized the notion that a lawyer may defend a malpractice action based upon the proposition that the trial court in the underlying matter incorrectly found waiver, even if that ruling were later affirmed in the appellate courts. The issue was recently considered by an appellate court outside of Pennsylvania.

In *Sere v. Trapeni*, 2018 WL 3583747 (Va.), in a pair of lawsuits constituting the underlying matter, the court had ruled that plaintiff had sued the wrong corporate entity, i.e., a corporate entity other than the entity

that could be legally liable for the harm claimed by the client. Thereafter, the client was deemed time-barred from suing the "correct" corporate entity. In an effort to avoid the need for expert testimony, the client argued, in the subsequent malpractice action against the lawyer who had represented her in the underlying action, that the issue of his negligence was already decided by the principle of collateral estoppel as a result of the court's ruling in the underlying action. Accordingly, the client argued, she did not need expert testimony to establish her lawyer's negligence because the court in the underlying action had already decided that issue when it found that her lawyer had sued the wrong entity. Moreover, with respect to what issues were not precluded by the court's ruling in the underlying matter, client argued that expert testimony was not required to make her case because issues "were matters within the common knowledge of laymen, such as whether an attorney should know how to sue the correct defendant, how to correct a pleading that names the wrong one, and how to do them without allowing the statute of limitations to elapse." The trial court rejected the client's argument, granting summary judgment in the lawyer's favor, and the Supreme Court of Virginia affirmed supported by an unpublished opinion.

The Supreme Court agreed with the trial court that "rulings in the underlying personal injury action have no preclusive effect in this malpractice action." The court noted that "[c]laim preclusion bars successive litigation of the same claim." In the court's view, the client's personal injury claim in the

underlying matter and her malpractice claim in the current action do not constitute the "same claim" for purposes of claim preclusion. Instead, in the view of the high court, they constitute different causes of action, which precludes application of issue preclusion. Moreover, that court noted that "[i]ssue preclusion...bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim."

Just as in *Ammon*, in the Supreme Court's view, no principle of issue preclusion can apply because the defendant lawyer in the malpractice action was not a party in the underlying personal injury action. "To hold otherwise would mean an attorney could never succeed in a malpractice case, since the prior...loss would foreclose any defense."

The Supreme Court also rejected the client's argument that expert testimony was not required under these circumstances even if principles of issue preclusion do not apply. The Supreme Court acknowledged the exception to the general rule that expert testimony is required to establish a lawyer's negligence, also recognized under Pennsylvania law, that "expert testimony is unnecessary when the alleged act of negligence clearly lies within the range of the jury's common knowledge and experience." The client argued that expert testimony was not required to find negligence based upon the fact that the lawyer had been told "at least seven times" that "the original complaint in the underlying personal injury action named the wrong defendant" and yet did not timely sue the right party. The

In the court's view, the client's personal injury claim in the underlying matter and her malpractice claim in the current action do not constitute the "same claim" for purposes of claim preclusion. Instead, in the view of the high court, they constitute different causes of action, which precludes application of issue preclusion.

Supreme Court rejected the argument "whether this conduct constitutes a breach of an attorney's duty is a matter within the common knowledge of a lay person."

Moreover, the Supreme Court identified at least four different issues, which it characterized as "complex legal questions not within the common knowledge of a layperson, or perhaps, even the average attorney," that were not decided in the underlying matter that must be decided in the subsequent malpractice action to find that the defendant lawyer had been negligent in the underlying matter, including whether the personal injury claim was actually time barred. After all, the court in the underlying action had determined that the defendant lawyer had sued the wrong party — it made no determination with respect to these four discrete issues. Therefore, in the court's view, expert testimony is required to address these issues as well.

The basic premise of the Virginia Supreme Court's holding in *Sere* echoes the holding of the Pennsylvania Superior Court in *Amon*, which is the defendant lawyer in the subsequent malpractice action can re-litigate rulings made by the court in the underlying action, i.e., the defendant lawyer can defend on the basis that the court in the underlying case made incorrect rulings adverse to the client, even if those rulings are affirmed on appeal.



Jeffrey P. Lewis is a member in the Philadelphia office of the law firm of Eckert Seamans Cherin & Mellott LLC. He serves on the PBA Professional Liability Committee.



Court Summaries

By Timothy L. Clawges

CIVIL PROCEDURE

Third Circuit

TITLE INSURER — DUTY TO DEFEND — claims of borrower/mortgagor — **FOUR CORNERS RULE** — comparison of insurance contract with four corners of complaint — **Kvaerner decision applies** — prediction re state court decision — “in for one, in for all” not applicable — order finding no duty affirmed in part

Lupu v. Loan City, No. 70-1944 (Sept. 10, 2018) — When identifying covered claim for purposes of determining duty of real estate title insurer to defend an insured party against claims of borrower/mortgagor, four corners of insurance contract must be compared to four corners of complaint.

Common Pleas

PERSONAL JURISDICTION — commercial transaction — purchase of product — contact with plant in other states — shipment from plant to job site in other state — lack of office or bank account in Pennsylvania — no specific or general jurisdiction — preliminary objections sustained

Coppola v. Steel Srv., 91 Bucks Co.L.Rep. 348 (June 7, 2018) — Pennsylvania court lacks personal jurisdiction over commercial entity that is based in other state and lacks bank account or office in Pennsylvania, when, despite telephone contact with customer in Pennsylvania, ships product from out of state directly to out-of-state job site.

CONSUMER PROTECTION

Superior Court

UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW (UTPCPL) — CATCHALL PROVISION — BENNETT DECISION — life insurance — investments — proof of negligent or fraudulent misrepresentation not required — nonjury verdict — question of law — de novo standard of review — plenary scope of review — res judicata — collateral estoppel — legislative intent — strict liability for vendors who deceive consumers — creation of likelihood of confusion or misunderstanding — private and public causes of action — judgment affirmed

Gregg v. Ameriprise Fin., 2018 PA Super. 252 (Sept. 12, 2018) — In catch-all provisions of UTPCPL, Legislature imposed strict liability on vendors who deceive consumers by creating likelihood of confusion or misunderstanding in private and public causes of actions; carelessness or intent required for negligent or fraudulent misrepresentations is not required conduct under 73 P.S. 201-2(4)(xxl).

EVIDENCE

Superior Court

EVIDENCE OF OTHER CONDUCT — homicide — sexual abuse — other instances of sexual assault — joking — attack with bare hands — strangulation — sexual abuse without choking — manner in which crimes committed — ostensible purpose of crime — sudden reactions in response to failure to agree with defendant — common scheme — evidence of domestic abuse — conduct not so distinctive that it shows identity —

no signature — evidence of habitual drug use — decisions not made by trial court — order granting motion affirmed

Com. v. Bidwell, 2018 PA Super. 250 (Sept. 11, 2018) — Denial of pretrial motion to admit evidence of other conduct that the defendant engaged in domestic abuse of other women affirmed when evidence offered in homicide case in which victim may have been choked or strangled but does not establish pattern of conduct so distinctive that proof of one tended to prove the others.

FEDERAL CIVIL PROCEDURE

Third Circuit

JURISDICTION — VIOLATION OF STATUTE — CASE OR CONTROVERSY REQUIREMENT — Fair Credit Reporting Act — 15 U.S.C. 1681 — standing — failure to hire plaintiffs — potential employer failure to provide copies of consumer reports — failure to notify plaintiffs of rights under act — Fed.R.Civ.P.12(b)(1) — grant of motion to dismiss affirmed in part

Long v. SEPTA, No. 17-1889 (Sept. 10, 2018) — Violation of Fair Credit Reporting Act consists of failure of prospective employer to provide copies of consumer reports to employees it rejected provides case or controversy for jurisdictional purposes; alleged failure of such prospective employer to notify plaintiffs of rights under Fair Credit Reporting Act does not provide basis for case or controversy necessary for jurisdiction.

ATTORNEY'S FEES — bad faith action — 42 Pa.C.S. 8371 — outrageously excessive request — 87 percent of hours under lodestar inadequately supported by documentation — billing listings for “communication” and “other” not sufficient — hours listed as trial prep — vagueness — lack of ability to determine reasonableness — denial of fees in whole affirmed

Clemens v. NY Central Mut. Fire Ins., No. 17-3150 (Sept. 12, 2018) — Where fee shifting statute, such as bad faith statute, 42 Pa.C.S. 8371, provides court discretion to award attorney's fees, that discretion includes ability to deny fee request altogether when amount requested is outrageously excessive.

LANDLORD-TENANT LAW

Superior Court

TERMINATION OF RESIDENTIAL LEASE — previous extension — month-to-month lease — start date disputed — contractual interpretation — question of law — de novo standard of review — plenary scope of review — LIST OF DAMAGES — failure to itemize sufficiently — failure to list items — waiver — assertions that tenant failed to leave forwarding address — retention of security deposit improper — judgment for tenant affirmed in part — remand ordered for evidence regarding damages

Nitardy v. Chabot, 2018 PA Super. 255 (Sept. 14, 2018) — List of damages to property allegedly caused by residential tenant that fails to provide specific items or amounts does not comply with Section 512 of Landlord and Tenant Act, 68 P.S. 250.512; remand ordered for determination whether landlord established that each item on damages list was actually damaged and amount that is listed for repair is reasonable.

POST-CONVICTION RELIEF ACT (PCRA)

Superior Court

CASE PENDING ON DIRECT REVIEW — RESULT OF REINSTATEMENT OF DIRECT APPELLATE RIGHTS — application of Alleyne — mandatory minimum sentence — drug offenses — 18 Pa.C.S. 7508 — subsequent finding that statute unconstitutional — plenary standard of review — application of new rule to all cases pending on direct review

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— **order granting relief affirmed**

Com. v. Andrews, 2018 PA Super. 254 (Sept. 12, 2018) — Case is considered pending on direct review for purposes of application of new rule where direct review results from reinstatement of direct appellate rights nunc pro tunc subsequent to date new rule was announced.

TIMELINESS — judgment of sentence final 32 years earlier — **FACIAL UNTIMELINESS** — asserted exception for newly recognized constitutional right — 42 Pa.C.S. 9545(b)(1)(iii) — *Com. v. Foust* — de facto life sentence — right not recognized by U.S. or Pennsylvania Supreme Court and found to apply retroactively — denial of petition affirmed

Com. v. Nedab, 2018 PA Super. 257 (Sept. 18, 2018) — Order dismissing petition affirmed, finding it was facially untimely and not subject to newly recognized constitutional right exception to jurisdictional time limit when it relied on *Com. v. Foust* in which Superior Court held that it was unconstitutional to impose a de facto life sentence without possibility of parole on juvenile without finding he is incapable of rehabilitation, because neither U.S. nor Pennsylvania Supreme Court has found *Foust* applied retroactively.

PRISON LITIGATION

Third Circuit

ADMINISTRATIVE REMEDIES — Prison Litigation Reform Act — alleged assault — alleged retaliation — **EXHAUSTION** — **UNAVAILABILITY OF ADMINISTRATIVE REMEDIES** — inmate inhibited by serious threat of retaliation — reasonably resolute inmate — objective test — resolution of procedurally improper administrative request on merits

— housing and cellmate assignments — discretionary function exception — **Federal Tort Claims Act** — **sovereign immunity** — **limited waiver** — **dismissal of complaint affirmed in part** — **remand ordered**

Rinaldi v. U.S., No. 16-1080 (Sept. 12, 2018) — Since serious threat of substantial retaliation can defeat a failure to exhaust defense, inmate must show such remedies are not available under Prison Litigation Reform Act when prison official inhibits inmate from resorting to them through serious threats of retaliation and bodily harm. To defeat failure to exhaust defense, inmate must show threat was sufficiently serious that it would deter reasonable inmate of ordinary firmness from lodging grievance and that threat actually deterred this inmate.

PROTECTION FROM ABUSE

Superior Court

ACTION SEEKING PROTECTION FOR MINOR AGAINST PARENT — 23 Pa.C.S. 6107 — **REFUSAL TO ALLOW CHILD TO TESTIFY AT HEARING** — **due process** — **reliance on testimony from ex parte hearing** — **failure to timely object** — **burden of proof** — **WAIVER** — **preponderance of evidence** — **grant of petition affirmed**

S.W. v. S.F., 2018 PA Super. 256 (Sept. 18, 2018) — Order granting final protection order in favor of child against parent affirmed; claim court erred by refusal to allow child to testify at final hearing waived when no timely objection.

REAL PROPERTY

Superior Court

ORDER STRIKING LIS PENDENS — **APPEALABILITY** — 42 Pa.C.S. 742 — **quiet title action** — **appealable as final order or collateral order** — Pa.R.A.P. 313 — **DISTINCTION FROM INJUNCTIVE RELIEF** — **different standards apply** — **creation of escrow account absent contract im-**

proper — **order striking lis pendens vacated**

Barak v. Karolizki, 2018 PA Super. 258 (Sept. 18, 2018) — In action seeking quiet title, order striking lis pendens is appealable both as final order and as collateral order. Preliminary injunctions and lis pendens are two distinct legal concepts and court erred by applying preliminary injunction standard to strike lis pendens notice.

SEARCH AND SEIZURE

Superior Court

WARRANTLESS SEARCH — **CAMPUS SECURITY OFFICERS** — **LSD ingestion on campus** — **concerns for health and safety** — **Fourth Amendment** — **Article I, Section 8** — **paraphernalia in plain view** — **NOT DE FACTO STATE ACTORS** — **search conducted pursuant to campus police policies** — **preservation of student safety** — **no input or oversight from local police** — **judgment of sentence affirmed**

Com. v. Yim, 2018 PA Super. 253 (Sept. 12, 2018) — Campus police were not de facto state actors when they conducted warrantless search of dorm room after receiving reports of LSD ingestion on campus and made decision to search unilaterally in accordance with university regulations without input, oversight or assistance from local police.

SENTENCING

Superior Court

MERGER — **FIRST- AND SECOND-DEGREE MURDER** — **legality of sentence** — **plenary review** — 42 Pa.C.S. 9765 — **separate but concurrent sentences** — **specific intent to kill** — **commission of felony** — **each offense requiring proof other does not** — **judgment of sentence affirmed**

Com. v. Crissman, 2018 PA Super. 249 (Sept. 6, 2018) — Separate but concurrent sentences for first- and second-degree murder are permissible and not barred by the merger doctrine since first-degree murder requires proof of

specific intent to kill in all cases while second-degree murder does not, and second-degree murder requires commission of enumerated underlying felony while first-degree murder does not.

SEXUAL OFFENSES

Superior Court

SEXUAL ASSAULT — **consent at issue** — **sufficiency and weight of evidence** — **Rape Shield Law** — 18 Pa.C.S. 3104 — **DNA evidence** — **material from other persons on underwear of victim** — **relevancy** — **EXPERT TESTIMONY** — 42 Pa.C.S. 5920 — **respons of victim of sexual assault** — **lack of Frye hearing** — **testimony not bolstering credibility** — **general questions** — **Brady violation** — **evidence not in possession of commonwealth** — **judgment of sentence affirmed**

Com. v. Cramer, 2018 PA Super. 248 (Sept. 6, 2018) — Court did not err in precluding DNA evidence that there was material from other person in underwear of victim when defense was lack of consent, or by allowing expert testimony re manner in which victims of sexual abuse respond to assault when witness merely responded to general questions, admitting she did not know facts of case before she testified and did not offer opinion re victim credibility.

SEXUAL ABUSE OF CHILDREN — **Section 6312** — **Crimes Code** — 18 Pa.C.S. 6312 — **CHILD PORNOGRAPHY ON COMPUTER** — **SUFFICIENCY OF EVIDENCE** — **credibility** — **defendant sole person present upon police arrival** — **images visible on computer when police entered apartment** — **medical emergency for defendant** — **de novo standard overview** — **plenary scope of review** — **judgment of sentence affirmed**

Com. v. Smyser, 2018 PA Super. 251 (Sept. 11, 2018) — Evidence sufficient to sustain conviction for sexual abuse of children when police, who were called to the apartment and found defendant on the floor, saw child pornography on

continued on page 7

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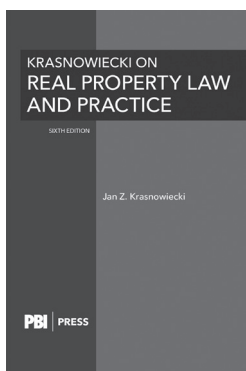
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Court Summaries

continued from page 6

his computer, rejecting the claim that the fact that defendant's family members testified defendant lacked knowledge and skills necessary to upload or download files or utilize file sharing program rendered evidence insufficient.

STATE PAROLE

Commonwealth Court

CREDIT FOR TIME AT LIBERTY ON PAROLE — convicted parole violator — board failure to state reasons for denial of credit — subsequent statement of reasons — unresolved drug and alcohol issues — Section 6138(a)(2) — Prisons and Parole Code — 61 Pa.C.S. 6138(a)(2) — recommitment order affirmed

Smoak v. Talaber, No. 112 C.D. 2018 (Sept. 11, 2018) — Though board originally failed to provide reasons for refusing credit for time spent on parole after revocation of parole for new conviction, its subsequent reason that he had unresolved drug and alcohol issues was sufficient to support recommitment.

UNEMPLOYMENT COMPENSATION

Commonwealth Court

VOLUNTARILY QUIT — CAUSE OF NECESSITOUS AND COMPELLING NATURE — Section 402(b) — 43 P.S. 802(b) — claimant accused of theft from employer — suspension — subsequent reinstatement — persistent lobbying by claimant to have discipline removed from record — alleged extreme emotional distress — ongoing harassment and discrimination — 10-month delay in termination — 34 Pa. Code 101.87 — CREDIBILITY — no credible evidence of real and substantial pressure

to terminate employment — decision affirming denial of benefits affirmed

Mazur v. U.C.B.R., No. 291 C.D. 2018 (Sept. 7, 2018) — When no credible evidence that circumstances produce real and substantial pressure for claimant to terminate her employment, order affirming denial of benefits for lack of cause of necessitous and compelling nature for voluntarily quitting employment of firm affirmed; denial of benefits not improper when claimant waited approximately 10 months after receiving disciplinary letter for alleged theft from employer and, even after reinstatement, asserted conditions at work arising from those allegations have become intolerable.



Timothy L. Clawges is counsel to the Pennsylvania House of Representatives Judiciary Committee. He also writes case digests for the PBA Criminal Justice Section Newsletter.

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Deputy Attorney General Goldman Speaks at Civil Litigation Section Regional Dinner



The PBA Civil Litigation Section Harrisburg Regional Dinner on Sept. 20 featured Jonathan Scott Goldman, executive deputy attorney general in charge of the Civil Law Division of the Commonwealth of Pennsylvania Office of Attorney general. His topic was "Your Commonwealth Office of Attorney General Protecting Pennsylvanians Every Day: Legal Issues Affecting Pennsylvanians and Beyond." Pictured at the gathering are, from left, Kathleen D. Wilkinson, Civil Litigation Section chair; Charles Eppolito III, PBA president; Lisa M. Benzie, Civil Litigation Section executive council member; and Goldman.

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Notice and Summary of Changes Pursuant to Article XII, Section 1202 of the PBA Bylaws

Pursuant to Article XII, Section 1202 of the Bylaws of the Pennsylvania Bar Association, below find notice of proposed amendments to the Pennsylvania Bar Association Bylaws.

At the suggestion of PBA House of Delegates Chair Honorable James J. Ross and the PBA Officers, the Bylaws Committee has considered and proposed a series of amendments to the Association's Bylaws to Article III. House of Delegates, Chapter A. Organization and Powers of the House, Section 301(a) (13). Composition of the House of Delegates and Chapter B. Rules of the House of Delegates to update and add clarity to those bylaws concerning the operation of the House of Delegates, the duties of the Presiding Officer and the composition of the House.

An amendment is proposed to Article III. House of Delegates. Chapter A. Organization and Powers of the House Section 301(a)(13), Composition of the House of Delegates. Section 301(a) (13) states that the deans of Pennsylvania Law Schools are deemed members of the House. The proposed amendment would permit deans to designate someone to attend the House meetings in their stead, so that law schools would more frequently be represented at the meetings.

An amendment is proposed to Article III. House of Delegates. Chapter B. Rules of the House of Delegates, Rule 327(c), regarding Presiding Officer, which states that "The Chair of the House shall sign every resolution and attest every report adopted by the House and the report of proceedings in the House Record, after approving its accuracy." This is an outdated provision in the Bylaws that is inconsistent with current practice. The amendment would permit the Chair to delegate the function.

An amendment is proposed to Article III. House of Delegates. Chapter B. Rules of the House of Delegates, Rule 339(a), regarding Privileges of the Floor, which states that "The privilege of the

floor, without vote, may be extended to any person by two-thirds vote of the voting Delegates present." Therefore, a person who is not a House member may speak on the floor of the House of Delegates only after first securing a two-thirds vote of the voting delegates. The House does not strictly adhere to this rule. For example, the Chief Justice of the Supreme Court regularly addresses our body, without a vote to yield the floor prior to his presentation. This amendment seeks to clarify this rule to confirm that such a vote is required only when a person who is not a member of the House wishes to advocate a position on a matter before the House.

An amendment is proposed to Article III. House of Delegates. Chapter B. Rules of the House of Delegates, Rule 345(a) and (b), regarding Debate, provides that no delegate in the House, chair of a Section or Committee shall speak more than ten minutes at one time without unanimous consent of the House. We have attempted to limit speakers at House of Delegates meetings to five minutes on a regular basis in recent years and so it is appropriate to amend the bylaw to five minutes, with any extension at the Chair's discretion.

An amendment is proposed to Article III. House of Delegates. Chapter B. Rules of the House of Delegates, Rule 351(b), regarding Nominations and Elections of Officers, which states that "In elections by the House, each office to be filled shall be voted for separately." The amendment seeks to make this Rule consistent with our actual practice, which is to include all candidates in one vote if all are unopposed, and to require separate ballots in the event there is more than one candidate for an office.

The amendments are to be submitted to the House of Delegates at its November 16, 2018 meeting.

Text to be added appears in bold type between brackets. Text to be deleted appears in strikethrough.

Proposed Amendments to Article III. Section 301(a). Composition of the House of Delegates

(13) The deans of the Pennsylvania Law Schools [~~and also former deans of Pennsylvania Law Schools as long as they maintain membership in the Association.~~], **or their respective designees,** and also former deans of Pennsylvania Law Schools as long as they maintain membership in the Association.

Rule 327. Presiding Officer.

(c) The Chair of the House [~~shall sign every resolution and attest every report adopted by the House and the report of proceedings in the House Record, after approving its accuracy.~~] **or his or her designee** shall sign every resolution and attest every report adopted by the House and the report of proceedings in the House Record, after approving its accuracy.

Rule 339. Privileges of the Floor.

(a) ~~The privilege of the floor, without vote, may be extended to any person by two-thirds vote of the voting Delegates present. [Any person not a member of the House may seek the privilege of the floor to speak to a matter before the body by request to the presiding officer and an affirmative vote of two-thirds of the voting Delegates present.]~~

Rule 345. Debate.

(a) When a Delegate in the House desires to speak, the Delegate shall rise and address the presiding officer. Upon being recognized, the Delegate shall state his or her name and representative capacity. No Delegate shall speak more than once at the same session upon any one question, ~~unless with unanimous consent of the House except [at the discretion of the Chair].~~ The Delegate who made the motion under discussion shall have the right to close the debate upon it.

(b) No Delegate in the House, chair of a Section or Committee (or his or her designee) or minority representa-

tive of a Section or Committee shall speak more than ten [~~ten~~ **five**] minutes at one time [~~, except at the discretion of the Chair,~~] without unanimous consent of the House [without the affirmative vote of two-thirds of the voting Delegates present], unless he or she be then engaged in making the report of a Section or Committee of the Association or of the House.

Rule 351. Nominations and Elections of Officers.

(b) In elections by the House, ~~each office to be filled shall be voted for separately. When there is more than one nomination, voting for the General Officers of the Association shall be by written ballot. In the event there is more~~

continued on page 10

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Please go to <https://www.law.upenn.edu/faculty/fellowships.php> for eligibility and requirements.

Application Materials

Applicants must submit the following materials:

1. Detailed research proposal
2. Teaching statement (course abstract and plan for class or seminar)
3. Writing sample(s)
4. Curriculum vitae
5. Law school and/or graduate school transcript(s)
6. Three references, minimum (at least one must be an academic reference) (For each reference, please give name, title, mailing address, email address and telephone number.) Letters of recommendation from references are not required.

Application

Applications for fellowships beginning the fall of 2019 are being accepted from July 1, 2018 to November 15, 2018. Applicants should apply here: <https://www.law.upenn.edu/faculty/fellowships.php> and are encouraged to submit their materials as soon as possible after July 1. Applications are reviewed on a rolling basis.

Questions about this program should be sent to sharswoodapp@law.upenn.edu.

rent. Click the SuperCode tab when looking at any statute or regulation to see any newly-enacted U.S. Public Law or newly-adopted regulation that affects the statute or regulation that you are viewing.

Beta version coming soon

Casemaker is looking for a small number of Casemaker users to help test the new Casemaker platform. Testers will get an exclusive first look at the new system and have the chance to provide

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LINE RATES:

PBA Member: \$35
Non-PBA Member: \$40
(first 30 words, each additional word \$1.50)

BLIND ADS: Processing surcharge \$10

BOX AD RATES:

Ad Size	PBA Member	Non-PBA Member
1 col. x 1	\$ 75	\$ 95
1 col. x 2	\$135	\$170
1 col. x 3	\$195	\$250

EMPLOYMENT ADS:

PBA Member: \$25
(first 30 words; each additional word \$1.50)
Non-PBA Member: \$40
(first 30 words; each additional word \$1.50)

BLIND ADS: Processing surcharge \$10
(no fee for job-seekers)

Legal Marketplace

Pennsylvania Bar Association
100 South Street P.O. Box 186
Harrisburg 17108

800-932-0311, ext. 2226

www.pabar.org

feedback. To get involved, email Khristina at kwilliams@casemakerlegal.com

Sometime during the first week of October, candidates will receive an email containing a link to a screening survey. This survey will help Casemaker staff choose testing candidates who best represent a cross-section of the various users of Casemaker.

PBA Bylaws Changes

continued from page 8

than one candidate for any office; [when there is not more than one (1) nominee for each office to be filled, voting for the total slate of officers recommended by the Nominating Committee, may be by one (1) vote. When there is more than one candidate for nomination to an office, voting for that office shall be by written ballot.

In such case,] the presiding officer shall appoint five Delegates in the House to act as tellers who shall have charge of the preparation, distribution, collection and counting of the ballots.

In June of 2008, the PBA House of Delegates approved six recommendations from the PBA House of Delegates Reform Committee. The Committee's third recommendation was that Section 815(b) and (c) of the bylaws be amended to allow for email/electronic balloting and that the Bylaws Committee draft proposed amendments to effectuate this recommendation. To be consistent, the Bylaws Committee also proposes amending Section 902(g), which would also allow for email/electronic balloting if an office is contested. These amendments would not only make these processes more efficient and effective, but also represent a cost savings. This amendment does not impact in any way the procedures employed by any zone for selection or appointment of delegates.

The amendments are to be submitted to the House of Delegates at its November 16, 2018 meeting.

Text to be added appears in bold type between brackets. Text to be deleted appears in strikethrough.

Article VIII. Meetings and Procedures

Section 815. Proxies; Letter [Written] Ballots.

(a) Voting by proxy shall not be permitted at any meeting of the House

of Delegates, the Board of Governors, the council of a Section or Committee, a Committee or any other body or unit existing under the Association.

(b) The House, the council of a Section or Committee and any Committee may take action by letter [written] ballot on matters requiring action between its meetings.

(c) The House shall take action by letter [written] ballot on any issue where the Board of Governors has voted to create a PBA policy before the next regularly scheduled House of Delegates meeting provided that:

(1) Fifty members of the House of Delegates request, in the manner prescribed in Section 811, a letter [written] ballot be circulated; or

(2) Eight members of the Board of Governors request, in the manner prescribe[d] in Section 811, a letter [written] ballot be circulated.

[For the purpose of this section, the term "written ballot" shall include a ballot sent or returned via email.]

Article IX. Nominations, Elections and Vacancies in Office.

Section 902. Zone Delegates in the House of Delegates Generally.

(g) If an office is contested, the Secretary shall cause ballots to be prepared mailed and [sent] to Active Members accredited to the Zone where the contest exists. All ballots must be returned to the Secretary not less than one month prior to the Annual Meeting. The persons receiving the largest number of votes cast, up to the number to be elected, shall be elected Delegates in the House. Cumulative voting shall not be permitted. When two or more Delegates are to be elected each Active Member may vote for any number up to the number to be elected. Other procedures incident to the election shall be as pre-

scribed by the Board of Governors.

[For the purpose of this section, the term "written ballot" shall include a ballot sent or returned via email.]

An amendment is proposed to Article IX, Section 907(b) Minority and Woman Governor, to extend the term of the 907(b) Minority At-Large Governor for an additional three year term commencing in 2019.

The amendments are to be submitted to the House of Delegates at its November 16, 2018 meeting.

Text to be added appears in bold type between brackets. Text to be deleted appears in strikethrough.

Article IX. Nominations, Elections and Vacancies in Office.

Section 907. Minority and Woman Governor.

(b) In the years 1998, 2001, 2004, 2007, 2010, 2013 and[,] 2016 [and 2019] prior to the adjournment of the Annual Meeting the President shall appoint one Active Member as a Minority Governor for a term of three years commencing with the adjournment of the Annual Meeting in the year of appointment and until a successor is appointed. In the case of vacancy in the office of Minority Governor, the President shall appoint an eligible Active Member as a Minority Governor who shall serve for the unexpired term.

2018-19 PBA leadership positions of vice president, chair of the House of Delegates, secretary and treasurer —

To learn more about the responsibilities of the various offices and nominating procedures, read rules 351, Sections 511 through 515 and 914 at <http://www.pabar.org/site/About-PBA/Bylaws>. Also, contact Kelly Myers in PBA Governance at 800-932-0311, ext. 2272, for any additional details. Interested candidates should send a cover letter and resume to Sharon R. López, Chair, PBA Nominating Committee, P.O. Box 186, Harrisburg, PA 17108-0186. Deadline for entry is Oct. 15.

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Pittsburgh, PA 15216

PBA Blog on Cybersecurity for All Members

The PBA Cybersecurity and Data Privacy Committee's newly launched blog gives all PBA members informational updates and prompts discussions about data privacy. Lawyers and their firms are prime targets for cyberattacks and ever-evolving cybersecurity threats. By reading the blog posts, PBA members can stay current on data liability, the new risks and upcoming legal expectations.

Recent posts include "GDPR in Pennsylvania: Should You Worry About It?" and "Does the Fifth Circuit Decision in Specs Suggest a Breach for Cyber Coverage Into Other Insurances?"

To read recent posts and sign up for email notifications when new articles are available, go to <http://cyber.pabar.org/>.



Minute with a Member

Cary B. Hall

Cary B. Hall is in solo practice at the Law Offices of Cary B. Hall LLC in Norristown. He has been a PBA member since 2000.

Where did you attend law school?

University of Miami School of Law

What would people be surprised to know about you?

Despite my lack of a Southern accent, I grew up in south Georgia in the 1970s. I also play guitar in a rock cover band.

What's on your desk right now?

Working from home today, my desk is covered with a laptop, iPhone, legal pad, two highlighters, banker's lamp, Delta Skymiles card, band song list ideas, a plant of unknown species and a Star Wars figure (Bossk).

What's your media mix?

Not sure what this question means (advertising? music/movies?) but I'll choose the "fun" interpretation of "What kind of music are you listening to?" The music in my iPhone currently includes, among others, The Allman Brothers Band, the Beastie Boys, Bob Marley & The Wailers, Donny Hathaway, the Foo Fighters, Keith Jarrett, Prince and Wilson Pickett.

When you're not working, what do you do?

I spend time with my girlfriend and my youngest son (in high school — older two kids have flown the coop to college); I play in a rock cover band some weekends; I collect LPs; I attend live music events.

What is your favorite book and why?

The Book: On the Taboo Against Knowing Who You Are by Alan Watts (1966). Blew my mind when I read it in either high school or college (probably college — I was a philosophy major) with the idea that the notion of self is the genesis of everything else. Totally different perspective that's as relevant today as it was when written over 50 years ago, and perhaps even more so. The blurb on the back cover said *The Book* is a lowdown on the nature of the self, a manual of initiation into the central mystery of existence which any father might slip to his son, or mother to her daughter, upon the threshold of adult life.

Who is your hero and why?

I think each of us has the ability to be "heroic," and anyone who has the courage to stand up for what they believe in — especially in the face of adversity — is a hero of mine (even if I don't concur in the belief). But if I had to pick a historical figure, I'd pick Benjamin Franklin. A founding father, Pennsylvanian and true Renaissance man. A man of both thought and action, of both science and the arts, and an unabashed hedonist. He milked all the days of his life and still lived to the uncommon (at that time) age of 84 while doing so.

When you were a child, what did you want to be when you grew up?

At age 9, I wanted to be a pathologist, even though I really didn't even know what that was, but it sounded good. I thought it meant a "laboratory doctor." But when someone explained just what the "Quincy" type of pathologist did (say, dissecting long-rotten bodies), and that blood was often involved, I quickly decided on the profession of law at age 10. So from ages 10 through 25, I charted and traveled a course towards a J.D. Upon graduation from law school, I quickly exclaimed, "NOW what?" I'm still answering that very question today.

What do you wish you could tell your younger-lawyer self?

Relax and slow down. Pick and choose your battles wisely, and rarely. Sit quietly with yourself daily. Make a to-do list at the start of each day. Start saving now.



Cary B. Hall at the Montgomery Bar Association's Lawyerpalozza event last year. He and Patrick Kurtas formed a one-off band for the occasion called Out of Order, and he got prison outfits from the Montgomery County Correctional Facility for the event. Their set included "Breaking the Law" by Judas Priest, "Lawyers, Guns & Money" by Warren Zevon and "Folsom Prison Blues" by Johnny Cash.

Any PBA member can provide information for the "Minute with a Member" feature by completing a few survey questions. If you're interested in telling your story, please complete the following survey and send it to Nancy Wilkes, *Bar News* editor, at nancy.wilkes@pabar.org.

- Name/name of firm/position/location
- Where did you attend law school?
- What would people be surprised to know about you?
- What's on your desk right now?
- What's your media mix?
- When you're not working, what do you do?
- What is your favorite book and why?
- Who is your hero and why?
- When you were a child, what did you want to be when you grew up?
- What do you wish you could tell your younger-lawyer self?

Connect with other PBA members and give them another way to connect with you. Email responses to nancy.wilkes@pabar.org. The editor will contact you for a photograph.

ATTORNEY DISCIPLINARY / ETHICS MATTERS

STATEWIDE PENNSYLVANIA MATTERS
NO CHARGE FOR INITIAL CONSULTATION

Representation, consultation and expert testimony in disciplinary matters and matters involving ethical issues, bar admissions and the Rules of Professional Conduct

James C. Schwartzman, Esq.

- Judge, Court of Judicial Discipline
- Former Chairman, Judicial Conduct Board of Pennsylvania
- Former Chairman, Disciplinary Board of the Supreme Court of Pennsylvania
- Former Chairman, Continuing Legal Education Board of the Supreme Court of Pennsylvania
- Former Chairman, Supreme Court of PA Interest on Lawyers Trust Account Board
- Former Federal Prosecutor
- Selected by his peers as one of the top 100 Super Lawyers in Pennsylvania and the top 100 Super Lawyers in Philadelphia
- Named by his peers as *Best Lawyers in America* 2015 Philadelphia Ethics and Professional Responsibility Law "Lawyer of the Year," and in Plaintiffs and Defendants Legal Malpractice Law

(215) 751-2863

Consumer Legal Information Pamphlets Available Online

The PBA offers a series of pamphlets that explain — in lay terms — what legal issues people need to consider during the major milestones, mishaps and challenges of life.

These Consumer Legal Information Pamphlets may be downloaded at no cost for law offices to provide to clients. PBA members may also order bulk copies of the pamphlets. To print a free copy of a pamphlet or order in bulk, go to <http://www.pabar.org/site/News->

[and-Publications/Consumer-Resources/Consumer-Legal-Info-Pamphlets](#). If you have difficulty downloading the pamphlet, call the PBA Member Services Center at 800-932-0311 or send an email to info@pabar.org to request a copy. Pamphlet topics are as follows:

- Arbitration and Mediation
- Auto Accidents and Insurance
- Bringing Suit Before a Magisterial District Judge
- Buying a Home

- Child Custody
- Collaborative Law
- Criminal Law
- Divorce and Separation
- Education Rights for Mentally Gifted Students
- Education Rights for Students with Disabilities
- Estate Planning
- How a Lawyer Can Help You
- Inventor Beware
- Issues on Aging

- Living Wills/Health Care Powers of Attorney
- Know Your Credit Rights
- Protection from Abuse
- Recognizing and Preventing Identity Theft
- Renting a Home
- Traffic Violations and Summary Offenses
- Unemployment Compensation
- Workers' Compensation

Avoiding Legal Malpractice Seminars

“Avoiding Legal Malpractice” seminars are available now through December at many locations. Go to www.pabar.org. With the Pennsylvania Bar Association Insurance Program, advised and administered by USI Affinity, you have the ability to gain valuable malpractice avoidance information and earn up to a 7.5percent discount on your malpractice insurance. The Avoiding Legal Malpractice Seminar, sponsored by the Pennsylvania Bar Association Insurance Program and

the Pennsylvania Bar Institute, has been approved by the Pennsylvania Continuing Legal Education Board for 1.5 hours of ethics, professionalism, or substance abuse CLE credit. The 7.5percent credit will be prorated based on the number of attorneys in the firm who attend the seminar. The discount does not apply to part-time policies.

Find the seminar schedule at www.pabar.org/events.



Upcoming Events

Unless otherwise noted, find more information in the PBA Events Calendar at www.pabar.org or call the PBA Member Services Center at 800-932-0311.

- Oct. 8** **Exceptional Children Conference 2018**, Marriott Lancaster at Penn Square, Lancaster
- Oct. 10** **PBA Bar/Press Committee First Amendment Program**, Parkland High School, Allentown
- Oct. 12** **PBA Collaborative Law Committee Mini Retreat**, Omni Bedford Springs, Bedford
- Oct. 17-18** **PBA Minority and Women Lawyers' Business Development Forum and 2018 Diversity Summit**, PBI CLE Conference Center, Philadelphia
- Oct. 29** **PBA Minority Bar Committee Philadelphia Minority Law Day**, PBI CLE Conference Center, Philadelphia
- Nov. 1** **PBA Minority Bar Committee Central PA Minority Law Day**, Widener University Commonwealth Law School, Harrisburg
- Nov. 9-10** **PBA 2018 Women in the Profession Retreat**, The Hershey Hotel, Hershey
- Nov. 12-13** **PBA Judicial Evaluation Commission Retreat**, PBA Headquarters, Harrisburg
- Nov. 15** **PBA Committee/Section Day**, Red Lion Hotel, Harrisburg
- Nov. 15** **Pennsylvania Bar Foundation NIGHTOUT**, Sheraton Harrisburg Hershey Hotel, Harrisburg
- Nov. 16** **PBA House of Delegates Meeting**, Sheraton Harrisburg Hershey Hotel, Harrisburg

Nominations Sought for Turner Award

The PBA Family Law Section is seeking nominations for the 2018-19 Eric Turner Memorial Award. The award is given in honor of Eric Turner who was an esteemed member of the section.

Since 2000, with the exception of 2002, the section has given an award to a member of the family law bar or jurist who exemplifies the qualities possessed by Eric — a mentor, teacher and person who holds the respect of the section and the legal community. As part of the award, the section makes a donation in the awardee's name to a charity of the awardee's choosing.

The awards committee encourages members to submit nominations for this award before Oct. 31. Send nominations to Mark B. Dischell, mdischell@dischellbartle.com.