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LAWYERS JOURNAL

FOCUS *on* FEDERAL COURT

22nd Annual Martin Luther King Jr. Prayer Breakfast and Program to be held Jan. 18

By Zandy Dudiak

As the ACBA Homer S. Brown Division (HSBD) looked ahead to its 10th anniversary year in 2021, the coronavirus pandemic created some uncertainty about holding its hallmark annual event, the Reverend Doctor Martin Luther King Jr. Prayer Breakfast and Program.

"The optic of not doing it was not an option," ACBA President Elizabeth Hughes said.

Given the Commonwealth's six-foot physical distancing recommendations and limits on social gatherings, along with the ACBA putting a stop to in-person events because of the pandemic, that meant moving the event to a virtual format.

"We knew since probably early fall that it was going to be virtual because we didn't know what things would look like," said Regina Wilson, the HSBD Chair who also held that post when the division was started 10 years ago. "Even with a miracle vaccine, the likelihood of the pandemic being gone by January was unlikely. We wanted to make sure it's accessible to anyone who wants to see the program."

One downside to a virtual event is that attendees will have to prepare their own breakfasts as they join together from their homes and offices to watch the program virtually at 9 a.m. Monday, Jan. 18. Information on how to register for the event can be found at *ACBA.org*.

"You can come in your pajamas," said Alysia Keating, ACBA Director of Diversity and Gender Equality, pointing out one upside of this year's event.

PHOTO BY EMMAI ALAQUIVA

Tracey McCants Lewis
Drum Major for Justice Awardee

"We want to try to bring the same sense of community," she continued. "I hope we are able to meet the needs of the people who participate on MLK Day. We want to produce a professional program without any glitches."

A production company will weave together the one-hour, pre-recorded program, which will be emceed by retired, veteran KDKA-TV reporter Harold Hayes. The Rev. Dr. Vincent K. Campbell, senior pastor of Ebenezer Baptist Church in the Hill District, where the gathering is traditionally held, will deliver the invocation and benediction. Segments will be recorded individually and in accordance with safe COVID-19 practices.

Attorney Tracey McCants Lewis will be honored as the recipient of this year's Drum Major for Justice Award. The award is presented by the HSB Division to recognize individuals and organizations for their contributions in perpetuating the convictions of Dr. Martin Luther King Jr. to "make justice, equality and opportunity a reality for all people."

The name of the award originates from one of King's final sermons about a eulogy that might be given in the event of his death. King said, "If you want to say that I was a drum major, say that I was a drum major for justice. Say that I was a drum major for peace. I was a drum major for righteousness."

"We recognize that it's going to be a little different this year," Wilson said. "We want to bring the community together to honor the legacy of Dr. King and Tracey and how her work embodies the work of Dr. King."

McCants Lewis joined the Pittsburgh Penguins as Deputy General Counsel and Director of Human Resources in 2019. She serves on the executive management committee for the Lower Hill District Redevelopment project to make sure the proposed development on the site of the former Civic Arena is in compliance with the Community Collaboration Implementation Plan. That involves making sure minority- and women-owned businesses are participating in the development and assuring that it provides jobs for Hill District residents, both now and in the future.

In her current position, McCants Lewis has helped facilitate a Black Girls Hockey Night at a Penguins game and present a Clean Slate and Expungement Clinic that was co-hosted by the Pens.

Prior to joining the Penguins, she served as a tenured associate professor of law at Duquesne University, where she is now an adjunct professor. McCants Lewis is a past director of the Tribone Center for Clinical Legal Education at the Duquesne University School of Law. She taught the Civil Rights Clinic and Unemployment Compensation Clinic and coordinated the law school's pro bono program.

McCants Lewis also recently served as Director of Human Resources at Peoples Gas Co.

She is the incoming board chair for the August Wilson Center, which she said is "a great asset for the city and a great asset for the African-American community." Despite COVID-19, she volunteered last spring and summer with Greater Pittsburgh Community Food Bank distributions at PPG Paints Arena.

McCants Lewis formerly chaired the HSB Division, emceed the MLK breakfast event a few times and served on the Bench-Bar Committee for the past two years. Aside from work and community involvement, she is also the mother of a 24-year-old son, Marcelius Lewis.

"I am very honored to receive this award and join the list of past recipients," McCants Lewis said.

Hughes lauds McCants Lewis' "serious dedication to social justice," including marching in the streets with protesters and serving as co-chair of the ACBA's ad hoc Police Use of Force Committee.

"Tracey has done so much to advance racial justice in and out of the justice community," Keating agreed.

"Tracey is an absolutely phenomenal individual," said Hughes, who met Lewis when the two were working together one summer in Erie about 30 years ago. They also share membership in AKA, the noted African-American sorority that boasts Vice President-Elect Kamala Harris as a member. "I'm proud to call Tracey a friend and colleague." ■

Even in a pandemic, ACBA Job Board sees flurry of activity

By Brian Knavish

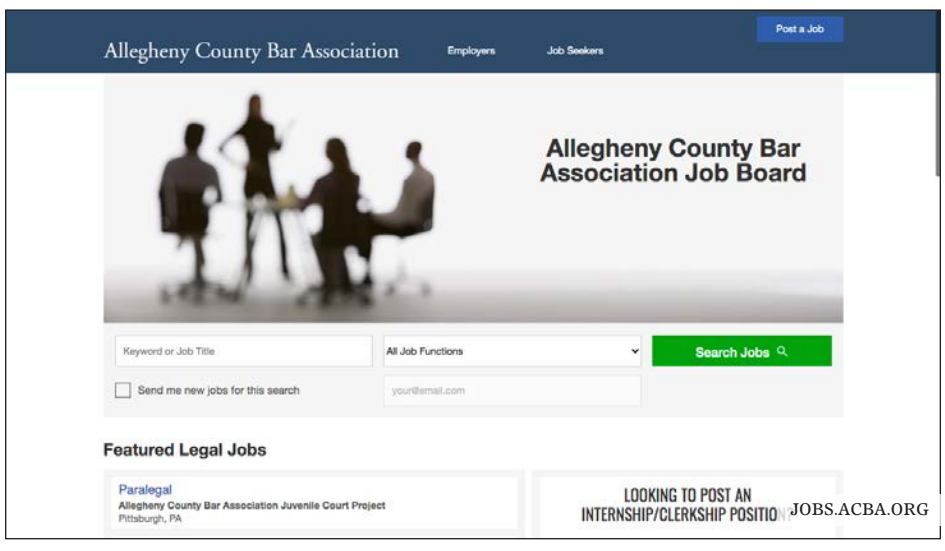
The COVID-19 pandemic has caused untold chaos in numerous areas of life. For many in the legal profession, the impact has hit their careers.

Some attorneys and other legal professionals endured job losses or reduced billable hours as a result of the pandemic. Other practice areas have seen an increase in workload, and those firms have been looking to hire.

This is all evident in the traffic that comes through the ACBA Job Board, at *jobs.acba.org*, explained Jennifer Pulice, the ACBA's Director of Legal Employment Services.

"Even during the pandemic, the ACBA Job Board has remained one of the first places legal professionals visit when they are looking for careers in the Pittsburgh legal community," Pulice explained.

In fact, there's been a 21 percent increase in page views at the Job Board from March to November, the most recent data available at the time of this publication. The Job Board is the most visited web page on any ACBA website.



JOBS.ACBA.ORG

The traffic has yielded results, as more than 150 employment matches were made as a result of postings on the job board last year.

"We were very grateful to be able to make so many matches through postings on our jobs board in 2020,"

Continued on page 2

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Gender Bias Duty Officers

If you (attorneys or law students) have observed or experienced any form of gender bias in your role as an attorney or law student intern, you may contact any one of the following members of the Gender Bias Subcommittee of the Women in the Law Division on a daily basis. The duty officers will keep your report confidential and will discuss with you actions available through the subcommittee.

Kimberly Brown.....412-394-7995
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Ethics Hotline

The ACBA Professional Ethics Committee "Ethics Hotline" makes available Committee Members to answer ethical questions by telephone on a daily basis.

January
Christine Long.....412-766-8660
Jana Pail.....412-400-3833

February
John F. Becker.....412-921-1605
Dawn Gull.....412-440-5718
Matthew McHale.....412-644-3500

THE FULL TEXT AND HEADNOTES FOR THE CASES BELOW APPEAR IN THE ONLINE, SEARCHABLE *PLJ* OPINIONS LOCATED AT WWW.ACBA.ORG.

ACBA JOB BOARD
continued from front page

said Pulice. "We did see a slowdown in hiring in the Pittsburgh legal market in April and May of 2020 during the first stay-at-home order, however, judging from subsequent postings on the jobs board, hiring in Pittsburgh is rebounding."

Pulice pointed out that one thing that makes the ACBA Job Board so attractive to candidates seeking jobs is that the ACBA Job Board is a public jobs board that anyone can view. Candidates searching for a job can view all of the jobs that are posted on the ACBA Job Board without having to first log in and/or pay a subscription to view them.

The ACBA Job Board allows job seekers to:

• Search and apply to attorney and legal support jobs.

• Upload their anonymous resume into a resume bank that is viewable by prospective employers.

> "Even during the pandemic, the ACBA Job Board has remained one of the first places legal professionals visit when they are looking for careers in the Pittsburgh legal community."
>
> *– Jennifer Pulice, ACBA Director of Legal Employment Services*

• Receive an alert every time a job becomes available that matches their personal profile, skills, interests, and preferred location(s).

The ACBA Job Board allows employers to:

• Post their job at an affordable rate and ensure their job posting will be seen by an audience who is looking for legal job openings in the Pittsburgh region.

• Promote their jobs directly to job seekers who have registered to receive the weekly Job Flash email.

• Search the resume database and contact qualified candidates proactively.

• Benefit from social media marketing: Once an employer posts a job on the ACBA Job Board, ACBA staff also publicizes that position on the ACBA's social media channels.

The association is currently offering a special to all employers who are looking to hire. Enter the code JOB30 and receive 30 percent off any of the first three job posting packages offered on the job board: The "30 Day" package, "First Seen" package, and "Job Flash" package. This coupon code is valid until Feb. 1.

Additionally, the ACBA offers career counseling assistance for job seekers and direct candidate placement for firms and employers; the latter is a fee-based service.

Members who have additional questions about the ACBA Job Board, career counseling or direct candidate placement are welcome to contact Pulice at *jpulice@acba.org* or 412-402-6623. ■

A message from the Federal Court Section Chair

By Paige Forster

The year just ended was unlike any other. When the world as we all knew it changed on a dime in March 2020, the federal courts had to assess and substantially revise a variety of proceedings, both civil and criminal. Under the CARES Act, a variety of criminal proceedings that had always been conducted in person were permitted to take place via videoconference, including initial appearances, preliminary hearings, plea hearings, and sentencing hearings. For civil proceedings, too, videoconferencing suddenly became the best way to conduct necessary business to keep cases moving forward. Of course, neither the CARES Act nor the courts' past practices set out exactly how these new-style proceedings should go. In the Western District of Pennsylvania, intensive collaboration – led by the bench, clerks of the courts, and court staff, and joined by members of the bar – enabled the Court to pivot.

Members of the Allegheny County Bar Association Federal Court Section stayed informed at every step of the way. In the first half of 2020, we held two town hall-style videoconference meetings with Chief Judge Mark Hornak of the U.S. District Court for the Western District of Pennsylvania. There, members learned about new procedures in real time. In addition, they had the opportunity to provide feedback, which the Court took into account as it continued to develop policies in response to the rapidly-changing environment we all found ourselves in.

Paige Forster
Federal Court Section Chair

The Third Circuit also found itself navigating uncharted waters. In-person oral argument, the lifeblood of the Court's decision-making process, was no longer possible. After a few sittings conducted by teleconference, the Third Circuit was able to move to videoconference oral arguments. Members of the Federal Court Section stayed abreast of changes on this front as well. Pittsburgh's Third Circuit judges attended our monthly Council meetings and advised us about updates in the Court's operations.

While the circumstances of 2020 were unique, the Federal Court Section's historical strengths were what positioned it to respond effectively. First and foremost, we have long enjoyed exceptional and supportive relationships with Pittsburgh's federal judges on the District Court, the Bankruptcy Court, and the Third Circuit. We are grateful to the members of the federal bench for their interest and involvement, which was more important than ever during the pandemic. In addition, we have over 300 members and a twenty-person Council providing active leadership. All of these individuals – bench and bar – have worked together over the long haul to build a Section that was ready and able to rise to the occasion in an extraordinary moment. I am proud of the Federal Court Section and honored to serve as its chair.

You, too, are invited to join the Federal Court Section or take advantage of our program offerings. The Section isn't just for federal-court regulars. If you practice mostly in state court, but occasionally find yourself on the other end of Grant Street or in the Third Circuit, membership in the Section is a tremendous value-add. Early in the pandemic, we shifted from traditional CLE formats to live webinar CLEs. Two spring programs that were already in the works were delivered online – one on alternative dispute resolution and one on the basics of Third Circuit appeals. Our roster of online CLE offerings continues to grow, as you can read about in this special issue. Upcoming CLEs will cover federal-court basics for criminal and civil practice, as well as important Third Circuit and Supreme Court cases. You'll take away key information that will allow you to litigate your case like a seasoned federal-court practitioner.

Federal courts and federal-court practitioners are an important part of Allegheny County's legal community. With the commissioning of Judge Scott Hardy and Judge Christy Criswell Wiegand in 2020, the Western District had a full complement of active judges for the first time since 2013. In addition, with the commissioning of Judge David Porter in 2018 and Judge Peter Phipps in 2019, four Third Circuit judges now have their chambers in Pittsburgh. The Federal Court Section provides you with a way to stay plugged into this key part of our community. Join the Section or sign up for a CLE. We look forward to partnering with you in 2021! ■

Office Depot, OfficeMax discounts

Through the ACBA's partnership with Office Depot and OfficeMax, individual members and entire firms can enjoy discounts of up to 55 percent on the purchase of office supplies and discounts of up to 70 percent on printing and copying services. Firms that spend $6,000 or more on office supplies annually are eligible for additional discounts. For more informationor to enroll, see *ACBA.org/OfficeDepot*.

U.S. District Court Bench filled for the first time since 2013

By Zandy Dudiak

Since 2018, eight new U.S. District judges – comprising 80 percent of the seats on the bench – have been appointed to the U.S. District Court for the Western District of Pennsylvania.

The latest appointment of U.S. District Judge Christy Criswell Wiegand on September 11, 2020 filled the 10-member bench for the first time since 2013. She replaced Peter Joseph Phipps, who was appointed as a judge for the U.S. Court of Appeals for the Third Circuit on July 22, 2019.

The longest gap for appointments was more than five years after the two of those vacancies occurred.

U.S. District Judge Gary Lancaster died on April 24, 2013 and his successor, U.S. District Judge Marilyn Jean Horan, was commissioned on Sept. 19, 2018 to serve in the Pittsburgh Chambers. U.S. District Court Chief Judge Sean J. McLaughlin resigned on Aug. 16, 2013 and his replacement, Susan Paradise Baxter, was commissioned as a U.S. District Judge on Sept. 10, 2018 to serve in the Erie Chambers.

Candidates must first be agreed upon by Pennsylvania's two senators, nominated by the president and then confirmed by the U.S. Senate following hearings by the Senate Judiciary Committee.

"Pennsylvania has a long history of cooperation between its two U.S. senators to recommend to the White House on a bipartisan basis qualified, mainstream nominees for federal district court vacancies in the Commonwealth," Natalie C. Adams, Pennsylvania press secretary for U.S. Senator Bob Casey, said in a joint statement issued on behalf of Casey and Sen. Pat Toomey.

Casey and Toomey have worked together since 2011 to vet, recommend and confirm 29 federal District Court judges for Pennsylvania, according to Adams. Only two states – New York and Texas – had more District Court judges confirmed to their federal benches during this time, she said.

To assist the senators in their vetting and recommendations, bipartisan judicial advisory panels are established in each district in Pennsylvania with leading members of the bar and other respected members of the community. Once Senators Casey and Toomey solicit applications for federal district judgeships, the panels then interview and recommend qualified applicants to the senators.

"After receiving these recommendations, Senators Casey and Toomey jointly submit names to the White House for potential nomination to an empty seat," Adams said. "The senators are proud that this process has ensured they are putting forth candidates with the necessary intellect, experience, character and temperament for a lifetime appointment on the federal bench."

In the last few years, the nominations have moved more quickly, Hornak said. He noted that while the number of open seats was significant, there were also many vacancies in the 1990s as well.

Kim R. Gibson moved to U.S. Senior District Judge status on June 3, 2016, but more than three years passed before her replacement, U.S. District Judge J. Nicholas Ranjan, was commissioned on July 12, 2019.

It took only two years before U.S. District Judge Robert J. Colville was commissioned on Dec. 31, 2019 to fill the seat vacated by Arthur J. Schwab, who moved to Senior District Judge status on Jan. 1, 2018. Nearly two years passed between the time David S. Cercone took senior status on Nov. 17, 2017 and he was succeeded by U.S. District Judge Stephanie Lou Haines in the Johnstown Chambers on Sept. 30, 2019.

U.S. District Judge William Scott Hardy was commissioned on July 31, 2020 to fill the seat vacated by Nora Barry Fischer on June 13, 2019, when she took senior judge status. Only about eight months passed between the time Joy Flowers Conti moved to senior judge status on Dec. 6, 2018 and her replacement, U.S. District Judge William Shaw Stickman IV, was commissioned on Aug. 5, 2019.

Three of the recent appointees are in their early-to-mid 40s, another three in their late 40s-to-mid 50s and the remaining two in their mid-60s.

Their ages take on significance because, according to Article III of the U.S. Constitution, these judges "hold their office during good behavior," which means they have a lifetime appointment except under very limited circumstances. Article III judges can be removed from office only through impeachment by the House of Representatives and conviction by the Senate.

Although all the new judges were nominated by President Donald J. Trump, there is no guarantee that they will agree with the positions of the White House. Recently, Ranjan threw out a lawsuit filed by Trump's campaign, dismissing its challenges to Pennsylvania's poll-watching law and its efforts to limit how mail-in ballots can be collected and which of them can be counted.

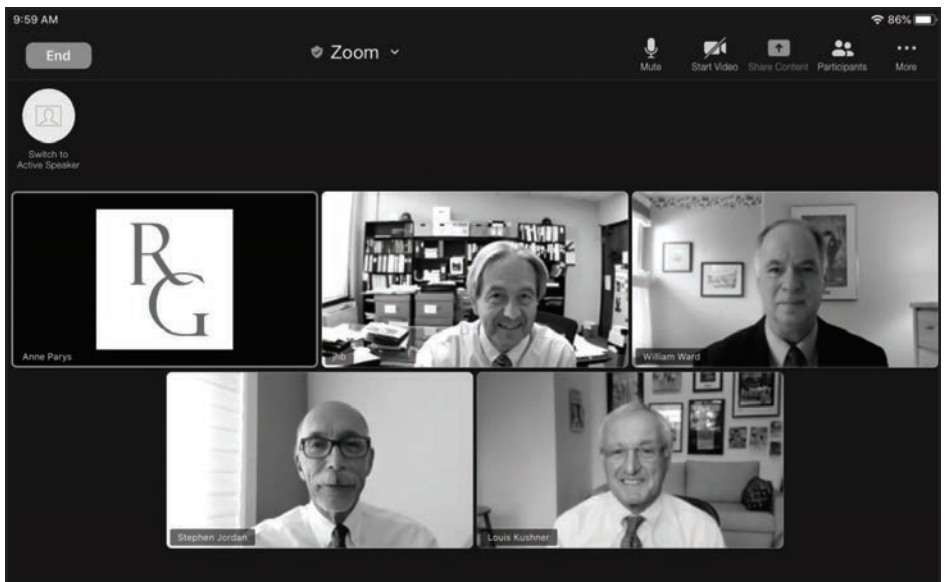
Hornak said the newer judges have energized the court.

"There is no exact mold," Hornak said. "Each of them has brought deep, rich, varied experience to the court."

Hornak praised the court's senior judges with helping to keep cases moving while the bench had vacancies. He credits Cercone with making more than 60 trips to Erie to pick up the criminal docket during the long vacancy for the district judge seat there. Other senior judges carried full caseloads in Pittsburgh and also picked up civil cases when needed in Erie before Baxter's appointment, he said.

The pandemic has not slowed the pace of the court schedule, although civil and criminal case jury selections and civil and criminal case jury trials scheduled to begin before February 8, 2021 have been continued pending further court order. In fact, the number of indictments is the highest in the history of the Western District, according to Hornak.

"The civil docket did not miss a beat," he said, crediting lawyers, judges and information technology staff with a smooth transition to virtual proceedings. "Our lawyers have been tremendously busy." ■



LAW PRACTICE MANAGEMENT

Microsoft Teams – How to smartly use a powerful collaboration tool

By Brett Creasy and John Unice

Since the world's shift to remote work, the use of workplace collaboration tools – which enable members of an organization to share information, work on documents, and communicate globally – has exploded. Microsoft Teams, an instant messaging and information sharing platform integrated into the Microsoft 365 (M365) suite of tools, is one such (very popular) platform.

While the commercial benefits of these tools can't be questioned, the robust nature of Teams also brings with it various risks: data volumes in Teams can be voluminous; files of all types can be stored in the platform; and chats (by default) are stored indefinitely. These characteristics can have major implications whenever Teams data are needed for civil discovery or other legal demands. Fortunately, lawyers can add value to their clients/organizations by helping them proactively plan for Teams' inherent risks. Before an organization rolls out this tool, attorneys should consider working with the relevant stakeholders (usually IT or information security departments) to discuss the particulars of retention settings, data collection and user groups.

Find this page helpful? Want more information and resources to help you run your practice? Check out the ACBA's Law Practice Management Center at *ACBA.org/PracticeManagement*.

Retention Settings

By default, the messaging and attachment data in Teams chats are stored in the cloud *indefinitely*. This can increase the risk of potentially compromising or damaging information being stored beyond an organization's retention policies that otherwise apply to corporate records, and of course can increase costs for data extraction, processing, review, and production. Automated deletion policies for Teams should be considered, in addition to policies across other platforms for the organization. Should automated deletion policies be implemented, the organization must also be mindful to consider the need to collect data relevant to legal holds or otherwise disable the autodelete feature, once a hold is issued.

Even though Teams chats and channel messages (targeted messages using @) are stored in M365 Exchange, retention settings for these data sources can be configured separately from user or group mailboxes. Consider establishing corporate policies that treat such communication sources similar to, for example, Outlook email, where automated deletion cycles can be implemented for the inbox and folder environments. Special consideration must be given, however, to account for legal holds.

If a custodian who is subject to, for example, a M365 litigation hold, departs the company and therefore has his/her account disabled, the user's Teams data are converted into an inactive mailbox and retained indefinitely, unless the user is removed from the hold/retention policy before disabling the mailbox (in which case the user's Teams data is deleted upon the account's deactivation). So, care must be given to monitor legal hold responses and attorneys should work with IT/HR departments to enable notifications when custodians subject to a legal hold change roles or depart the organization. Finally, consideration should be given to the various forms of "holds" available within M365. The standard "litigation hold" prevents a custodian from deleting any content, whatsoever, including documents clearly not relevant to the subject hold. This will lead to over-preservation and, ultimately, increased e-discovery costs. Other retention policies in M365 permit the user to delete data clearly not subject to one's hold obligations.

Collection

Since Microsoft Teams is part of the M365 suite of tools, the data is stored in the same format as data in M365 email (sender, recipient, date and time, subject (which is left blank) and contents of the message). eDiscovery searching is performed in an eDiscovery portal that can be set up to search for all of the communications for a user or group.

Date range, keywords and other data culling filters can be administered while searching within M365. However, when searching for key terms to respond to discovery or other legal demands, it is advisable to collect the subject user's *entire* M365 account. And, while date filtering can be applied within M365 when collecting custodial data, it can often be more efficient, cost effective, and defensible to search using parameters in tools outside of M365, particularly where key terms may be modified as the investigation or litigation unfolds.

Teams Groups

Teams Groups can be created by any M365 user. Using M365's administrative console, all groups to which a user belongs can be identified and the entire group's data can be

Continued on page 11

Clerk's Office keeps U.S. District Court for the Western District of PA running smoothly

By Meghan Swartz

When people think of the Clerk's Office, public records and case filings are among the first things that come to mind.

But that's just the tip of the iceberg for the Clerk's Office of the U.S. District Court for the Western District of Pennsylvania.

"It's like a mini municipal government," said Colleen Willison, Chief Deputy Clerk. "We're the ones who are doing a lot of the behind-the-scenes work to make sure that everything gets done on time – accurately, efficiently and professionally."

The Clerk's Office is like the nerve center of the court's operations across its Pittsburgh, Erie and Johnstown locations.

Its 70-member team supports 175 judges and chamber staff members with space, human resources and a secure information technology (IT) infrastructure. The office also serves countless lawyers, litigants, jurors and members of the public. In fiscal year 2019, for example, it summoned 9,700 prospective jurors and facilitated swearing-in ceremonies for 486 attorneys.

The Clerk's Office sets the stage for each of the court's proceedings – which amounted to over 3,000 case filings in fiscal year 2019 – from processing fees to coordinating courtroom technology and training for judges, chamber staff and lawyers.

Joshua C. Lewis

It also oversees facilities, procurement, contracting, finance and operations, and received and disbursed $17 million in fees, fines and restitution payments during fiscal year 2019.

And of course, the Clerk's Office serves as the official custodian of public records.

"The dedicated professionals that I get to work with … go above and beyond every day to make sure the judges have what they need to make sure that everyone has access to justice in the federal system," said Joshua C. Lewis, who has been Clerk of Court since 2017 and a member of the Allegheny County Bar Association since 2002.

His office also ensures the courtroom itself is accessible. If a litigant needs translation or sign language interpretation, the Clerk's Office arranges it. Accommodations also are available for nursing mothers, people with visual impairments or visitors in need of wheelchair access.

The Clerk's Office also serves as an important access point for pro se filers, who can use its online program to build the documents they intend to file with the court.

"Some of our pro se litigants are prisoners who are seeking civil rights or other relief and don't have access to counsel, so they'll file their civil rights actions themselves pro se," Lewis said.

The Clerk's Office helps to connect some pro se litigants with pro bono representation if counsel is requested as their case progresses. Attorneys interested in serving the court in this capacity can contact the Clerk's Office about adding their name to the contact list.

In a nutshell, the Clerk's Office ensures the court runs like a well-oiled machine. While its IT system has always greased the wheels, technology took on a new dimension with the onset of COVID-19.

Since March – when administrative orders from Chief Judge Mark R. Hornak postponed most jury trials and allowed video and telephone conferencing for certain proceedings – the Clerk's Office has facilitated over 1,850 video conferences.

"Basically within a few weeks, we had to figure out how to conduct court virtually as well as allow all of the participants – litigants, the public, the judges and even court reporters and interpreters – to all be able to connect to these services virtually and conduct a proceeding just as they would in person," said IT Manager Shaun Nocera.

"Security is always a top priority for the federal courts," Nocera said. "We have many teams that watch over the network to ensure that there's no malicious activity or traffic and we're constantly making adjustments, patching out systems and implementing new security controls."

Technology was playing a growing role in the courtroom well before the pandemic. All courtrooms feature fully integrated, high-definition systems, including document cameras, big-screen TVs for evidence projection and video conferencing capabilities.

"We're trying to make everything as paperless as possible ... so attorneys can plug into our system and display anything on any of the monitors for the jury and the judges to be able to view," Nocera said. "A lot of the judges are telling attorneys to use the courtroom technology, because it speeds up trials."

Some courtrooms are piloting iPads that jurors can use to view evidence, and the IT team is experimenting with touch screen features.

Continued on page 11

United States v. Borden: Why imposing mandatory minimums under the ACCA for reckless crimes offends due process

By Danielle Bruno McDermott

Danielle Bruno McDermott

The Armed Career Criminal Act, 18 U.S.C. §924(e), imposes a mandatory minimum sentence of 15 years in prison when a person who has three prior convictions for a "violent felony" or a "serious drug offense" is subsequently convicted of possessing a firearm under 18 U.S.C. § 922(g). If the ACCA does not apply, a person convicted of unlawful possession of a firearm faces a maximum penalty of 10 years' imprisonment (with no mandatory minimum). *(The language of the ACCA also implies an increased maximum sentence of life imprisonment – "such person shall be fined under this title and imprisoned not less than fifteen years[.]" 18 U.S.C. §924(e).)* 18 U.S.C. §922(g).

Under the ACCA, a defendant convicted of §922(g) who has three prior convictions for violent felonies is subject to enhanced penalties under §924(e) – however, courts are in disagreement as to whether crimes of recklessness should qualify as "violent felonies" under the ACCA.

On Nov. 3, 2020, the United States Supreme Court heard oral argument in the case of *Borden v. United States* to determine that very question. Of particular import to the Justices were various scenarios where reckless acts could hypothetically fall under the provisions of the ACCA, such as drunk driving; texting while driving; and swinging a bat recklessly resulting in serious injury to another. In *Borden*, the defendant was convicted of reckless aggravated assault in violation of Tenn. Code Ann. §39-13-102(a)(1)(B), which the Sixth Circuit has held qualifies as a crime of violence under USSG §4B1.2(a). *See Davis v. United States,* 900 F.3d 733, 736 (6th Cir. 2018). Should that conviction of reckless aggravated assault qualify as a "violent felony" under the ACCA, the defendant will be subject to a mandatory minimum sentence of 15 years in prison.

The heart of the issue in *Borden* is whether individuals who have been convicted of acting recklessly – as opposed to intentionally, knowingly or willfully – should be subject to the harsh punishment of a mandatory 15 year prison sentence (with a possible maximum sentence of life imprisonment) under the ACCA, which was created to penalize violent, repeat armed criminals. In defining the term "violent felony," the ACCA's "force clause" employs the phrase "the use ... of physical force against the person of another." This is essentially the same language that the Supreme Court analyzed in *Leocal v. Ashcroft,* 543 U.S. 1 (2004), where the Court held that 18 U.S.C. §16(a) excludes offenses committed negligently. Even if *Leocal* should apply, there remains a question of whether crimes committed recklessly were intended to qualify as "violent felonies" that would warrant the imposition of such severe penalties.

The potential effects of the Supreme Court's decision *Borden* are vast, and the potential for a ripple effect should be of significant concern to the Court and practitioners alike. The term "crime of violence" appears in a wide variety of federal statutes, including Title 18. Section 373 makes it a felony to solicit or persuade another person to commit a crime of violence. 18 U.S.C. §373(a) (incorporating the same force clause). Section 931 makes it a felony for any person to purchase, own, or possess body armor if they have been convicted of a crime of violence. 18 U.S.C. §931(a). Section 1959(a) prohibits threatening to commit a "crime of violence" in aid of racketeering. 18 U.S.C. §1952(a). The phrase is also used in various sentencing enhancements, including 18 U.S.C. §25(b) (use of a minor to commit a crime of violence); 18 U.S.C. §3663A(c)(1)(a)(i) (mandatory restitution for victims of crimes of violence); and 18 U.S.C. §924(c)(1)(A)(i) (which imposes a mandatory minimum five years' imprisonment for a person who uses or carries a firearm during and in relation to any "crime of violence").

Mandatory sentencing provisions permit little discretion, and the history of criminal sentencing legislation and jurisprudence instructs that such provisions must be constructed with an exacting certainty of potential outcomes. While there is room for disagreement on what underlying crimes should justify the harsh punishment mandated by §924(e), the question is whether the statute clearly provides that crimes committed recklessly – and not with intentional, knowing or willful conduct – were intended to be punished under this provision. In *Morissette v. United States,* Supreme Court Justice Robert Jackson – a former U.S. Attorney General and special prosecutor during the Nuremberg trials – wrote the following:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.

Continued on page 11

Wiegand becomes newest judge for the U.S. District Court for the Western District of Pennsylvania

By Zandy Dudiak

U.S. District Judge Christy Criswell Wiegand might be the newest judge on the bench for the U.S. District Court for the Western District of Pennsylvania, but she has significant experience in dealings with the federal court.

For 16 years, Wiegand served as an Assistant U.S. Attorney for the Western District in both the civil and criminal divisions. She represented the federal government and its agencies in a wide array of civil litigation in federal court and served as Deputy Chief of the Civil Division.

Then, in 2018, Wiegand moved to the Criminal Division of the U.S. Attorney's Office, where she prosecuted a variety of crimes, including large-scale drug trafficking, child exploitation, illegal firearm possession and fraud. She also served for two years on the Project Safe Child Task Force, which enhances the ability of the U.S. Attorney's Office to quickly identify and investigate those individuals who prey on children.

"Those experiences built in me a deep love and respect for our federal court," Wiegand said. "Being a federal district court judge has been a dream of mine for a long time."

That dream came true on Sept. 11, 2020 when Wiegand received her commission. Her appointment, recommended by both of Pennsylvania's U.S. senators, Bob Casey and Pat Toomey, filled the final opening on the

Christy Criswell Wiegand

bench, which has seen a number of vacancies in recent years.

"I'm so honored to be able to serve as a judge in my home city," Wiegand said.

Wiegand's interest in the law was piqued as a high school student when she became interested in the Federalist Papers. As an undergraduate student at Princeton University, she studied Constitutional interpretation and had her first thoughts about becoming a federal judge someday.

As she was pursuing her degree from Cornell Law School, where she served as an articles editor for the Cornell Law Review, she was a judicial intern for Western District Court Judge Donald E. Ziegler. As she experienced trials and saw federal cases, she gained a deeper interest in the federal courts.

As a lawyer, she said she always considered how the "other side" viewed issues and how criminal investigations developed. In her work with crime victims, she also considered the impact criminal charges had on a defendant and whether their Constitutional rights were being protected.

"When I think about my role as a federal judge, it is to be fair and impartial," she said. "My mission, as I see it, has not changed. I am committed to law and justice."

The Pittsburgh native has been in public service for most of her career. After graduation from Cornell, Wiegand practiced antitrust law at Arnold & Porter in Washington, D.C. for two years. Prior to becoming a U.S. District Attorney, she served as a law clerk to then-Judge, now Chief Judge D. Brooks Smith of the U.S. Court of Appeals for the Third Circuit.

Wiegand joined the Western District Court at a time when the courts are mostly "virtual" because of the COVID-19 pandemic. Because she had been doing video proceedings as a practitioner prior to her appointment as judge, the transition has been relatively smooth.

"I have been very lucky since I have been practicing in (federal) court for several years and I'm generally familiar with how it operates," she said. "I have friends and colleagues in the courthouse that I've known and can turn to."

That said, she is looking forward to the day she can see litigants in the courtroom.

A 2019 Pew survey found that Americans have a declining trust in government but that 84% think that decline can be turned around and improve the level of confidence people have in government. When asked about how the federal courts could help change that trend, Wiegand said it could be done one case at a time with judges showing fairness and respect.

"I do think each individual federal judge can improve confidence," she said, by making the process understandable, especially in civil cases when litigants don't have attorneys representing them.

If judges explain their decisions and follow the law in case after case, that trust can be rebuilt because the public will know they will receive fair treatment.

Wiegand has been active in professional organizations, including the ACBA Federal Court Section. She has also been involved in the community, previously serving on the boards of the Pittsburgh Parks Conservancy, the Three Rivers Rowing Association and the Princeton University Rowing Association.

"Pittsburgh has really amazing parks and the rivers are wide," Wiegand said, noting that she and her family like to stay active and take advantage of what the city has to offer. "It's a nice way to get outside and enjoy the city." ■

FCA remains an important tool for deterring and remedying fraud against the government

By Darth M. Newman

Darth M. Newman

$4 trillion dollars, Lamborghinis, Ferraris and fraud. The federal government has spent nearly as much money on COVID relief as the entirety of federal spending in fiscal year 2019. It is reasonable to expect additional billions or trillions of dollars of federal COVID relief spending in the coming months. This deluge of money is a tempting target for fraudsters. Already multiple people have been caught buying "Lambos" or Ferraris with their ill-gotten gains.

Fortunately, the government, the public, and the bar are well armed to deal with these and other cheats that would steal taxpayer money. Center stage in that fight is the False Claims Act (FCA), 31 U.S.C. §§3729 - 3733. Widely heralded as the government's best tool to combat fraud, the FCA was signed into law by President Lincoln in 1863 and was originally targeted at stemming the tide of war profiteers selling the Union Army defective material. The modern FCA remains an important tool for deterring and remedying all manner of fraud against the government. Although the law is now most often brought to bear to address healthcare fraud, the FCA remains broad.

With the exception of tax fraud, which is statutorily carved out, the FCA reaches almost all manner of fraud against the government. Submitting or causing the submission of false claims, making or using false documents to support a false claim, and withholding the payment of monies due to the government are all violations of the FCA. In addition, conspiring to violate the FCA is itself a separate explicit violation of the FCA.

One of the most powerful components of the FCA is the fact that the law empowers whistleblowers, called relators, to bring cases in the name of the government, participate in the prosecution of an action, and share in any recovery. In fiscal year 2019 alone, the government recovered more than $3 billion through FCA cases. Of that total, more than $2.1 billion came from *qui tam* cases brought by whistleblowers. In fact, since 1987, more than two-thirds of FCA recoveries have come from whistleblower-initiated cases.

To bring a *qui tam* claim, a relator must file a complaint under seal. Maintenance of the seal is of utmost importance. During the seal, no papers are served on the defendants who remain "in the dark" as to the existence of the case and the allegations of fraud. During the seal, the government will interview the relator and undertake an investigation of the alleged fraud. The case remains sealed for an initial period of only 60 days, but the government may (and often does) request extensions of the seal in order to complete its investigation. The seal preserves the government's ability to conduct a thorough and complete investigation and violations of the seal have been severely punished by the Courts.

At the conclusion of its investigation, the government will intervene and take over prosecution of the case or decline to intervene. Either way, the case is unsealed. Should the government decline to intervene, the relator may proceed to litigate against the defendant(s) on behalf of the government. Still, the government remains the injured party, will be involved in any resolution, and may seek to intervene at a later date. In fiscal year 2019, the government recovered more than $293 million from declined cases.

The damages available under the FCA are substantial. The total effective damages liability imposed for repeat small dollar frauds (think a large quantity of individually small but false healthcare charges) quickly balloons. In addition to treble damages, defendants are liable for a per-offense civil penalty of between $11,181 and $22,363, an amount indexed to inflation. Defendants must also pay a successful relator's reasonable expenses, attorneys' fees and costs. Relators may be awarded 15%-30% of the proceeds of the action depending on various factors including chiefly whether or not the government intervened.

Being a whistleblower is notoriously difficult and they remain unfortunately rare. The FCA protects whistleblowers by prohibiting retaliation and creating a cause of action for employees, contractors and agents to vindicate their rights. The protection is reasonably broad and covers being "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment". An individual need not actually file a whistleblower complaint to gain the protection of the law. "[E]fforts to stop 1 or more violations" are sufficient. The relief awarded to aggrieved whistleblowers "shall include" reinstatement, double their backpay plus interest, and an award of litigation costs and reasonable attorneys' fees.

Many states have mini-FCAs of their own and most are modeled after the federal law. Some, including New York and California, have statutes that

Continued on page 11

Officer's use of force must be "objectively reasonable"

By Jonathan Fodi

In an instant, a police officer decides to use force, sometimes deadly, in the line of duty. Today, that decision has the potential to garner vast attention, with the media, politicians, and communities alike analyzing each millisecond of an encounter between law enforcement and a civilian. At the same time, investigators and prosecutors are conducting a similar, but more consequential, inquiry – Was the force justified or excessive? Has there been a violation of state or federal law? And, if so, who is going to bring charges?

At the state level, a police officer's use of excessive force might result in charges of official oppression, assault, or, potentially, criminal homicide. Federally, 42 U.S.C. §1983 affords citizens an avenue to sue officers and public officials for civil rights violations. And, where the Department of Justice believes criminal conduct can be proven, 18 U.S.C. §242 provides for criminal sanctions for deprivation of rights under the color of law.

No matter the venue or statute at issue, an officer's use of force must be "objectively reasonable." This does not mean that an officer must use the least amount of force available to him, nor does the law permit the officer's action to be viewed with the benefit of 20/20 hindsight. Instead, "objective reasonableness" asks whether, under the totality of circumstances as viewed by the officer on the scene, a reasonable officer would have used similar force.

The "objective reasonableness" standard flows, primarily, from two

Jonathan Fodi

United States Supreme Court cases decided in the 1980s. In *Tennessee v. Garner,* the Court held that use of deadly force is a "seizure" and, pursuant to the Fourth Amendment, all seizures must be "reasonable." *Tennessee v. Garner,* 471 U.S. 1, 6 (1985). Several years later, in *Graham v. Connor,* the Court extended the *Garner* analysis to uses of non-deadly force and laid guideposts for assessing reasonableness. *Graham v. Connor,* 490 U.S. 386 (1989). The Court pointed to factors such as (i) the severity of the crime at issue, (ii) whether the suspect posed an immediate threat to the safety of the officers or others, and (iii) whether the suspect was actively resisting arrest or attempting to evade arrest by flight, as ways to assess the objective reasonableness of the force used by an officer during a stop or an arrest. *Id.* at 396. As Justice Scalia opined decades later, though, rigid application of such factors is not sufficient, and, in every case where excessive force is alleged, "we must still slosh our way through the fact-bound morass of 'reasonableness.'" *Scott v. Harris,* 550 U.S. 372, 383 (2007).

Further confounding excessive-force inquiries is the *mens rea* component inherent in all criminal prosecutions. For example, deprivation of rights under color of law must be proved by a showing that the officer in question acted "willfully." 18 U.S.C. §242. But what does "willfully" mean in this context? Must it be proven that the act (the use of force) was intentional, or that the deprivation of a civil right was intentional? While courts are split on this issue, the Third Circuit is currently settled on defining willfulness, in this context, as a "reckless disregard for a constitutional or federal right." *United States v. Johnstone,* 107 F.3d 200 (3rd Cir. 1997).

The authorities charged with the duty to investigate excessive use of force claims, thus, have a difficult job. Amidst loud cries for swift action, federal law enforcement officials must first believe that the "admissible evidence probably will be sufficient to obtain and sustain a conviction" before bringing a case against an officer. *Principles of Federal Prosecution,* Justice Manual, §9-27.220. And, where the Commonwealth might also pursue state charges based upon the same conduct, federal prosecutors face additional hurdles based in law and policy that limit dual and successive prosecutions. *See Rinaldi v. United States,* 434 U.S. 22, 27, (1977) and *Authority of the U.S. Attorney in Criminal Division Matters/Prior Approvals,* JM §9-2.031.

While dual prosecutions are not barred, they are disfavored. Accordingly, from the very moment an officer's use of force is brought into question, state and federal authorities must either work together and decide who will take the lead or run the risk of stepping on one another's investigations. Who ultimately brings a prosecution might depend on the relevant statutes at play, the potential consequences of conviction, available resources, or simple prosecutorial discretion. Indeed, even in Allegheny County over the past several years, we have seen instances of use of force cases brought only in state court *(Commonwealth v. Michael Rosfeld),* cases brought only in federal court *(United States v. Nicole Murphy),* and cases brought in both jurisdictions (*United States v. Stephen Matakovich* – federal charges filed after state charges dismissed by Pittsburgh District Magistrate).

Without question, an officer's use of force in the line of duty is under greater scrutiny than ever before – especially with a camera in every pocket and on nearly every street corner. Often there is a rush to judgment, whether it be to demand immediate prosecution or defend the reasonableness of the action. But above the cacophony of voices, investigators and prosecutors must "slosh their way through the factbound morass" of these vital inquiries with care, always mindful that their decisions must be firmly grounded in the law. ■

Continued on page 11

LAW PRACTICE MANAGEMENT
continued from page 5

searched in the same manner that an individual user's account is searched. Private groups are not discoverable to regular non-admin users; however, M365 eDiscovery Administrators can search across private groups. Consider establishing permission parameters around who can (and cannot) create groups.

Key Takeaways

1. Consider implementing automated deletion policies for Teams, in addition to policies across other platforms for the organization. Also explore setting size quotas within a user's Teams environment, to the extent permitted by the organization's M365 license.
2. If auto-delete settings are enabled, organizations must also be mindful to consider the need to collect data relevant to legal holds or otherwise disable to the autodelete feature, once a hold is issued.
3. Consider implementation of corporate policies that categorize Teams communications as ephemeral/temporary (similar to Outlook email).
4. IT, legal, HR and business unit personnel should coordinate to monitor scenarios where custodians under legal hold change jobs or leave the organization.
5. Aside from date-term restrictions, consider conducting key term searching for Teams content outside of the Microsoft environment.
6. Consider the different retention settings available within M365 (litigation hold vs. retention policies), rather than solely defaulting to the litigation hold option. ■

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CLERK'S OFFICE
continued from page 6

Nocera encourages attorneys to contact the courtroom deputy about arranging a test run with the technology. His team also offers periodic training sessions for attorneys, including some for CLE credit.

Most documents can be filed electronically, and the Clerk's Office also maintains 15 years of digital court records, which attorneys and members of the public can access at the courthouse or by applying for a PACER login to use the system remotely.

The specialties and services of the Clerk's Office could fill a book. But it all boils down to creating an efficient, accessible platform for the important work of the court.

"Our goal is to provide outstanding customer service," Willison said. "The only way we can do that is if we have feedback. So please, let us know how we're doing, let us know what we're doing well and let us know if there is something we can improve upon." ■

UNITED STATES V. BORDEN
continued from page 7

342 U.S. 246, 250 (1952). While our society has decided that some crimes can be committed recklessly or negligently, it is clear that a person who commits such an act is deemed far less culpable than a person who commits an intentional act with the purpose of harming another. Irreparable harm will result from imposing a mandatory minimum sentence of 15 years in prison for defendants that lack a culpable state of mind. Moreover, imposing such severe penalties in the absence of a culpable state of mind offends the notions of fairness and due process upon which our criminal justice system is based. These principles instruct that we must closely evaluate whether innocent acts were meant to be made criminal, and if so, we must require such provisions to be spelled out clearly in the law. ■

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FCA REMAINS AN IMPORTANT TOOL
continued from page 9

are meaningfully broader than the federal FCA. For example, the New York law permits whistleblowers to bring forward most claims of tax-fraud. Pennsylvania does not have a false claims act, but Allegheny and Philadelphia Counties do.

The FCA, mini-FCAs, and the caselaw that has grown up around them, set up myriad procedural pitfalls and best practices. As always, it is best to consult an experienced *qui tam* practitioner before filing. Beginning later this year, the Federal Court Section is producing a short series of CLEs discussing the practical side of the FCA. Dates and times to be announced. ■

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OFFICER'S USE OF FORCE
continued from page 10

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For more on the ACBA Federal Court Section visit *ACBA.org/Federal-Court-Section.*

Daubert gate-keeping in bench trials: Make sure your expert fits the bill

By James C. Martin and Devin M. Misour

In complex litigation in federal court, when technical concepts abound, parties will often need testifying expert witnesses to address the issues the jury will consider. Experts, of course, bring to mind a *Daubert* hearing with the briefing and argument that goes with it.

In that paradigm, trial courts exercise their gate-keeping duties to make sure that only reliable testimony from qualified witnesses that fits the facts of the case will be admitted and ultimately reach the jury. The reason for this rigor is well-documented. Jurors are not equipped to decide highly technical issues without expert assistance and testimony from experts can be particularly persuasive. Therefore, to reach a considered resolution of the technical issues in dispute, jurors need expert testimony grounded in "good science." That grounding, in turn, provides the requisite support for the jury's fact-finding mission.

Yet, while the need for gate-keeping when a jury is the trier-of-fact is well-documented in *Daubert* and its progeny, what about when the case involves a bench trial and a judge is the trier of fact? The governing Federal Rule of Evidence incorporating the court's gate-keeping charge, 702, makes no distinction for judges or juries, referring only to the trier-of-fact. But it also is conventional wisdom that evidentiary principles are relaxed in bench trials because judges presumptively know the rules of evidence and can separate fact from speculation more readily than lay jurors.

So the question arises, should bench trials be exempted from a threshold expert opinion admissibility analysis, with the court left to simply sort things out on the backend after hearing the opposing experts testify? Or, does the gate-keeping requirement intercede to prevent unfounded expert opinion from being introduced at trial at all, just as it would be in a case headed for a jury?

The Third Circuit addressed this question in its recent decision in *UGI Sunbury LLC v. A Permanent Easement* for 1.7575 Acres, 949 F.3d 825 (3d Cir. 2020). The answer, unanimously, is that *Daubert's* gate-keeping principles do indeed apply in bench trials and the failure to adhere to them can bring about reversible error.

Before getting to *Sunbury,* a bit of background is helpful. The court's gate-keeping role with respect to expert testimony, now reflected in Rule 702, grows out of three seminal U.S. Supreme Court decisions: *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 507 U.S. 579 (1993), *General Electric Co. v. Joiner,* 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael* 526 U.S. 137 (1999). These cases sent a clear and indelible message that the same rigors governing scientific analysis outside of the courtroom ought to apply inside it. The Supreme Court decisions find their counterparts in an established line of Third Circuit decisions which provide the ground rules for determining admissibility as well. An exhaustive analysis of the Third Circuit decisions is for another day but a few highlights can help set the stage here.

James C. Martin

Devin M. Misour

First, the Third Circuit insists that the district court, as the gate-keeper, must look at three specific issues: qualifications, reliability, and fit; and, in a proper *Daubert* ruling, the court must make findings on each one. In re *Paoli R.R. Yard PCB Litig.,* 35 F.3d 717, 741-43 (3d Cir. 1994). The first, qualifications, is self-evident. Does the witness have the needed expertise, by background or experience, to testify on the technical issues involved? See *Schneider ex rel. Estate of Schneider v. Fried,* 320 F.3d 396, 404 (3d Cir. 2003); *Elcock v. Kmart Corp.,* 233 F.3d 734, 741 (3d Cir. 2000). As for reliability, the issue at a high level is whether the witness's opinion is the product of a proper methodology grounded in the type of studies, data or publications that an expert in the field would reply on. See *Karlo v. Pittsburgh Glass Works, LLC,* 849 F.3d 61, 80-81 (3d Cir. 2017); In re *TMI Litig.,* 193 F.3d 613, 703-04 (3d Cir. 1999). And as for fit, there the question is whether the expert's opinion is properly aligned with the facts in the case. *Karlo,* 849 F.3d at 80-81. The failure to meet any one of these prongs should lead to the exclusion of the testimony, particularly where the opinion is unduly speculative or lacks the appropriate foundation for a specific case. *Oddi v. Ford Motor Co.,* 234 F.3d 136, 145-46 (3d Cir. 2001) ("The test of admissibility is not whether a particular scientific opinion has the best foundation or whether it is demonstrably correct. Rather, the test is whether the particular opinion is based on valid reasoning and reliable methodology.") (internal quotation marks omitted); see In re *Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods Liab. Litig.*, 706 F.3d 217, 225 n.7 (3d Cir. 2013). These were the working principles that took stage center in *Sunbury.*

Sunbury involved consolidated pipeline condemnations under the Natural Gas Act, in which two landowners offered testimony from an expert, Don Paul Shearer, to establish the value of the easements across their respective properties. 949 F.3d at 830. That testimony, which *UGI* challenged by pretrial motion in limine, consisted of Shearer's admittedly subjective opinion that the property encumbered by the pipeline lost value because it became "damaged goods" – not unlike appliances at a "scratch and dent" sale. Id. at 834.

The trial court admitted the testimony in bench trials in both cases, but the Third Circuit reversed that decision on appeal, finding that Shearer's testimony failed both the reliability and fit components under *Daubert.* Id. at 834-36. As for reliability, the court concluded that Shearer's reports failed to indicate that his speculative "damaged goods" theory had ever been used in the land valuation context. Id. at 834-35. As for fit, the court similarly found that Shearer's theory had never been used to show a reduction in property value as a result of the presence of an underground natural gas pipeline. Id. at 835-36. To the contrary, the court concluded that Shearer's assumption reflected "leaps of logic, elements of subjectivity, and even speculation." Id. at 835.

Central to the court's reasoning on both accounts was the conclusion that Rule 702 does, in fact, apply in the bench trial context, and that trial courts are not free to abandon their gatekeeping role merely because an expert will testify before the court, rather than a jury. Id. at 832-33. Ultimately, while the court recognized a trial court's "leeway" in admitting expert testimony, it reiterated that the trial court abused its discretion by "abandon[ing] the gatekeeping function" and by "sidestepping Rule 702 altogether and declining to perform any assessment of Shearer's testimony before trial." Id. at 833.

So what does *Sunbury* tell us? First and foremost, that a well-prepared expert relying on a proper foundation for his or her opinion is just as necessary in a bench trial as it is in a case tried to a jury. Next, *Sunbury* makes clear that a party who is resisting the admission of expert testimony in a bench trial should protect the record the same way as he or she would in a jury trial. Make a motion in limine before the trial starts. Ask for a hearing where a *Daubert* analysis can be presented. Press the issue again post-trial if the testimony is allowed. And lastly, for both parties, *Sunbury* reiterates that there is no substitute for a well-prepared expert who can speak with an adequate foundation to the issues where his or her testimony is needed.

A qualified witness is not enough. The witness must bring the requisite qualifications but also apply them to the particular case with a grounding in relevant data and facts. The Third Circuit expects reliability and fit, not speculation and conjecture. This will be true whether the trier of fact is a jury or a judge. ■

Additional options for removal to Federal Court: Tips for practitioners

By Anderson Bailey, John Goetz, Becky Kcehowski and Simone DeJarnett

Anderson Bailey

John Goetz

Becky Kcehowski

Simone DeJarnett

Every litigator knows that 28 U.S.C. §1441 allows for removal of cases alleging federal claims or involving diverse parties. But recent decisions from the Third Circuit and elsewhere highlight *additional* ways to secure federal jurisdiction over cases filed in state court. Practitioners should be aware of this developing area of the law when considering the preferred forum to litigate a dispute.

1. 28 U.S.C. §1442 allows removal of cases filed against any federal "officer (or any person acting under that officer)" relating to actions taken under color of that office. In recent precedential opinions, the Third Circuit has held that private entities can also invoke this statute, which – unlike Section 1441 – is broadly construed to favor removal. *Golden v. N.J. Inst. of Tech.*, 934 F.3d 302 (3d Cir. 2019); *Papp v. Fore-Kast Sales Co.*, 842 F.3d 805 (3d Cir. 2016).

An important question for 1442 removal is whether the defendant was assisting federal superiors in carrying out their duties. The classic example is a military contractor who follows federal specifications in manufacturing a plane, as in *Papp*. But courts have also applied the statute to government incentive programs. For example, the Western District of Pennsylvania recently permitted a healthcare system to remove state-law claims arising from the use of a secure, online patient portal. Because such portals allow health care entities to assist federal healthcare officials who are statutorily charged with expanding the nationwide use of electronic health records, the district court permitted removal under 1442. *Doe v. UPMC*, 2020 WL 4381675 (W.D. Pa. July 31, 2020). Similarly, other courts have allowed Section 1442 removal in cases involving large federal programs like Medicare. *See, e.g., Escarcega v. Verdugo Vista Operating Company, LP*, 2020 WL 1703181 (C.D. Cal. April 8, 2020). These decisions demonstrate the potential application of 1442 removal to cases implicating the operation of a federal program.

Section 1442 removal is unique, because a decision to remand can be automatically appealed. *See* 28 U.S.C. §1447(d). The Supreme Court is considering now whether this right to appeal permits a defendant also to appeal the propriety of removal on *other* grounds that ordinarily cannot be appealed. *B.P. P.L.C. v. Mayor and City of Baltimore*, 2020 WL 5847132 (Oct. 2, 2020).

2. Any defendant facing a putative class action filed in state court should consider the distinct removal provisions of the Class Action Fairness Act ("CAFA"), 28. U.S.C. §1332(d). Subject to certain exceptions, CAFA allows removal if there is "minimal diversity" in a putative class of more than 100 people seeking damages in excess of $5 million. "Minimal diversity" is a low threshold; any one member of the putative class who is a "citizen" of a state different from any defendant establishes minimal diversity.

In a question that is still being addressed within the Third Circuit, courts have split on whether allegations of *residence* are sufficient to establish *citizenship*. A case from the Eastern District followed Sixth Circuit precedent in holding that residence creates a presumption of citizenship. *Ellis v. Montgomery Cnty.*, 267 F. Supp. 3d 510 (E.D. Pa.) (citing *Mason v. Lockwood, Andrews & Newnam, P.C.*, 842 F.3d 383 (6th Cir. 2016)). Other circuits have disagreed, however, and a subsequent decision from the Western District applied the more traditional rule that courts cannot presume citizenship based on residency. *Hughes v. Nationwide Bank*, 387 F. Supp. 3d 612 (W.D. Pa. 2019). Under this traditional rule, Plaintiffs cannot avoid removal by claiming to represent a single-state class comprising only residents of the defendant's home state.

Defendants considering removal of a putative class action must scrutinize the complaint's class definition in light of these decisions. And while, as noted in *Hughes*, the residence-citizenship question "has yet to be addressed by our Court of Appeals" in the CAFA context, the statute is intended to favor removal and is more liberal in permitting appeals. *See Dart Cherokee Basin Operating Co., LLC v. Owens*, 574 U.S. 81 (2014); 28 U.S.C. §1453(c). Accordingly, defense counsel seeking to remove a case under CAFA have a better chance of obtaining appellate review of any remand order.

Continued on page 18

Federal multidistrict litigation: Recent trends and the impact of COVID-19

By Gary F. Lynch

The United States Judicial Panel on Multidistrict Litigation (JPML) was created by Congress in 1968. The purpose of the JPML is to address the situation where civil actions pending in different federal district courts involve "one or more common questions of fact" and to determine whether transfer of such actions to one federal district court for coordinated or consolidated pretrial proceedings will serve "the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." *See* 28 U.S.C. §1407.

In addressing the question of transfer, the JPML seeks to avoid duplication of discovery, prevent inconsistent judicial rulings, and conserve the resources of the parties, their counsel and the court system. The JPML, which consists of seven circuit and district court judges appointed by the Chief Justice of the United States, maintains its own docket and is located in Washington, D.C. The judges on the JPML travel throughout the country and the panel holds hearings up to six times per year in various federal courthouses. Proceedings for transfer of cases (centralization) may be initiated by the JPML on its own initiative, or by motion of a party in any action in which centralization is being sought.

Since its inception, the JPML has considered motions for centralization on more than 2,750 occasions, resulting in the transfer and centralization of over 950,000 civil actions.[1] Of these actions, approximately 325,000 actions remain pending in their transferee courts, approximately 609,000 have been resolved while in the transferee court, and approximately 17,000 actions have been remanded back to their original transferor courts for trial. As of September 30, 2020, the United States District Court for the Western District of Pennsylvania has received, and resolved, 21 Multidistrict Litigation (MDL) proceedings from the JPML, and is currently handling one active MDL proceeding. Nationally, as of November 16, 2020, there were 180 active MDL proceedings pending in 45 different federal district courts, involving 150 different district court judges. The types of cases which have been transferred and centralized by the JPML include: Antitrust, Common Disasters, Contract, Employment Practices, Intellectual Property,

Gary F. Lynch

Products Liability, Sales Practices, Securities, and other miscellaneous topics. Approximately 120 of the 180 active MDL proceedings involve class action allegations.

The COVID-19 pandemic does not appear to have impacted the business of the JPML. In its fiscal year 2020 (October 1, 2019 through September 30, 2020), the JPML received 54 motions for centralization, 21 of which were granted and 20 of which were either denied, withdrawn or deemed to be moot. These numbers are similar to fiscal year 2019, where the JPML received 49 motions, granting 20 of them. Like many courts around the country, the JPML responded to the COVID-19 pandemic by switching to remotely conducted hearings via Zoom, rather than in person.

While the COVID-19 pandemic, government shutdown orders, and related CARES Act relief programs have spawned several waves of federal court litigation on behalf of consumers, employees and businesses, much of this litigation so far has been denied centralization by the JPML.

For instance, in the wake of hundreds of federal lawsuits filed by various businesses claiming insurance coverage for business interruption losses resulting from the pandemic and/or government shutdown orders, the JPML denied industry-wide centralization of this litigation, noting that, while several factual questions raised in each case share "a superficial commonality," industry-wide centralization of all cases against all insurers would not serve the convenience of the parties and witnesses or further the just end and efficient conduct of this litigation and, to the contrary, would raise "significant managerial and efficiency concerns."[2] In denying the motion for industry-wide centralization, the JPML did, however, indicate a willingness to consider centralization of cases against specific insurers and, on that basis, subsequently granted a motion to centralize cases involving at least one insurer.[3]

In other COVID-19 related litigation, the JPML similarly denied centralization of approximately 70 cases alleging that various lenders across the banking industry failed to pay mandated fees to agents who assisted small businesses in applying for loans under the Paycheck Protection Program, a federal loan program established under the CARES Act. In denying centralization, the JPML indicated that, while the cases "undoubtedly allege similar policies and practices by the defendant banks, ... [c]ommon factual questions are lacking, as the policies and practices for paying agent fees are unique to each lender which differ significantly across the actions."[4]

Finally, in another series of cases involving the Paycheck Protection Program, the JPML denied several motions for defendant-specific centralization of various actions brought against lenders administering the Paycheck Protection Program loans under the CARES Act. The cases alleged that the lenders failed to follow federal regulations which required the loans to be processed on a "first-come, first-served" basis. The JPML again focused on the lack of efficiencies to be gained from centralization. For example, in denying centralization of the cases brought against JPMorgan Chase, the JPML indicated that "the individualized factual issues concerning the circumstances of each loan application will significantly diminish the potential efficiencies from centralization."[5]

The foregoing decisions by the JPML, in the context of the various COVID-19 litigation, demonstrate a willingness by the JPML to deny centralization, even in the face of common factual questions, whenever the panel concludes that centralization will not lead to an efficient and timely handling of the litigation, or will present too great of an administrative burden for the transferee court. As more cases related to the COVID-19 pandemic continue to be filed in federal courts around the country, it remains to be seen if the JPML will relax or modify this standard in the future. ■

Gary F. Lynch is a founding partner of Carlson Lynch LLP, a nationally-recognized plaintiffs class and complex litigation firm with offices in Pittsburgh, San Diego, Chicago and Los Angeles. Mr. Lynch routinely is appointed to lead multidistrict litigation on behalf of plaintiffs and was recently included on Law.com's top 30 list of attorneys with the most MDL appointments for the period 2016-2019.

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[1] All statistics are taken from the official website for the JPML: *www.jpml.uscourts.gov.*

[2] *In Re: COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2942.

[3] *In Re: Society Insurance Company COVID-19 Business Interruption Protection Insurance Litigation*, MDL No. 2964.

[4] *In Re: Paycheck Protection Program Agent Fees Litigation*, MDL No. 2950.

[5] *In Re: JPMorgan Chase Paycheck Protection Program Litigation*, MDL 2944.

A primer on admiralty and maritime actions and the federal courts

By Frederick B. Goldsmith and Eric A. Iamurri

Frederick B. Goldsmith

Eric A. Iamurri

Seamen's Claims

A seaman is typically a member of a crew of a commercial vessel, or a commonly-owned fleet of vessels, in navigation, who contributes to the function of the vessel or the accomplishment of its mission. When injured, the seaman typically brings three claims: (i) a federal statutory negligence claim against his employer under the Jones Act, (ii) a general maritime law ("GML"), or federal common law, unseaworthiness claim against the owner or operator of the vessel, and (iii) a GML maintenance and cure claim against his employer.

The first two claims require the seaman to prove fault or liability; the third is no-fault. A featherweight causation standard applies to a Jones Act negligence claim. The seaman prevails if the negligence of the employer played a part, "no matter how small," in causing the injury. An unseaworthy vessel is one which is not reasonably fit for its intended purpose (*e.g.,* defective equipment or condition, undermanned or improperly trained crew). This is a strict liability claim; proof of negligence is not required. A traditional substantial factor proximate cause standard applies to the unseaworthiness claim. Maintenance is a sum to compensate the seaman for his or her reasonable food and lodging expenses until reaching maximum medical improvement (MMI). Cure encompasses medical, pharmaceutical, and associated health care, and medical transportation expenses, also payable until MMI has been achieved. If the seaman's employer willfully denies or terminates maintenance and cure, it becomes liable for actual and punitive damages and attorney's fees. Seamen have long been considered wards of the court, because of their typically modest means and a history of being taken advantage of by unscrupulous marine employers.

These three seaman's injury-related claims may be brought in state or federal court, the seaman is entitled to a jury trial in either, and, if brought in state court, the case is non-removable. A seaman may also bring these claims in federal court under the court's admiralty jurisdiction, versus "at law," and so designate the claims as admiralty claims under Fed.R.Civ.P. 9(h), and thereby proceed non-jury.

Marine Insurance, Maritime Commercial and Property Damage Claims

Marine insurers typically bring declaratory judgment actions in federal court "in admiralty," meaning non-jury. They may ask the court to deny coverage based upon a policy exclusion, or void a policy from inception due an insured's misrepresentations in the application or claim process, which may constitute a violation of the GML duty of *uberrimae fidei,* or utmost good faith, which requires the insured to affirmatively disclose to the insurer, without request, all conditions which may materially affect the risk undertaken.

Parties may also bring maritime commercial and property damage claims in federal court, typically in admiralty on the basis of a maritime tort or maritime contract. When such claims are brought "at law" in state court, they are, under the Saving to Suitors Clause of 28 U.S.C. §1333(1), non-removable, absent a separate and independent basis for federal jurisdiction, such as diversity under 28 U.S.C. §1332.

The Vessel Owners' Limitation of Liability Act

When a vessel, which can range in size and value from a Ski-Doo® to a towboat, is involved in a maritime casualty, under an anachronistic federal statute passed in 1851 to encourage American shipbuilding, and before marine insurance was commonplace, its owner has the right under the Vessel Owners' Limitation of Liability Act to file a complaint in federal court under its non-jury admiralty jurisdiction. In a "Limitation Action," the vessel owner asks the court to limit its liability to the post-casualty value of the vessel and pending freight (sums due the vessel for the voyage in question).

The vessel owner's liability becomes uncapped, however, if it or its senior management personnel had "privity or knowledge," *i.e.,* they knew or should have known of the acts, omissions, events, or conditions which caused the casualty. When the vessel is a total loss, the limitation fund may be zero, or, as in the case of the Titanic, composed only of the value of its lifeboats. As in a bankruptcy filing, a Limitation Act filing acts as a concursus, and the vessel owner is entitled to a stay of all other state and federal actions against it, and all claimants against the vessel owner arising from the casualty must file an answer to the owner's complaint and a claim in the federal Limitation Action.

In certain situations, such as when there is a single claimant against the vessel owner, such as a seaman with personal injury claims, the seaman is entitled to file or resume his or her suit in state court against the vessel, provided he or she files stipulations protective of the federal court's exclusive right under the Limitation Act to later determine (i) the privity and knowledge issue and (ii) the value of the limitation fund.

Rule B Attachments and Rule C Arrests

Under Rule B of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions, if a defendant is not found within the federal district, a creditor may file a verified complaint in federal court against the debtor's vessel to attach and garnish it to both obtain jurisdiction and satisfy or secure a judgment. Under Supplemental Rule C, a claimant or other creditor with a maritime lien against a vessel, may file a verified complaint against the vessel and have the U.S. Marshal arrest it. Rule B and C actions may only be brought in federal court.

Strategy Considerations of Filing in State Versus Federal Court

Counsel for a Jones Act seaman may prefer to file suit in federal court to draw a jurist who may be more familiar with admiralty and maritime actions. In federal court, they will be able to depose opposing experts and easily issue and serve nationwide Fed.R.Civ.P. 45 document and witness subpoenas. Whereas in state court, such as in the Allegheny County Court of Common Pleas, while the court *may* be less familiar with admiralty actions, counsel is unlikely to be under the time constraints of a scheduling order, which may be preferable if, for example, the client has an injury or medical condition which is still evolving. The Pittsburgh Division of the U.S. District Court for the Western District of Pennsylvania draws jurors from 13 counties, most of which are considered politically conservative in contrast to the typical Pittsburgh-weighted venire in Allegheny County. ■

Frederick B. Goldsmith is a 1990 graduate of Tulane Law School, former federal judicial law clerk and tugboat company general counsel, Proctor Member of the Maritime Law Association of the United States and vice-chair of its Marine Torts & Casualties Committee, is admitted in PA, WV, and OH. He is the co-founder of Goldsmith & Ogrodowski, LLC (www.golawllc.com) and focuses his nationwide practice on representing commercial vessel crewmembers in death and career-ending injury claims. Eric A. Iamurri is a 2020 combined JD/MBA graduate of Tulane University's law and business schools, where he was a member of the Tulane Maritime Law Journal, is a law clerk for Goldsmith & Ogrodowski.

Our Health Care Power of Attorney and Living Will documents are available on the ACBA website for free at *ACBA.org/POA-Living-Will.*

U.S. District Court for the Western District of Pa. continues to serve the citizens of Western Pennsylvania

By Chief District Judge Mark R. Hornak and Chief Magistrate Judge Cynthia Reed Eddy

Mark R. Hornak

Cynthia Reed Eddy

Thank you to the Allegheny County Bar Association for dedicating this issue of the *Lawyers Journal* to practice in our federal courts. For more than 200 years, our Court has served the people of Western Pennsylvania, spanning 25 counties and 3 million of our fellow citizens. Each year, nearly 3,000 civil cases and more than 500 felony criminal cases are filed in our Court. Through the efforts and energy of our staff and colleagues, our Court has developed innovative approaches to providing just, timely and economical resolutions to those disputes.

With courthouses in Pittsburgh, Erie and Johnstown, our Court is comprised of ten active and seven senior District Judges and six Magistrate Judges. The Court's work is furthered by the work of Clerk of Court Joshua C. Lewis and his team. With dedicated and professional staff on duty in each Division, that office is responsible for the safe and secure processing of tens of thousands of case filings, and often handling more than $50 million in entrusted funds each year. As a public institution, we strive to perform our work with transparency, precision and care.

The past two years have been a time of great change and challenge in the Western District. We have had the pleasure of welcoming new colleagues to our Court, including District Judges Marilyn Horan, J. Nicholas Ranjan, William Stickman, Robert Colville, Scott Hardy and Christy Criswell Wiegand in Pittsburgh, Susan Paradise Baxter in Erie and Stephanie Haines in Johnstown, along with Magistrate Judges Patricia Dodge in Pittsburgh and Richard Lanzillo in Erie. Their broad, profound and varied professional and personal experiences have added much to the Court, and their collegiality and commitment have been in the great tradition of our Court. We acknowledge and appreciate the efforts of Senators Bob Casey and Pat Toomey in working together to fill each of the vacancies that had arisen in our Court. For many years, the Court operated with a vacancy rate of up to 80%, and their collaborative efforts have advanced the sound administration of justice in our District.

The Court is fortunate to have the continued service of our Senior District Judges, who each carries a significant caseload and brings their considerable experience to the work of the Court. We are also grateful for the thoughtful and dedicated work of our Court Executives. The teams that they have assembled and lead support the work of the Court in many important ways.

This year, we, too, have confronted the COVID-19 pandemic. It has significantly impacted the lives of all who interact with the Court. In the blink of an eye, we were required to turn our operations on a dime and move to the "virtual world." Thanks to our Information Technology team, and collaboration with our colleagues in the United States Attorney's Office, the Federal Public Defender, the Criminal Justice Act ("CJA") lawyers panel, and the Probation and U.S. Marshal's Offices for our District, we have fully implemented the provisions of the CARES Act authorizing federal courts to conduct certain proceedings by video or telephone conference. More than 2,300 video proceedings have been held, including bench trials, initial criminal proceedings, evidentiary hearings, oral arguments, change of plea hearings and criminal sentencings. The lawyers who practice in our Court have adapted quickly and effectively and have combined dedication to the cause of their clients with an unprecedented level of flexibility to accomplish their work.

During the pandemic, the Court has welcomed the advice of public health professionals in guiding how we would continue to conduct the public's business. The Court has remained open and in operation in each Division. While jury trials and most in-person proceedings have been on hold due to public health concerns, grand juries have been in session, urgent naturalization ceremonies have been held in a "socially distant" fashion, our "specialty courts" have convened, and the Court's civil docket, which is recognized for its timeliness and efficiency, has remained current. The Court continues to work closely with counsel to address the complex and difficult challenges the pandemic has generated for cases on the Court's criminal docket.

Our Court has long been a national leader in using Alternative Dispute Resolution or "ADR" processes to facilitate the timely disposition of civil cases. That has continued apace, thanks to the creative work of our dedicated ADR Neutrals and counsel and clients who have used technology to conduct those proceedings virtually with rates of success consistent with pre-pandemic times.

The Court has been supported by the resources of the Administrative Office of the U.S. Courts, and we have appreciated collaborating with the Allegheny and Erie County Bar Associations in "town hall" meetings to further two-way communication with the practicing Bar. We have benefitted from the leadership of Chief Circuit Judge Brooks Smith and Circuit Executive Margaret Wiegand, and the wise counsel of chief district judges of other courts inside and outside of our Circuit, as we confront common challenges. We have forged renewed relationships with the state courts in our District, and with their President Judges, who have been the source of sound judgment and many good ideas.

For more than two centuries, through times of war and of peace, and during times of economic, social and public health challenges, the federal courts have been a constant in our national life. Often called upon to resolve some of our Nation's most difficult and complex legal questions and disputes, the federal courts have relied on the confidence of our fellow citizens in our dedication to the rule of law. By virtue of the judicial independence granted to the federal courts by our Nation's Founders, we strive each day to apply the sacred principles of our Constitution to resolving the matters before us. In times of great challenge, those principles can take on added significance, and the work of the federal courts, including ours, may become more visible and urgent. We in the Western District of Pennsylvania are grateful for the privilege of serving the residents of our District and of the Nation and look forward to continuing that service with fidelity to those historic principles for many years to come. ■

Child exploitation investigations rise during pandemic

By David Shrager and Lyle Dresbold

As the pandemic has forced many to spend more time at home and likewise online, the number of Cybertips involving child pornography and child exploitation are spiking. Meanwhile, federal law enforcement is investing resources into investigating these cases and seeking lengthy prison sentences, despite no recent guidance from Congress.

Federal law prohibits the possession, receipt, and distribution of files and videos containing intimate images of children under eighteen. Internet service providers such as Comcast and Verizon and internet companies such as Google and Facebook are required by law to take steps to prevent the online exploitation of children. When suspected child pornography is identified on their platforms, the companies must provide a Cybertip report to the National Center for Missing and Exploited Children, including a visual description with geographic and other information known to the company.

These tips, once received, are distributed to the appropriate region. Most tips received in Western Pennsylvania are sent to the Internet Crimes Against Children Task Force and the Pittsburgh Child Exploitation and Human Trafficking Task Force. These teams are comprised of members of the FBI, Allegheny County Police, Pennsylvania State Police, and local police forces. In 2019 Western Pennsylvania received 302 Cybertips, this year we are on pace to open 375.

David Shrager

Lyle Dresbold

Steve Dish of the Allegheny County Police and a member of both task forces believes that the marked increase in Cybertips is directly related to people being at home and on their devices more. With less out-of-home activities and less physical contact with other people, those already predisposed to viewing child pornography are spiraling deeper into their addiction.

The disruption in normalcy presents a second problem as children are spending more time at home with their potential abusers. Because of changing dynamics in the home, a potential predator may have more access to the child. Abusers also may have a greater and often uninterrupted opportunity to groom children, or lower their resistance using manipulation. Predators use child pornography in grooming and then often produce files of their own to share or swap with others. As there are no teachers or other mandated reporters interacting with the children or speaking to them, there is less opportunity to intervene or even spot signs of abuse.

Once a tip is confirmed as containing images of child pornography, agents work to confirm the identity of the user. This often requires issuing subpoenas and search warrants to internet service providers and social media companies. Once they determine the account holder's address they will apply for and execute a search warrant of the residence for any devices capable of holding or receiving the images. An arrest is not usually made immediately unless they discover evidence of a hands-on offense. Once the devices are searched, a decision is made, often based on the number of images and what they contain, whether to pursue the case at the federal or state level.

If the case is prosecuted in state court it can often be resolved with probation or a short jail sentence followed by sexual offender treatment and intense supervision. If the case is prosecuted in federal court, it almost always results in significant prison time.

At sentencing, a federal court starts its analysis by looking at the advisory guideline provisions promulgated by the United States Sentencing Commission. The base level for most child pornography offenses is 18, which translates to a guideline sentence of 27-33 months, before a slight decrease for acceptance of responsibility and assuming no prior record. However, there are several specific offense characteristics that can greatly increase that calculation.

Many of the enhancements were created at a time when internet use was less ubiquitous. Guidelines that were intended to apply only in atypical or aggravated cases, are now common. Guidelines will be enhanced if the defendant used a computer, if there were more than ten images, or if the images depicted prepubescent minors, or sadistic or masochistic content. The enhancements involving pre-pubescent minors, use of computers, and number of images, each apply in over 96% of cases. Due to the enhancements, many defendants, including those with no prior criminal records, have guideline ranges at or near the statutory maximum. Because most of the enhancement provisions apply to typical defendants, the guidelines do a poor job of distinguishing among defendants in terms of their relative culpability and dangerousness. This results in significant sentencing disparities as sentencing judges often do not sentence defendants within the recommended guideline range.

In 2012, the Sentencing Commission issued a report to Congress, urging them to address the problems with the guidelines and the need to adapt to

Continued on page 18

Federal Court Section announces 2021 CLE programs

By Ron Cichowicz

With a new year comes new opportunities for attorneys to increase their knowledge, particularly in specialty areas. With that in mind, the ACBA Federal Court Section continues to develop an attractive schedule of CLE offerings for 2021, while still acknowledging the ongoing impact of disruptions caused by COVID-19.

"When the pandemic hit, Pennsylvania' CLE Board wisely – and graciously – extended the deadlines for 2020 CLE compliance," said Paige Forster, law clerk to Judge D. Michael Fisher in the U.S. Court of Appeals for the Third Circuit and Chair of the ACBA Federal Court Section. "While we all figured out how our practices would look in the new normal, the easiest thing to do was to hit the pause button on attending CLEs.

"But now, things are different. The CLE Board has lifted the cap for distance learning credits for both 2020 and 2021, everyone has figured out videoconferencing and all systems are go for a great slate of programs in the new year. Whether Allegheny County lawyers are interested in local legal history, want to build their District Court practice skills, or need updates on key Third Circuit and Supreme Court decisions, the Federal Court Section has them covered."

The CLE Programs currently scheduled are:

January 28: *Labor and the Steel Bar: Pittsburgh Lawyers and the Fate of the NLRB,* with attorney presenters Ron Schuler, Joseph Hornack and Joseph Quinn.

Mary-Jo Rebelo, a partner at Burns White who is planning this program, explained that the session ties to the book, "*The Steel Bar: Pittsburgh Lawyers and the Making of America.*"

"The focus of the program is to cover the remarkable story of how two Pittsburgh lawyers came to argue the Supreme Court case that sustained the National Labor Relations Board as the arbiter of collective labor activity in the United States," Rebelo said. "This case came against the backdrop of an economic depression, intense labor strife and a president's threat to pack the Court.

"It will be an hour filled with a most interesting historical presentation followed by a moderated discussion by two noted Pittsburgh labor lawyers – Joseph Hornack and Joseph Quinn – about the future of the NLRB."

Spring (date TBD): *Federal Court Basics,* a 3- to 4-hour CLE on how to handle a criminal case in the Western District from start to finish. (If conducted via Zoom, the presentation may be divided into two 2-hour segments.)

"This will be a program designed for practitioners both new to federal court or experienced ones looking for an update," said program planner John Schwab, a partner at Pietragallo Gordon Alfano Bosick and Raspanti. "It covers the full breadth of a federal criminal case – from the grand jury investigation and indictment to the presentence report and sentencing. The speakers include judges, prosecutors, defense counsel and probation officers."

April or May (date TBD): *Third Circuit Review*

"The Third Circuit Review is an annual CLE program during which a panel of distinguished Third Circuit judges discuss the most significant Third Circuit decisions from the past year," said Devin Misour, program planner and an associate at Reed Smith. "The program provides great insights for anyone who practices in federal courts within the Third Circuit."

June 24: *U.S. Supreme Court Case Review*

According to program planner Kezia Taylor, Assistant United States Attorney in the U.S. Attorney's Office for the Western District of Pennsylvania, this CLE session will be moderated by Third Circuit Judge Thomas Hardiman. Panelists will include former Supreme Court clerks Leo deJulius and Dean Amy Wildermuth.

"The program will discuss recent Supreme Court decisions and their impact on lower courts and the practice of law as well," Taylor said. "The former clerks will provide a behind-the-scenes perspective in the innerworkings of the court and the decision-making process.

"This program will be of great value because we are living in a time where even laypersons are tuning in and weighing in on the composition of the court and the cases pending before the court and the opportunity to have an appellate judge and former Supreme Court clerks discuss judicial independence and the interpretation of law is rare."

For more information in the 2021 schedule, visit *ACBA.org.* ■

ADDITIONAL OPTIONS FOR REMOVAL
continued from page 13

3. Finally, counsel should be aware of the federal courts' increasing acceptance of "snap removals." Section 1441, which permits removal in diversity cases, does not apply where any of the parties "properly joined *and served* as defendants is a citizen of the State in which" the action is brought. 28 U.S.C. §1441(b)(2) (emphasis added). Earlier this year, the Fifth Circuit joined two other Circuits – including the Third Circuit – in interpreting this language to permit removal before the forum defendant is served. *Tex. Brine Co., L.L.C. v. Am. Arbitration Ass'n,* 955 F.3d 482 (5th Cir. 2020) (citing *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018)). Both forum defendants and non-forum defendants can seek to take advantage of this interpretation by seizing the initiative and removing a case quickly after it has been filed and before service of process, even if the case is filed in a defendant's home state. But beware: not all courts have embraced this interpretation of the statute. *See, e.g., Brown v. Teva Pharms., Inc.*, 414 F. Supp. 3d 738 (E.D. Pa. 2019).

This article does not address every possible theory of removal. However, counsel should consider the variety of options for securing federal jurisdiction when analyzing the preferred forum in which to litigate a dispute. ■

David Shrager is the managing partner at Shrager Defense Attorneys, a law firm focusing on criminal defense and DUI defense. Lyle Dresbold is a senior attorney at the firm.

CHILD EXPLOITATION INVESTIGATIONS
continued from page 17

changing times. However, Congress has not acted. With the pandemic and new technology creating an uptick in exploitation, individual task forces, prosecutors, and courts will continue to adapt, without congressional guidance, to try and tackle this problem. ■

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A Look at the Updated ACBA Advance Directive Forms
Thursday, January 14 | Noon
1 Substantive Distance Learning credit

Tips for Handling Unpaid Medical Bills and Liens in Workers' Compensation Litigation and Mediation
Thursday, January 14 | 3 p.m.
1 Substantive, 1 Ethics Distance Learning credits

Tax Planning in the Post-Election World
Tuesday, January 19 | Noon
1 Substantive Distance Learning credit

Corporate Law for the Non-Corporate Attorney – In the COVID Economy and Beyond
Thursday, January 21 | Noon
1 Substantive Distance Learning credit

Preparing to Examine Vocational Experts in Social Security Hearings
Monday, January 25 | Noon
1.5 Substantive Distance Learning credits

Environmental Law Update – 2020 Year in Review
Tuesday, January 26 | Noon
1 Substantive Distance Learning credit

Understanding QDROs and like Orders for Dividing Retirement Plans in Divorce
Wednesday, January 27 | Noon
2 Substantive Distance Learning credits

Labor and The Steel Bar: Pittsburgh Lawyers and the Fate of the NLRB (Then and Now)
Thursday, January 28 | Noon
1 Substantive Distance Learning credit

Staying Safe and Sound – Maintaining a Work-Life Balance in Uncertain Times
Thursday, February 4 | Noon
1 Ethics Distance Learning credit

COVID-19's Impacts and Challenges in Education
Wednesday, February 10 | 1 p.m.
1 Substantive and 1 Ethics Distance Learning credits

Miles for Inches: A History of the Advancement of Women and African Americans in the Pittsburgh Bar
Thursday, February 11 | Noon
*1 Ethics Distance Learning credit | * Free for ACBA Members*

Ethical Considerations for Lawyers Working Remotely
Friday, February 12 | Noon
1 Ethics Distance Learning credit

Legal Issues Listing and Selling Real Estate Involving Oil and Gas
Tuesday, February 23 | 2 p.m.
3 Substantive Distance Learning credits

The ACBA has nearly 100 previously recorded **ONLINE CLEs** in dozens of practice areas ready to be viewed 24/7 from anywhere at **cle.acba.org.** *View anytime, anywhere.*

#ElderLaw – An Overview of Elder Law
1 Substantive, 1 Ethics credits

A Behind the Scenes Look at a Residential Real Estate Transaction
2 Substantive credits

A Look at the Ethics of Physical Evidence at a Crime Scene
1 Ethics credit

A Name is an Identity: The Name Change Process and Vulnerable Communities
1 Substantive credit

A Primer on COVID19-related Business Interruption Insurance Coverage in Pa.
1 Substantive credit

Alcoholic Beverages and Nonprofit Organizations
1 Substantive credit

Alimony: Expert Views on Need, Amount and Duration
2 Substantive credits

Allegheny County Voir Dire in 2020
1 Substantive, 1 Ethics credits

An Introduction to Telemedicine and the Future of Patient Care
1 Substantive credit

An Overview of Trusts
2 Substantive credits

Are You Lawyering or Laboring
1 Substantive credit

Are Your PC and Data Secure – What Cyber Security Means to Today's Lawyer
2 Substantive credits

Asylum Law for Non-Immigration Lawyers
2 Substantive credits

Attorney Office Space – Options and Considerations
1 Substantive credit

Bankruptcy Basics for the Non-Bankruptcy Practitioner
2 Substantive credits

Behind the Mask: How to Effectively Try a Case in a Pandemic
2 Substantive credits

Best Practices for Working with Intellectual Property Damages Experts
1 Substantive credit

Biggest Mistakes Made by Trial Lawyers
1 Substantive credit

Client Conversations that Connect Planning & Philanthropy
1 Substantive credit

Constitutional Rights in the Digital Age – Is There an App for That
2 Substantive credits

Contract Drafting Overview: Tips & Tricks for Corporate Attorneys
1 Substantive credit

Coronavirus and Your Mental Health
1 Ethics credit

COVID in Schools from the Perspective of Pa. Teachers
1 Substantive, 1 Ethics credits

Covid-19 Tax Update
1 Substantive credit

Criminal Law for the Non-Criminal Attorney
1 Substantive credit

Crisis Communication: A Guide for Safeguarding Brand Equity Amid COVID-19
1.5 Substantive credits

Crisis Communication: A Guide for Safeguarding Brand Equity, Reputation & Bottom Line
2 Substantive credits

Diversity and Inclusion in Probate and Trust Practice
1.5 Ethics credits

Divorce Law 101
1 Substantive credit

Does Your Brand Have Bandwidth
1 Substantive credit

Education in the Era of COVID-19
1 Substantive credit

Effects of Trauma and Stress on Our Lives
1 Ethics credit

Electronic Evidence: Collecting, Preserving and Reviewing Critical Information
1 Substantive credit

Emeritus Status in Pennsylvania
1 Ethics credit

Environmental Site Assessments and the New All Appropriate Inquiry Rule
1 Substantive credit

Equitable Distribution of Oil, Gas and Mineral Rights in Family Law
1.5 Substantive credits

Ethical Considerations in Drafting Contracts
1 Ethics credit

Ethical Considerations in Family Law Custody Litigation
2 Ethics credits

Ethical Considerations When Lawyers Make Lateral Moves
1 Ethics credit

Fair Housing Rights and Responsibilities: Reasonable Accommodations
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Bar Briefs

News and Notes

John Unice

John Unice has assumed the position of CEO at bit-x-bit. Unice will lead the overall management, strategic direction, and service offerings for the company, leveraging his experience as a litigator and in-house legal advisor at multinational, complex organizations.

Ashley N. Crane

Audra E. Phibbs

People on the Move

Leech Tishman Fuscaldo & Lampl, LLC (Leech Tishman) is pleased to announce the addition of two new associates to the firm, **Ashley N. Crane** and **Audra E. Phibbs.** Crane joins the firm as an Associate in the Intellectual Property Practice Group and Phibbs joins the firm as an Associate in the Estates & Trusts Practice Group. Both are based in Leech Tishman's Pittsburgh Office.

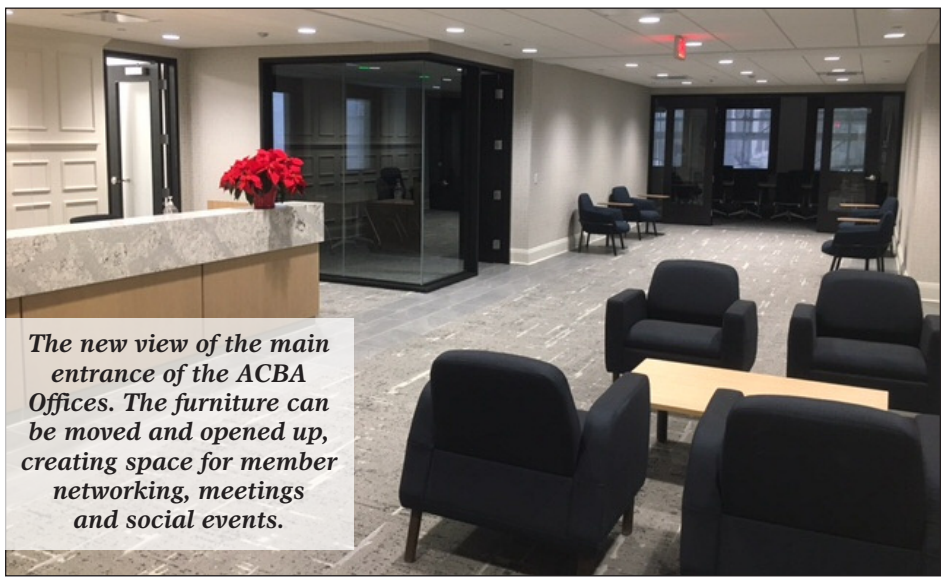
Strassburger McKenna Gutnick & Gefsky (SMGG), a full-service law firm, is pleased to announce the hiring of **Michael Nicolella** as the firm's newest Associate Attorney. Nicolella's primary area of focus will be commercial law.

Wonder if your decisions, legal advice or other professional actions are ethical?

Members can get consultation on their legal actions and potential actions through the ACBA Professional Ethics Hotline.

See *ACBA.org/OfficerAssignments* for details.

Take a look inside the renovated ACBA headquarters



The new view of the main entrance of the ACBA Offices. The furniture can be moved and opened up, creating space for member networking, meetings and social events.

The new ACBA Board Room features brand new AV equipment. This is now located right along the Seventh Ave. side of the Koppers Building.

Members can meet and mingle in the member lounge area.

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Visit us today at *ACBA.org*.

OIL, GAS & MINERALS

ATTORNEY STEPHEN RALPH, PROFESSIONAL GEOLOGIST Oil & Gas Transactions, Mediation, Asset Management and Consulting *(P.G. license status: active-retired).* 724-519-8094. *OilandGasMediation.com.*

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