

# LAWYERS JOURNAL

## Cappy to resign at the end of 2007

By Lisa M. Wolfe

**P**ennsylvania Supreme Court Chief Justice Ralph J. Cappy announced on September 11 that he would resign at the end of the year after 18 years on the state's highest court. Cappy disclosed his early retirement in a public statement and in a letter to Gov. Ed Rendell, who must name a successor to fill out the last two years of his term. The governor's choice will face confirmation by the state Senate in early 2008.

Cappy has been a member of the judiciary for nearly 30 years. He was an Allegheny County Court of Common Pleas judge prior to taking his seat on the Pennsylvania Supreme Court.

"After years of an extremely busy work schedule, I believe it is time to go," he said in his statement.

Cappy had a hip replaced in July, and during his recovery he decided it was time to move on.

"I had time for reflection. I realized that ... the time had come for me to pass on the torch," Cappy said. "My health is still good. But I want to spend more time with my family and to pursue personal interests."

ACBA President Ken Gormley believes that Cappy will leave a lasting mark on Western Pennsylvania's legal community.

"Chief Justice Cappy has been a dominant force in the Pittsburgh legal community for decades," said Gormley, a professor of constitutional law at Duquesne University School of Law. "He left a real imprint as the public defender in Allegheny County and then he established a real presence on the Court of Common Pleas. He was known as the judge who could resolve the most impossible cases."

"Chief Justice Cappy had a knack for bringing people together, zeroing in on the core issue and finding a way to

resolve the most complicated disputes."

After a mostly quiet tenure on the Supreme Court, Cappy was placed into the spotlight during the controversy over the 2005 pay raise. Cappy, however said that the pay raise issue did not cause him to leave the court prior to the expiration of his term in 2009.

"Let me be clear: The fact is that the controversy played no part in this decision," he said.

Cappy did not back down on his assertion that fair and adequate pay for state judges is needed. While "we cannot hope to have judicial salaries that compete with the private sector," he said, "we must have salaries high enough to attract and retain outstanding people as judges."

Cappy is proud of the improvements in the Supreme Court during his five years as chief justice.

"We have modernized. We have developed new programs to better serve the people who use the courts. We have worked to address the needs of families, women and minorities in the courts. We have improved courthouse security," he said.

Cappy said he will continue to serve on the University of Pittsburgh's board of trustees and on the University of Pittsburgh Medical Center board, but he intends to cut back on any other public commitments.

"I am proud of Pennsylvania's Unified Judicial System and all that we have accomplished within the courts,"

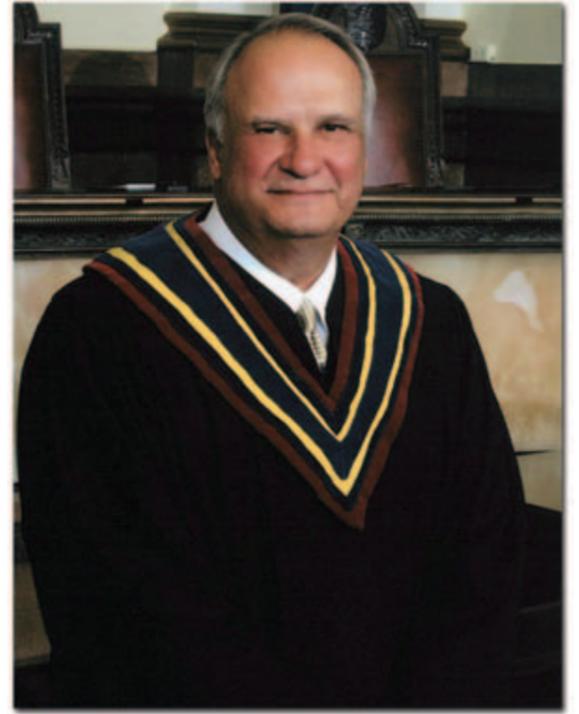
said Cappy. "Although I will leave judicial service at the end of this year, I will always remain committed to the principles of judicial independence and judicial excellence. As importantly, I will always treasure the honor of having worked with so many fine colleagues who devote themselves to these principles."

Gormley said that Cappy has been a dominant force of the Pennsylvania Supreme Court since he ascended to the bench.

"He has been a leader in establishing a body of law relating to the Pennsylvania Constitution," said Gormley. "In *Commonwealth v. Edmunds*, Justice Cappy set out a protocol for judges and lawyers to follow in analyzing state Constitutional cases so that a lasting body of law would develop in that area. He succeeded in doing that and his cases are now widely cited by courts across the country as leading examples of state Constitutional jurisprudence at its best."

Justice Ronald Castille, the justice with the second longest tenure on the court, will take over the role of chief justice beginning in January.

There also will be other changes on



Hon. Ralph J. Cappy

the seven-member high court in 2008. Along with the justice appointed by Rendell to fulfill the rest of Cappy's term, two new justices will be elected in November to replace Justice Cynthia Baldwin and Justice James Fitzgerald. Baldwin and Fitzgerald are currently filling the terms of former Justices Nigro and Newman. ■

## Christian Legal Aid Society joins Pro Bono Center

By Jason Green

**T**he Christian Legal Aid Society (CLA), a legal clinic that helps low-income and indigent individuals with civil law issues, has joined the Allegheny County Bar Foundation's Pro Bono Center.

"The advantage is that we will have better training for volunteers," said Livia Langton, the society's president and clinic manager. "We'll have a broader pool to pull from."

The clinic, which opened in January 2004, is staffed by 20 attorneys and 30 University of Pittsburgh and Duquesne University law school students who volunteer their time on a monthly or quarterly basis. It is open from 6 to 9 p.m. four evenings per month—at the Church of the Ascension in Oakland on the first Thursday of the month and at the Allegheny Center Alliance Church in the North Side on the second, third and fourth Tuesdays of every month.

The clinic is operated by two attorneys and three law student staff members each night it is open, said Langton,

an attorney with Eckert Seamans Cherin & Mellott. The volunteers counsel clients, providing advice and referrals on a variety of non-criminal issues, including estates and trusts, landlord-tenant, protection from abuse and bankruptcy matters. Christian Legal Aid members do not regularly accompany clients to court, Langton said.

Langton hopes the clinic will be able to acquire private funding to hire a paralegal, and eventually, an attorney, to staff the clinic on a full-time basis.

As a member of the Pro Bono Center, resources will be available to the CLA. The resources include assistance with recruiting attorneys, providing malpractice coverage to the volunteers and providing the CLA with access to free legal research through the Pro Bono Center's LexisNexis grant.

Lorrie Albert, the Allegheny County Bar Foundation's director and former pro bono coordinator, said the CLA will be an asset to the Pro Bono Center because it offers a convenient location to city residents.

"For as long as I have been in the

role of pro bono coordinator, I have had requests for legal services that just were not covered by any of the member organizations/projects of the Pro Bono Center or were not conveniently located to offer assistance," she said. "I have referred numerous clients to the clinics in Oakland and North Side."

Albert said she has also provided mentors to attorneys who work at the clinics on occasion.

"It just made sense to make CLA a Pro Bono Center member so that we can join forces to help expand legal services to the community," she said.

CLA also expands the volunteer opportunities that the Pro Bono Center can offer.

"In the way of volunteering, we have also discovered that one size does not fit all," Albert said. "This offers another volunteer opportunity for ACBA lawyers who may be interested in serving in such a clinic setting."

Langton said CLA can also be an asset, taking clients that other agencies, like Neighborhood Legal Services,

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All letters must include signature, address, and phone number. All letters are subject to editing. We regret that we can neither print nor acknowledge every letter. We will not return letters.

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# Satellite sites not always a "single site" under WARN

By Maria Greco Danaher

The Worker Adjustment and Retraining Notification (WARN) Act requires employers to provide 60 days notice to employees in the event of a plant closing or mass layoff involving 50 or more employees at a "single site of employment." An employer who fails to notify workers under the act may be liable for back pay, benefits, and attorney fees. The 9th U.S. Circuit Court of Appeals recently addressed the question of whether certain satellite work sites could be aggregated for purposes of the WARN Act, and reached the conclusion that they could not. *Bader v. Northern Line Layers, Inc.* No. 05-36012 (9th Cir. Sept. 10, 2007).

Northern Line Layers, Inc. (NLL), a company providing specialty construction services, employed less than 50 individuals at its administrative and maintenance facilities in Billings, Mont. At the end of 2002, NLL also employed over 160 construction workers and project managers at construction sites in 10 different states. Financial accounting and payroll was done in Billings, but day-to-day operations of the individual project sites were overseen locally. The on-site project managers had the authority to hire and fire non-management crew members for that manager's particular site.

On Jan. 1, 2003, NLL's parent company merged NLL with another subsidiary, Par Electric, transferring 70 employees onto the Par payroll. Within 90 days, 58 of those employees were laid off, without any advance notice to the employees and without notice to the state. A group of former NLL employees sued both NLL and its parent company, alleging that NLL violated the WARN Act by failing to give notice prior to the layoffs. The employees argued that the Act applied because over 50 individuals were affected, and because the company's multiple project sites should be viewed along with the Billings, Mont. main office location as a "single site" under the Act.

The lower court granted summary judgment in favor of the defendants on the basis that the employees' "single site" argument failed. On appeal, the Ninth Circuit upheld that decision. The court recognized that certain courts (including the Third Circuit) have looked to the Department of Labor regulations' definition of "single site" to determine whether groups of employees in multiple locations can qualify for WARN Act protection. Examining these definitions, the court determined that the NLL employees could not demonstrate that they were, in fact, employed by NLL's Billings headquarters location because: (1) they were not assigned to Billings as a home base; (2)

their work was not assigned at the Billings location; or (3) the employees did not report to the Billings site. While any one of those alternatives would have qualified the diverse NLL locations as a single site under WARN, the court found that none of the three criteria applied, and upheld summary judgment in favor of the employer.

Employers with multiple locations should become familiar with the regulations that offer guidance under the WARN Act in order to determine a particular site's eligibility under that Act. For instance, separate facilities may be considered a single site of employment if they are in geographic proximity, are used for the same purpose, and share staff and equipment. For purposes of the WARN Act, employees who travel during the course of a workweek (truckers or traveling salespeople, for instance) generally are deemed to be employees of a "home base" site (i.e., trucking terminal or home office) if they report there for assignments, or begin and end a workweek at that particular location. A mass lay-off or facility closure at such a site may trigger the provisions of the WARN Act, and can lead to unintended liability under the Act for employers who do not fully understand the "single site" designation. ■

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# Personality-based termination not national origin discrimination

By Maria Greco Danaher

Under the familiar burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp., v. Green*, a protected-class employee attempting to show employment discrimination must establish a *prima facie* case by showing, in part, that he was treated differently than similarly situated non-protected employees. The employer then must articulate a legitimate business reason for its actions. The burden then returns to the employee to prove that the reason offered by the employer is not its true reason, but is a "pretext for discrimination." The 6th U.S. Circuit Court of Appeals recently addressed a claim of national origin discrimination by an Iraqi national, and held that more than a dispute over the facts upon which that employee's termination was based is necessary to prove "pretext." *Abdulnour v. Campbell Soup Supply Company, LLC*, No. 06-4590 (6th Cir. Sept. 19, 2007).

Sarmad Abdulnour, an Iraqi national, holds citizenship in both Iraq and Canada. He received permanent resident status in the U.S. in 1999, and became employed with Campbell in April 2003 at an Ohio facility. He worked as an area supervisor, overseeing approximately 30 employees. Within weeks after Abdulnour began to work for Campbell, his supervisor began to receive complaints from employees regard-

ing Abdulnour's management style, including complaints that Abdulnour "demeaned" the hourly employees, especially the women. In October 2003, after receiving continued complaints from both Abdulnour's supervisors and subordinates, the operations manager told Abdulnour that the employment was "not working out" due to a conflict in "management style or personality." While Abdulnour admits that no one made disparaging remarks about his national origin at that time, he alleges that the operations manager told him that maybe the "people of Northwest Ohio have a problem with you."

Abdulnour ultimately filed a lawsuit, alleging that he was discharged based upon his national origin and in violation of Title VII and the applicable Ohio law. Campbell conceded that Abdulnour established a *prima facie* case (he was a member of a protected class; he was terminated; he was generally qualified for the position; he was replaced by someone outside of the protected class), but alleged that it fired him for a legitimate business reason, based on complaints about his poor performance and personality conflicts. Abdulnour conceded that if true, poor performance was a "legitimate business reason" for his termination. Because both parties carried their initial burdens, the case turned on whether Abdulnour could show that the reason set forth by Campbell for his termination was simply a pre-

text for discrimination.

In order to establish pretext, Abdulnour must show that Campbell's stated reason had no basis in fact, did not actually motivate the termination, or was insufficient to warrant that termination. Both the lower court and the Sixth Circuit found that apart from his own testimony, Abdulnour failed to provide evidence that he was fired for a reason other than poor job performance. While Abdulnour also pointed out that employees discussed the ongoing war in Iraq during lunch breaks, the court specifically stated that such a fact alone did not make it more likely that Campbell fired Abdulnour because of his Iraqi nationality. Summary judgment therefore was granted in favor of Campbell.

In this case, the employer was successful because there was a myriad of statements regarding Abdulnour's performance problems and his personality conflicts with other employees. Abdulnour was unable to show that those statements against him were false, inaccurate, or not made. However, it is important to note the court's admonition that "we are skeptical of undocumented accounts of employee conduct that may have been created post-termination." In this case, the fact that the court found "ample evidence" of Abdulnour's poor performance overrode the fact that there was a dearth of written documentation regarding that

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# Successor board cannot terminate finance-related agreements

By Jason Miller

The Pennsylvania Supreme Court recently held that a successor board of directors of the Dauphin County General Assembly could not terminate, without cause, contracts executed by its predecessor board for the administration of certain school-related financing activities. *Program Admin. Services, Inc. v. Dauphin County Gen. Auth.*, No. 136 MAP 2005 (Pa. Aug. 20, 2007). Statutory authorization for such agreements prevents termination not provided for in the agreements. *Id.*

The Dauphin County General Authority (Authority) is a corporate agency of the Commonwealth of Pennsylvania created by Dauphin County under the Municipality Authorities Act (Act), 53 Pa.C.S. §§5601-5623. Pursuant to the Act, the Authority may make agreements with bondholders and others in connection with bonds that it deems advisable.

In 1986, the Authority launched a program geared towards providing financial assistance to Pennsylvania schools. Known as "School Pool I," the program was funded by proceeds from the issuance of 40-year bonds. Program Administration Services, Inc. (PAS) was the program administrator for School Pool I. In 1997, the Authority started a similar program, "School Pool II," and PAS was again made the program administrator via agreement.

Under the program administration agreements for School Pool I and II, bonds were purchased by private investors and the proceeds pooled for the Authority to lend to qualifying school districts for construction or reconstruction, debt refinancing, and other dedicated purposes. School districts then repay the principal and interest on the loans and the interest is paid to bondholders while the principal is returned to the pool to be re-loaned. PAS, as the program administrator, markets the programs to school districts, assists districts with their applications, calculates note payments, bills the districts, assists the Authority in securing investment funds from banks, and also performs other functions. The program administration agreements provide that PAS continue as the program administrator until: (1) no portion of the bonds remain outstanding; (2) PAS continues to fail to perform in any material respect; or (3) the parties mutually consent to terminate.

In November 2000, under a newly appointed board of directors, the Authority notified PAS that it intended to terminate the contracts without cause. PAS initiated a declaratory judgment action against the Authority seeking a judicial determination that the contracts may not be terminated outside the terms of the agreements. The trial court, however, entered a declaratory judgment in the Authority's favor, determining that agreements entered into by the predecessor Authority could not be enforceable against the current Authority.

Sitting *en banc*, a divided Commonwealth Court reversed. The majority stated that the central question was one of whether the program administration agreements involved a government function or a proprietary function. According to the majority of the Commonwealth Court, contracts involving government services may be terminated by a successor body without cause and irrespective of the termination date or procedures for termination set forth in the agreement. The Commonwealth Court then stated that the test to be applied to determine whether an activity is governmental or proprietary is the test set forth in *County of Butler v. Local 585, SEIU, AFL-CIO*, 631 A.2d 1389 (Pa.Cmwlth. 1993). Under this test, courts are to consider whether the activity: (1) is one the government is not statutorily required to perform; (2) also may be carried on by private enterprise; or (3) is used as a means of raising revenue.

The Commonwealth Court applied the test to the instant case and determined that the Authority's money-lending activity was proprietary in nature since the Authority was not statutorily required to perform this activity and since it is an activity carried on by private lenders as well. Moreover, the court distinguished the Pennsylvania Supreme court holding in *Lobolito Inc. v. North Pocono Sch. Dist.*, 755 A.2d 1287 (Pa. 2000) since *Lobolito* involved the decision of whether to build a school, a government function. In the instant case, the Authority is not involved in the decision to build schools, but was only involved in the financing of such projects. The Commonwealth Court also distinguished *State Street Bank & Trust Co. v. Commonwealth*, 712 A.2d 811 (Pa.Cmwlth. 1998), on the basis that in *State Street* the funds being lent were state assets whereas in the present case the funds

were the assets of the bondholders.

The majority of the Commonwealth Court also agreed with PAS's alternative argument that §5607(d)(12) of the Act represents a statutory exception to the general rule that current governing bodies cannot bind their successors with regards to government functions.

On appeal, the Pennsylvania Supreme Court characterized the issue as whether the board of directors of the Authority may terminate, without cause, contracts executed by its predecessor board relating to the administration of certain school-related financing activities.

The court first noted that both the trial court and the Commonwealth Court focused on the distinction between contracts relating to government functions and contracts relating to proprietary or business functions. The court agreed that such a distinction has been recognized in Pennsylvania since the mid 1800s. Moreover, the court noted that both parties reference this difference and present opposing arguments as to where the functions at issue fell. Discussing the history of this distinction at length, the court noted that "the precept that governmental contracts are voidable in some range of circumstances is a common-law rule premised upon considerations of public policy." *Program Admin. Services, Inc. v. Dauphin County Gen. Auth.*, No. 136 MAP 2005 (Pa. Aug. 20, 2007). The

court cautioned that in applying this principle courts should not lose sight of the roles of the General Assembly and the courts in terms of establishing public policy.

The court cited *Chichester Sch. Dist. v. Chichester Educ. Ass'n*, 750 A.2d 400 (Pa.Cmwlth. 2000) where the Commonwealth Court upheld collective bargaining agreements entered into by a predecessor board by relying upon the statutory authority for such agreements contained in the Public Employee Relations Act. The court in *Chichester* acknowledged that the prior board's actions were governmental in character but noted the statutory authority the board relied upon in entering into such agreements.

Discussing the present case, the court noted that the General Assembly has authorized municipal authorities to enter into agreements in connection with bonds as set forth in 53 Pa.C.S. §5607(d)(6) and (12). According to the court, §§5607(d)(6) and (d)(12) "embody a legislative policy decision favoring predictability, stability, and certainty with regard to some range of matters connected with public bond issues by municipal authorities." *Program Admin. Services, Inc. v. Dauphin County Gen. Auth.*, No. 136 MAP 2005.

The court noted that bond terms can be as long as 40 years, thus these provi-

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## From the ACBA

### PRESIDENT'S MESSAGE

# Informing citizens about "Merit Retention" of qualified judges

By Ken Gormley

One of my foremost duties as President of the Allegheny County Bar Association is to inform the organization's 6,500 members when important decisions are reached by our board of governors. One such important decision, reached last month, relates to the upcoming judicial retention elections in November.

As you know, the Pennsylvania Constitution in Article V, Section 15, establishes a "retention" system for judges in this Commonwealth, which has been in place since the State Constitutional Convention of 1967-68. The so-called Merit Retention approach, designed as a compromise between partisan elections and an appointive system, sought to shield judges from the shifting winds of politics once they were elected via popular election. In a "Merit Retention" election year, voters determine whether a sitting judge has done his or her job satisfactorily, based on the entirety of his or her judicial record. Assuming the judge is qualified and receives a total of over 50 percent "yes" votes, he or she is retained, free from the distractions and scars of political jousting.

Over the last four decades, the vast majority of judges have been retained by the citizens of Pennsylvania after being rated qualified by their bar associations. The overriding purpose of this Merit Retention system is to ensure that sitting judges are able to remain independent, i.e. free from outside political pressures, so that they can render decisions in an impartial fashion based upon their disciplined interpretations of the law.

The American Bar Association, in laying out its standards for properly assessing sitting judges, has indicated that the relevant qualities to be evaluated should include experience, integrity, professional competence, judicial temperament, preparation, attentiveness, service to the law, and quality of judicial opinions.

This year, because there has been so much confusion and misinformation surrounding the impending Merit

Retention elections, the ACBA's Judicial Merit Selection Committee (its Political Action Committee) recommended to the board of governors that the ACBA suspend its usual "umbrella campaign" on behalf of retention judges from Allegheny County. Rather than in essence running campaigns for those judges who pledge not to raise their own funds, members of the Judicial Merit Selection Committee urged a different approach this year, focusing on educating the public with respect to the retention election process and informing citizens about judges running for retention. Based upon the Judicial Merit Selection Committee's recommendation, the board of governors has voted as follows:

1) Judges up for retention will be free to raise funds, or not to raise funds, as they deem appropriate;

2) The bar association Judicial Merit Selection Committee will not host its usual cocktail party to raise funds for an umbrella campaign; thus, the JMSC will not put attorneys and law firms in the position of receiving solicitations from both the bar association and candidates for retention;

3) Rather than run its usual umbrella campaign, the Judicial Merit Selection Committee will spend special bar association funds to engage in a public education campaign with respect to the importance of Merit Retention under our Pennsylvania Constitutional system and provide information with respect to those judicial retention candidates rated qualified by the ACBA and the Pennsylvania Bar Association;

4) The ACBA's Judicial Merit Selection Committee will recruit lawyer volunteers to go into the community in Allegheny County to hold public forums for the purpose of discussing the vital role of an independent judiciary in our democratic system of gov-



Ken Gormley

ernment, as well as to discuss the purpose of the Merit Retention system established by the Pennsylvania Constitution;

5) The Judicial Merit Selection Committee will run public education ads in local newspapers prior to the November election, announcing the ACBA's "recommended" ratings of the three Allegheny County Common Pleas Court Judges (President Judge Joseph M. James, Judge Lester G.

Nauhaus, and Judge Terry O'Brien), of the two Superior Court Judges (Judge John L. Musmanno and Judge Joan Orié Melvin), and of the one Commonwealth Court Judge (Judge Bernard L. McGinley) who reside in Allegheny County and who were rated "recommended" for Merit Retention by members of the ACBA.

6) The Judicial Merit Selection Committee will post the ACBA's 2007 Retention Ratings on its new website to educate voters and attorneys interested in learning more about judges rated qualified by the bar association. The Judicial Merit Selection Committee website will also provide a link to the Pennsylvania Bar Association's "Vote Smart" website, for a similar purpose;

7) The Judicial Merit Selection Committee will not serve as the official campaign committee for any judge participating in the public education campaign this year. Rather, the public education campaign will occur in lieu of the usual umbrella campaign;

8) Through the leadership of attorney Mark Martini and other volunteers, our Judicial Merit Selection Committee PAC plans to assist in recruiting lawyer volunteers to spend time at the polls on election day answering questions of citizens concerning Merit Retention, as well as handing out informational cards that list those judges rated recommended for retention by the ACBA and the PBA.

The Judicial Merit Selection Committee and the board of governors of the ACBA, in approving the above public education campaign, concluded that such a plan will enhance voter understanding of this crucial electoral process under our Pennsylvania Constitution and heighten citizen awareness of those qualified judges who are seeking retention.

It is my belief that the plan adopted by the board of governors is a sound and positive one. Last month, I had the privilege of attending a luncheon in the State Capitol hosted by the Pennsylvania Judicial Independence Commission and the PBA, at which retired United States Supreme Court Justice Sandra Day O'Connor served as keynote speaker. Justice O'Connor, who stepped down from the nation's highest court in 2005, has continued to work tirelessly, speaking at venues across the United States to educate the citizenry about the importance of an independent, non-political judicial system.

Justice O'Connor reminded the overflow audience in our State's Capitol that James Madison, in advocating the ratification of the United States Constitution, called the judiciary an "impenetrable bulwark" against encroachments on our most cherished freedoms. Without a truly independent judiciary, said Justice O'Connor, our entire system of democracy can "break down." This does not mean, she insisted, that judges are free to decide cases based upon their "personal views." Rather, it means that judges must be able to reach decisions "fair and impartially, based on the laws and Constitution, without fear of retaliation."

It is because our courts have been protected from the vagaries of politics and pressure from special interest groups, Justice O'Connor concluded, that they have fared so well, avoiding the disastrous problems that have faced judicial systems in countries like Russia, Uganda, Zimbabwe, Ecuador and Pakistan.

Over the next several weeks, the Judicial Merit Selection Committee will be sending out e-mail messages to

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## Honorable Joseph A. Del Sole



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# Supreme Court of Pennsylvania issues new order for out-of-state lawyers

■ *Disciplinary Board of the Supreme Court of Pennsylvania reminds in-state attorneys of Rule 8.3*

By Jamie Fulginiti

**O**n June 29, 2007 the Supreme Court of Pennsylvania issued orders to amend rules governing civil case procedures and attorney professional conduct. The orders took effect on Sept. 4, 2007 and will establish a standardized method for determining eligibility for out-of-state attorneys to practice in Pennsylvania as counsel pro hac vice—a legal term meaning “for this occasion.”

In addition to the new standards, the court also adopted a first-time-ever fee for pro hac vice admission, and designated the proceeds to go to the Interest On Lawyers Trust Account (IOLTA) program. IOLTA funds civil legal serv-

ices for Pennsylvanians who cannot afford to pay for those services. The fee applies to those practicing in the state’s trial and appellate courts.

This new addition to pro hac vice is the first uniform statewide rule to govern an evaluation of the application that requires an admission fee to practice in the Commonwealth.

These amendments propose that Pennsylvania lawyers who sponsor a pro hac vice lawyer or encounter an out-of-state lawyer, abide by Rule 8.3 that states all lawyers have a general duty to report lawyer misconduct, regardless of the jurisdiction where the suspect lawyer is licensed.

Lawyers in Pennsylvania are reminded of their duty to the adminis-

tration of justice to assure that the integrity of court proceedings is protected, and the duty to the courts and to their clients to make sure the decision-making process is not undermined by the participation of unqualified individuals.

Lawyers having a concern as to the licensure of out-of-state lawyers can contact the Office of Disciplinary Counsel. However, while the Disciplinary Board does not have jurisdiction over out-of-state attorneys not admitted pro hac vice, the board has information to make a referral to the disciplinary agency that does.

The new rules were adopted with input from the IOLTA Board, Pennsylvania’s Board of Law Examiners, and

Pennsylvania Lawyers Fund for Client Security Board and the Civil Procedural Rules Committee. The rules are the latest in a series of administrative enhancements to emerge from the Supreme Court’s 17 advisory boards and committees that significantly enhance court operations statewide. Over the last year, the court has implemented new rules to streamline and standardize foreign adoption registrations; enhanced the administrations of trusts and estates through new forms; boosted public trust and confidence in the courts under a new financial records review policy; and developed a Public Health Law Benchbook to prepare for a major threat, such as a pandemic. ■

## BLI participation opens door to future opportunities

By Tracy Carbasho

**P**articipation in the ACBA’s Bar Leadership Initiative can open the door to future opportunities.

“The BLI is a wonderful opportunity to help lawyers network, grow their current practice and meet new clients,” said Hal Coffey, an associate at Grogan Graffam who is serving as the leader, or “professor,” for this year’s class. “An attorney in our current BLI class contacted me recently about a client who needed help with a real estate matter and I needed to refer a family law matter to her.”

Coffey was a student in the 2002-03 BLI class. He is also the immediate past chair of the ACBA’s Young Lawyers Division. The class experience helped him hone his leadership skills, gave him a behind-the-scenes look at how the bar association operates and made him realize that he wanted to become more involved with the ACBA.

As the leader of this year’s class, he has requested that each student contact several individuals who chaired the YLD going all the way back to the early 1950s. His goal is to start building a history of the YLD that can be used as a resource for future BLI classes.

“We want to know what past chairs learned from their experience. It will also be a good experience for the chairs to realize that their tradition is being carried on,” said Coffey.

The leadership program requires students to make a commitment to learn about the ACBA and to get involved with projects that help the local community. This is the seventh BLI class.

Dorie Schnippert, director of membership services and continuing legal education for the ACBA, also serves as YLD liaison for the BLI program.

“The BLI was developed out of an acknowledged need for additional leadership training for the young lawyers of the Allegheny County Bar Association,” she said. “Its goal is to aid and encourage young lawyers in developing their professional and community leadership skills and to position themselves to assume a leadership position with the ACBA.”

“The YLD has developed this exciting program for qualified young lawyers who have an interest in participating in the ACBA, but who have had little or no involvement in the association thus far,” added Schnippert. “There were more applicants than ever for this year’s class.”

Although 25 hopeful students applied, only 15 were accepted. Schnippert said the number of students is limited to between 12 and 15 for numerous reasons. For example, each student must make a tremendous commitment

to the class, each student is assigned to a mentor from the 16-member YLD Council, class members must attend board meetings for all of the ACBA entities at some point throughout the

Continued on page 10



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# Young Lawyers “Step Out” to help students

■ *The ACBA's Young Lawyers Division needs volunteer attorneys to give presentations for the Stepping Out Program*

By **Stephanie R. Reiss**

**A**ttention attorneys! The Public Service Committee of the Young Lawyers Division of the Allegheny County Bar Association needs YOU to participate in the Stepping Out Program for high school students. Each year, volunteer attorneys participate in this program which is designed to educate high school students, and particularly graduating seniors, about legal issues that they might face as they “step out” into the world. The program

focuses on a broad range of legal topics including contractual agreements, employment, wills, marriage, alcohol and drugs, small claims court, and voting. The Berks County Bar Association founded Stepping Out in 1986. Since that time, Young Lawyers Divisions across the Commonwealth have sponsored Stepping Out. In Allegheny County, a letter explaining the program was sent in August to the principals of all of the Allegheny County and City of Pittsburgh public high schools, private high schools and

vocational technical schools. A pamphlet detailing all of the topics in the program is provided to both the volunteer attorney and the individual teacher. The topics are general enough that an attorney need not receive any training prior to a presentation but a training session has been scheduled for Oct. 26, 2007 at noon at the ACBA office on the 4th floor of the Koppers Building. Last year the local Stepping Out Program was a resounding success and we hope to duplicate that success this year. The program

will run from October through December. Although Stepping Out is administered by the Young Lawyers Division, any volunteer attorney is encouraged to speak and many volunteers from the senior bar have presented to students in the past. Efforts are made to match up schools with speakers who reside in the same geographic area. Any lawyer who is interested in participating in the Stepping Out Program is invited to contact Stephanie Reiss at 412-560-3378 or [sreiss@morganlewis.com](mailto:sreiss@morganlewis.com). ■

# ACBA Services Inc.'s founding board members step down after nine years

By **Tracy Carbasho**

The extraordinary vision of the original leaders of ACBA Services, Inc. positioned the company for the growing success it continues to experience.

“Their vision helped us take an idea and make it a reality,” said ACBA Executive Director David A. Blaner. “We’re fortunate to have had their leadership and advice on the development of ACBA Services.”

Founded in 1998 as the for-profit subsidiary of the ACBA, Services, Inc. is a full litigation support provider, offering a long list of technology-related services and rental equipment to local legal entities and businesses. Among the available services are videoconferencing, video depositions, courtroom video playback, computer-based and real-time court reporting, photography, media duplication and editing, digital video recording, digital trial presentation and synchronizing transcripts with video footage.

“ACBA Services was the brainchild of Jim Smith more than anyone,” said Blaner. “He always envisioned a for-profit subsidiary operating at peak performance and generating non-dues revenue. The ACBA is actually unique among bar associations because we produce more non-dues revenue than any other metropolitan bar association in the United States.”

Blaner said the ACBA operates with 23 percent funding derived directly

**Continued on page 10**



PHOTO BY: JENNIFER PULICE

ACBA President Ken Gormley (left) presents John Gismondi (center) and Jim Abraham (right), founding members of the ACBA Services, Inc. board of directors, with plaques recognizing their years of service to the ACBA's for-profit subsidiary.

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Registration and setup are required to take advantage of these benefits. To get started or learn more about the program, please contact your personal representative Bill Gallagher at 877.353.9100 ext. 4114 or [william.gallagher@officedepot.com](mailto:william.gallagher@officedepot.com).

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# Strengthening your clients' non-compete agreements: important checkpoints

By Jay D. Marinstein and  
Carl J. Rychcik

Today's business world is filled with companies eager to hire key individuals away from their competitors. Clients have increasing needs to protect their investments by having their employees sign non-compete agreements. Unless properly drafted, the covenants may provide limited to no protection and cause devastating consequences not only to your client's business, but also to your attorney-client relationship. This article addresses important considerations that practitioners in Pennsylvania should consider when drafting non-compete agreements.

## Be sure the non-compete agreement supports a legitimate protectable interest.

Because non-compete agreements seek to restrict competition, they are strictly construed. Non-competes, under Pennsylvania law, are only enforceable if they support a legitimate protectable interest, such as customer goodwill, trade secrets and specialized training. *Thermo-Guard, Inc. v. Cochran*, 596 A.2d 188 (Pa.Super. 1991). It is prudent to identify the protectable interest in your clients' non-compete agreements.

The Pennsylvania Supreme Court has made it clear that customer

relationships, which are developed and nurtured by the employee, are owned by the employer, not by the employee. *John G. Bryant Co. v. Sling Testing & Repair, Inc.*, 369 A.2d 1164 (Pa. 1977). Customer good will-based covenants are appropriate when employees have routine contact with your clients' customers. It may, however, be difficult to enforce customer good will-based covenants if the customers are well known in the industry or when the product or service is sold strictly on price (*i.e.* a commodity), rather than based on relationships.

Trade secrets provide the protectable interest if the employee has access to information that is owned by the company, is not publicly available, and provides the company with a competitive advantage. *Omicron Systems, Inc. v. Weiner*, 860 A.2d 554 (Pa.Super. 2004). In such cases, it is not necessary for the employee to have contact with customers. Trade secret-based covenants should generally identify the categories of trade secrets (*i.e.* customer lists, formulas, etc.), which employees are expected to be exposed to during their employment.

Covenants can also be supported by providing employees with specialized training and skills. *Thermo-Guard*, 596 A.2d 188. This interest is most appropriately applied in cases where the employee receiving the

training is a neophyte. The training must be more than communicating general techniques; it truly needs to be specialized.

## Be sure the non-compete agreement is reasonably limited in duration and territory.

In some jurisdictions, courts will not enforce non-compete agreements if the covenants, as written, are not reasonable in duration and/or geographic territory. However, in other jurisdictions, like Pennsylvania, courts have discretion to modify the agreement, if necessary, to make the duration and territory reasonable. *Hess v. Gebhard & Co.*, 808 A.2d 912 (Pa. 2002). The safest course of action, though, is to tailor the duration and territory component of the covenant to the specific employee.

While Pennsylvania courts have generally upheld covenants for terms of one to three years, courts apply greater scrutiny to longer covenants. The duration of the covenant should be no greater than is reasonably necessary to protect the employer's legitimate business interests. *Robert Clifton Assoc., Inc. v. O'Connor*, 487 A.2d 947 (Pa.Super. 1985). If the non-compete agreement seeks to protect customer goodwill, the agreement should be no longer than the time it will take a new hire to demonstrate his or her effectiveness to customers. If

the agreement seeks to safeguard a trade secret, it should be no longer than the time it takes the employer to develop the trade secret. If the agreement seeks to compensate the employer for providing specialized training, it should be no longer than the time it takes the employer to develop the specialized training.

As to territory, in customer goodwill cases, the territory should be limited to the geographic area covered by the employee during his or her employment. *Victualic Co. v. Tieman*, 2007 WL 2389795 (3d Cir. (Pa.)). For trade secret cases, the non-compete agreement may extend to areas where the product is primarily sold and/or services are rendered by the employee. *Fres-Co Sys. USA, Inc. v. Bodell*, 2005 WL 3071755 (E.D.Pa.).

## Be sure the non-compete agreement is supported by adequate consideration.

A non-compete agreement is generally supported by adequate consideration if it is entered into at the time of the initial employment. While some states allow "continued employment" to serve as adequate consideration for a non-compete, many states, such as Pennsylvania, do not. In these jurisdictions, a non-compete agreement entered after the start of

Continued on page 11

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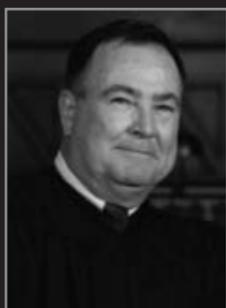


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## Bar Briefs

### News and Notes

Chautauqua Institution Board of Trustees elected George T. Snyder to the position of chairman. Snyder is a partner in the firm of Stonecipher, Cunningham, Beard & Schmitt, P.C. His concentration has been in the area of bankruptcy/insolvency law.



Wendy Denton  
Heleen

Wendy Denton Heleen spoke before a group of approximately 80 people in August as part of Rep. Randy Vulakovich's Older and Wiser Seminars.

Todd Berkey and Cynthia Danel, partners with the law offices of Edgar Snyder & Associates, have been certified as members of the Multi-Million Dollar Advocates Forum.

Louis M. Tarasi, Jr., a partner with Tarasi & Tarasi, P.C., has been certified as a member of the Multi-Million Dollar Advocates Forum.

Tammy Singleton-English of Singleton-English Law Offices, has been published in the global directory of Who's Who, which recognizes professionals who are leaders in their respective fields.

### People on the Move

The law firm of Zimmer Kunz, PLLC announced the addition of associates Joseph Petrina and Ryan Krescanko.

Petrina joins Zimmer Kunz as a senior associate and will concentrate his practice on toxic tort litigation and employment law. Krescanko joins as an associate in the asbestos litigation group.

Edgar Snyder & Associates announced the appointments of Diane Clark and Brian Wuenshell. Both join the personal injury litigation team, and are working at the law firm's Pittsburgh office.

Vuono & Gray, LLC announced that Les A. Goldstrom, Jr. has joined the firm as an associate. Goldstrom will concentrate his efforts in the areas of corporate and commercial transactions, real estate, construction law and estate and trust planning. ■

*All submissions for "Bar Briefs" or "In Memoriam" should be sent to the attention of David Blaner, ACBA Executive Director, 400 Koppers Building, 436 Seventh Ave., Pittsburgh, Pa., 15219, or e-mailed to dblaner@acba.org.*

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## ADMINISTRATIVE LAW

### Update on the Lobbying Disclosure Act

Opportunity to hear from and ask questions of faculty panel of which three are members of the committee that drafted the regulations, reporting forms and advisory opinions.

**Credits:** 4 substantive • **When:** Friday, October 19, 2007; 9:00 a.m. to 1:15 p.m., registration begins at 8:30 a.m. • **Where:** Live via Videoconference—Koppers Building, 9th Fl., 436 Seventh Ave. • **Tuition includes course book:** Member-Pa., or any co. bar assn.: \$189; Member admitted after 1/1/03: \$169; Nonmember: \$209; Paralegals attending with an attorney: \$99; Paralegals attending alone: \$129; Judges & judicial law clerks: \$95; Judges & judicial law clerks admitted after 1/1/03: \$85. Register with PBI.

## BUSINESS LAW

### India and China: The Next Ten Years

This course will focus on what you cannot afford to ignore about doing business with these emerging giants.

**Credits:** 5 substantive, 1 ethics (Must attend entire program to receive ethics credit) • **When:** Thursday, November 8, 2007; 8:30 a.m. to 4:30 p.m., registration begins at 8:00 a.m. • **Where:** Koppers Building, 436 Seventh Ave., 9th Fl. • **Tuition (includes course book):** \*Early Registration Discount - Member-Pa., or any co. bar assn.: \$249; Member admitted after 1/1/03: \$229; Nonmember: \$269; Paralegals attending with an attorney: \$99; Paralegals attending alone: \$129; Judges & judicial law clerks: \$125; Judges & judicial law clerks admitted after 1/1/03: \$115. \*Standard Registration - Member-Pa., or any co. bar assn.: \$274; Member admitted after 1/1/03: \$254; Nonmember: \$294; Paralegals attending with an attorney: \$124; Paralegals attending alone: \$154; Judges & judicial law clerks: \$150; Judges & judicial law clerks admitted after 1/1/03: \$140. \*(Registrations received more than 2 days before the presentation qualify for the Early Registration Discount.) Register with PBI.

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### Selecting and Influencing Your Jury

Practical pretrial and trial strategies that win cases. Learn to listen to “clues” from your jurors’ attitudes and beliefs to shape your case, your delivery, etc., and to transform your practice!

**Credits:** 6 substantive • **When:** Friday, October 26, 2007; 8:30 a.m. to 4:00 p.m., registration begins at 8:00 a.m. • **Where:** ACBA Auditorium, City-County Building, 414 Grant St. • **Tuition includes (273 pg.) course book:** Member-Pa., or any co. bar assn.: \$289; Member admitted after 1/1/03: \$269; Nonmember: \$309; Paralegals attending with an attorney: \$99; Paralegals attending alone: \$129; Judges & judicial law clerks: \$145; Judges & judicial law clerks admitted after 1/1/03: \$135. Register with PBI.

### Litigating Tractor Trailer Accidents

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**Credits:** 6 substantive • **When:** Tuesday, November 6, 2007; 9:00 a.m. to 4:30 p.m., registration begins at 8:30 a.m. • **Where:** Koppers Building, 436 Seventh Ave., 9th Fl. • **Tuition (includes course book and lunch):** \*Early Registration Discount - Member-Pa., or any co. bar assn.: \$249; Member admitted after 1/1/03: \$229; Nonmember: \$269; Paralegals attending with an attorney: \$99; Paralegals attending alone: \$129; Judges & judicial law clerks: \$125; Judges & judicial law clerks admitted after 1/1/03: \$115. \*Standard Registration - Member-Pa., or any co. bar assn.: \$274; Member admitted after 1/1/03: \$254; Nonmember: \$294; Paralegals attending with an attorney: \$124; Paralegals attending alone: \$154; Judges & judicial law clerks: \$150; Judges & judicial law clerks admitted after 1/1/03: \$140. \*(Registrations received more than 2 days before the presentation qualify for the Early Registration Discount.) Register with PBI.

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## ETHICS

### Bridge the Gap for Newly Admitted Attorneys

**Credits:** 4 ethics • **When:** Wednesday, November 7, 2007; 9:00 a.m. to 1:30 p.m.; registration begins at 8:30 a.m. • **Where:** ACBA Conference Center Auditorium, 920 City-County Building • **Cost:** Free to newly admitted attorneys and \$100 for all others. Newly admitted attorneys have two years to complete this course as part of their post admission requirement. Register with ACBA.

## INTELLECTUAL PROPERTY

### Legal and Intellectual Property Aspects of Sports and the Entertainment Industry

This program covers important clauses in agreements with client representatives as well as licensing/merchandizing & common agreements in sports, music, publishing & higher arts industries.

**Credits:** 6 substantive • **When:** Friday, October 12, 2007; 8:30 a.m. to 4:15 p.m.; registration begins at 8:00 a.m. • **Where:** Live via Videoconference—Koppers Building, 9th Fl., 436 Seventh Ave. • **Tuition includes course book and lunch:** Member-Pa., or any co. bar assn.: \$229; Member admitted after 1/1/03: \$209; Nonmember: \$249; Paralegals attending with an attorney: \$99; Paralegals attending alone: \$129; Judges & judicial law clerks: \$115; Judges & judicial law clerks admitted after 1/1/03: \$105. Register with PBI.

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**Credits:** 5 substantive, 1 ethics • **When:** Tuesday, October 16, 2007; 8:30 a.m. to 3:40 p.m., registration begins at 8:00 a.m. • **Where:** Live via Videoconference—Koppers Building, 9th Fl., 436 Seventh Ave. • **Tuition includes course book and lunch:** Member-Pa., or any co. bar assn.: \$249; Member admitted after 1/1/03: \$229; Nonmember: \$269; Paralegals attending with an attorney: \$99; Paralegals attending alone: \$129; Judges & judicial law clerks: \$125; Judges & judicial law clerks admitted after 1/1/03: \$115. Register with PBI.

## REAL ESTATE PRACTICE

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**Credits:** 4 substantive • **When:** Thursday, October 18, 2007; 9:00 a.m. to 1:15 p.m., registration begins at 8:30 a.m. • **Where:** Live via Videoconference—Koppers Building, 9th Fl., 436 Seventh Ave. • **Tuition includes course book:** Member-Pa., or any co. bar assn.: \$189; Member admitted after 1/1/03: \$169; Nonmember: \$209; Paralegals attending with an attorney: \$99; Paralegals attending alone: \$129; Judges & judicial law clerks: \$95; Judges & judicial law clerks admitted after 1/1/03: \$85. Register with PBI.

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**PRO BONO CENTER continued from cover**

cannot help.

"I think it is actually going to be wonderful for both the Pro Bono Center and for us," Langton said. "If Neighborhood Legal Services Association cannot help them, hopefully, we can fill the gaps."

While the CLA's name suggests a religious connection, the group works with clients of all faiths, Langton said.

"We service anyone," she said. "If they are willing to come into a church building, we'll help them."

The group's affiliation to Christianity stems from a common commitment to faith pledged by all of the CLA's volunteers, Langton said. People who lend their time to work in the clinic are from a variety of faiths, she said.

For more information about the clinic or to volunteer, contact Livia Langton at (412) 622-0232, or [clapittsburgh@yahoo.com](mailto:clapittsburgh@yahoo.com). Volunteers, Langton said, are provided with training materials and have an opportunity to shadow another volunteer before working in the clinic. ■

**PERSONALITY continued from page 2**

performance. But not every situation includes sufficient testimonial evidence. Employers must ensure complete and accurate documentation of performance problems in order to support its reasons for adverse employment actions in order to preclude a finding of pretext, and to avoid an ultimate finding of liability under Title VII. ■

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**AGREEMENTS continued from page 3**

sions authorize the execution of agreements that outlast the terms of individual board members. To the extent that this legislative policy conflicts with the common law, the legislative authority prevails. The court moved to determine whether the program administration agreements constitute agreements in connection with the Authority's 1986 and 1997 bond issues for purposes of §5607(d)(12).

The Pennsylvania Supreme Court determined that the program administration agreements fell under §5607(d)(12). In explaining, the court noted that the statute authorizes contracts "with others in connection with" bonds, and not just the bond issues themselves. The court concluded on this issue that the reasonable conclusion is that a contract for the provision of support for the administration of a bond program is an agreement falling under the statutory authorization. The court found it sufficient that the Legislature authorized the type of agreements at issue and cautioned that it "is not to say that there can never be circumstances under which a successor board of directors may avoid a contract held over from its predecessor, even where such a long-term contract is statutorily authorized." ■

**PRESIDENT'S MESSAGE continued from page 4**

all members of the bar association to update you on the PAC's "Vote Yes" and public education campaigns. This is a matter of utmost importance to our Bar Association, and to our democratic system of government. I urge you to carefully weigh and assess the infor-

mation provided, and to do your best to ensure that family members and citizens with whom you interact understand the vital role that independent, experienced, and well-qualified judges play in our society.

It is a fair and impartial judiciary, in the end, that makes the American system of democracy the envy of the world. Maintaining that impressive system, which has endured for over two centuries, is a job that must begin at home. The ACBA is committed to preserving a strong and independent judiciary in Allegheny County and throughout the Commonwealth of Pennsylvania. The board of governors' plan, I believe, will move us closer toward that laudable goal. ■

**BLI continued from page 5**

year and there are only so many seats at those tables. There are also budgetary reasons since all students who successfully complete the program requirements receive complimentary registration and housing at the Bench-Bar Conference, which costs approximately \$500 per student.

Orientation was held on Aug. 14 and classes will meet once a month through June 2008. Coffey said this year's class roster includes the following students: Jennifer Andrade, Zoe Babe, Lawrence Baumiller, Erin Farabaugh, Beth Brandsetter Fischman, Hope Guy, Elizabeth Hughes, Kristi Johnson, Matthew Lenahan, Mandi Scott, Daniel Spanovich, Tara Stevens, Nicole Wetherton, Jason Yarbrough and Julie Yarbrowski.

Schnippert said the only requirements in order to take part in the BLI are to be a young lawyer member of the ACBA and to be able to fulfill the class requirements. Students are required to attend a variety of meetings and activities pertaining to the actual BLI classes, the YLD Council, at least one YLD Committee, the Stepping Out Program, the Very Important Papers Program, the mid-year and annual YLD meetings, the ACBA's board of governors, the ACBA Services Inc.'s board of directors and the Allegheny County Bar Foundation.

In addition, they must take part in the YLD children's holiday party and participate in the BLI class project.

"One of their assignments is to come up with an idea for a public service project to be completed by the class," said Coffey. "We will meet in October to discuss ideas and to take a vote. I want them to vote on the project and to agree on it because when you have ownership in something, you care about it more."

Schnippert said previous students have provided extremely positive feedback about their experience in the class.

"Even though we give them a pretty comprehensive overview at the orientation, by the end of the year the class

members have done so many things and learned so much that the class has exceeded their expectations or preconceived ideas," she said. "It gives participants insight into the operations of the ACBA and its entities that they would not otherwise gain."

"It also provides innumerable opportunities to expand their professional and community contacts, allows for professional and personal development and growth, gives them the ability to share ideas about what they think young lawyers need and provides opportunities to receive information on a firsthand basis about all operations of the organization," added Schnippert.

Coffey said the BLI experience can help young lawyers if they later decide to seek election for a position in the ACBA because they will have more name recognition among ACBA members.

"Bar association participation should be seen as an enhancement and not a detriment to the practice of law," said Coffey. ■

**SERVICES continued from page 6**

from annual dues paid by members, while most associations rely on between 30 and 40 percent of their revenue from this source.

Smith, who served as executive director of the ACBA from 1963 until he retired in 2001, passed away in 2006. He imparted his business philosophy to Blaner who also believes that creating business lines that ACBA members need and are willing to pay for is a great way to support the structure of the association and to keep dues as low as possible.

Blaner said the ACBA has the third lowest dues structure in the United States at \$170 per year, just somewhat more expensive than the \$165 charged by bar associations in San Diego and Dallas.

Joining Smith as founding members of Services, Inc. were Blaner, Jim Abraham and John Gismondi. Abraham and Gismondi served the maximum allowable term of nine years as members of the board of directors. Although Paul Beck was not a founding member, he served six years as a director and was a valuable contributor to the board.

The ACBA bylaws state that directors can serve no more than three consecutive three-year terms.

"The reason it was set up that way is because it was a new venture and we needed longevity with people who would serve for a long time. We knew it would take a number of years for us to develop the appropriate business lines and to grow the company," said Blaner. "Therefore, we felt that longer terms for board members would help us grow the company and provide stability." ■

# Twinkle, Twinkle.



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Blaner noted that Services, Inc. generated approximately \$500,000 in annual revenue in 2001, but now the figure is well over \$1.1 million.

At the time the ACBA formed its for-profit subsidiary, there were about eight other bar associations in the nation that had profit-generating divisions in place. However, the other associations created their subsidiaries to offer insurance products and services.

"Our subsidiary was different because we kept insurance products and services in the association and focused our subsidiary on video depositions and replay when we first started the organization," said Blaner. "We actually created that industry by conducting the first video deposition in the United States."

Gismondi, a former ACBA president, said being the first bar association in the country to offer videotaped depositions was the catalyst for offering other services.

"The more that members can get out of a bar association in general, the stronger the organization will be and the people will feel more of an allegiance to the organization," said Gismondi. "The success of ACBA Services is a testament to the strength and perseverance of the bar association itself in Allegheny County. Our bar association has such a name brand and presence that when it creates an offshoot, it has an excellent chance of succeeding."

Gismondi is the owner, founder and partner of Gismondi & Associates, a firm he started in 1987 at the age of 34. He focuses on medical malpractice and personal injury cases. He has been teaching law classes at the University of Pittsburgh for 24 years. The university recognized his contribu-

tions to the legal profession by creating the John Gismondi Civil Litigation Certificate Program.

He received his law degree from the University of Pittsburgh in 1978. Gismondi and his wife Lisa have three children, Maria, Tory and Justin.

Abraham recalls that Services, Inc. was formed while he was serving as treasurer of the ACBA. He went on to serve as chairman of the board during most of his tenure with the subsidiary.

"As treasurer of the ACBA, I saw that we were doing a lot of activities for members and generating taxable income," said Abraham. "These activities also put us in competition as a bar association with other businesses. If we would have continued to handle these activities internally, all of the decisions would have had to be made by the board of governors. It made sense to move these activities into a subsidiary with its own board of directors so the ACBA board of governors could handle other matters."

Abraham, who started his solo practice last year, said it was rewarding to watch the concept blossom into a profitable business venture. He earned his law degree from Duquesne University in 1978 and worked for a large public accounting firm and several Pittsburgh firms before becoming a sole practitioner.

Abraham's specialty areas include employee benefits, estate planning and federal income tax matters. He and his wife Francine have two children, Andrew Ferraro and Amy Ferraro.

Beck, who chaired the ACBA Headquarters Committee for 16 years, decided not to serve another term on the Services, Inc. board because he wanted to make way for someone with a fresh perspective. He has served in

numerous positions with the ACBA since 1962 when he received his law degree from Duquesne University. He served as secretary of the Young Lawyers Division, a member of the Finance Committee, chairman of the Law Day Committee and chairman of the Intellectual Property Section, which he also founded.

Prior to becoming an attorney, Beck was an electrical engineer and then served two years in the military. He fondly remembers reading the legal publications that a military lawyer received in the mail. In fact, he was still in the military when he applied to the Duquesne University School of Law.

He worked as a patent attorney and handled cases pertaining to copyright and trademark litigation. He and his wife Nancy have eight children, Bradford Beck, Jennifer Foley, Michael Beck, Shawn Flaherty, Peter Flaherty, Brian Flaherty, Gregory Flaherty and Maggie Gurtner.

"The ACBA is a model bar association; it's one of the finest in the country," said Beck. "It didn't happen by chance, though. It resulted from the dedication of many lawyers and it's a real tribute to Jim Smith. I'm proud to have been part of it."

The board of directors announced new appointments in July and the board reorganized at the end of August. New members of the board now include Hal Coffey, Kelly Jones and Steve Perry. Officers are Marvin Lieber, president; Jennifer Cerce, secretary; and Greg Harbaugh, treasurer.

"I'm very interested in all aspects of the ACBA, especially its future, so I wanted to be part of the for-profit wing and find other avenues we can continue to grow," said Coffey. ■

#### NON-COMPETE continued from page 7

employment is enforceable only if the employee receives new consideration. *George W. Kistler, Inc. v. O'Brien*, 347 A.2d 311 (Pa. 1975). The new consideration must provide a real benefit, which the employee is not otherwise entitled to receive. Examples of new consideration include money, new job responsibilities and titles, new benefits, or a change in employment status from at-will to contract employee status.

#### Be sure that the non-compete agreement contains an assignment provision.

In some jurisdictions, like Pennsylvania, where a company sells its assets to another company, the purchaser cannot enforce the seller's non-competes unless the agreement expressly permits the assignment. *Hess*, 808 A.2d 912. Courts in these jurisdictions hold that it is not reasonable to allow an entity that is not an original party to the non-compete agreement to enforce the agreement, unless the employee has previously agreed to the assignment. Including an assignment provision is, therefore, highly recommended.

#### Be sure the non-compete agreement contains a tolling provision.

In certain jurisdictions, like Pennsylvania, the term of the non-compete starts to run on the date of termination, not on the date an injunction is obtained. *Hayes v. Altman*, 266 A.2d 269 (Pa. 1970). For example, suppose an employee breaches a one-year non-compete and an injunction is ultimately obtained after eight months

Continued on page 12



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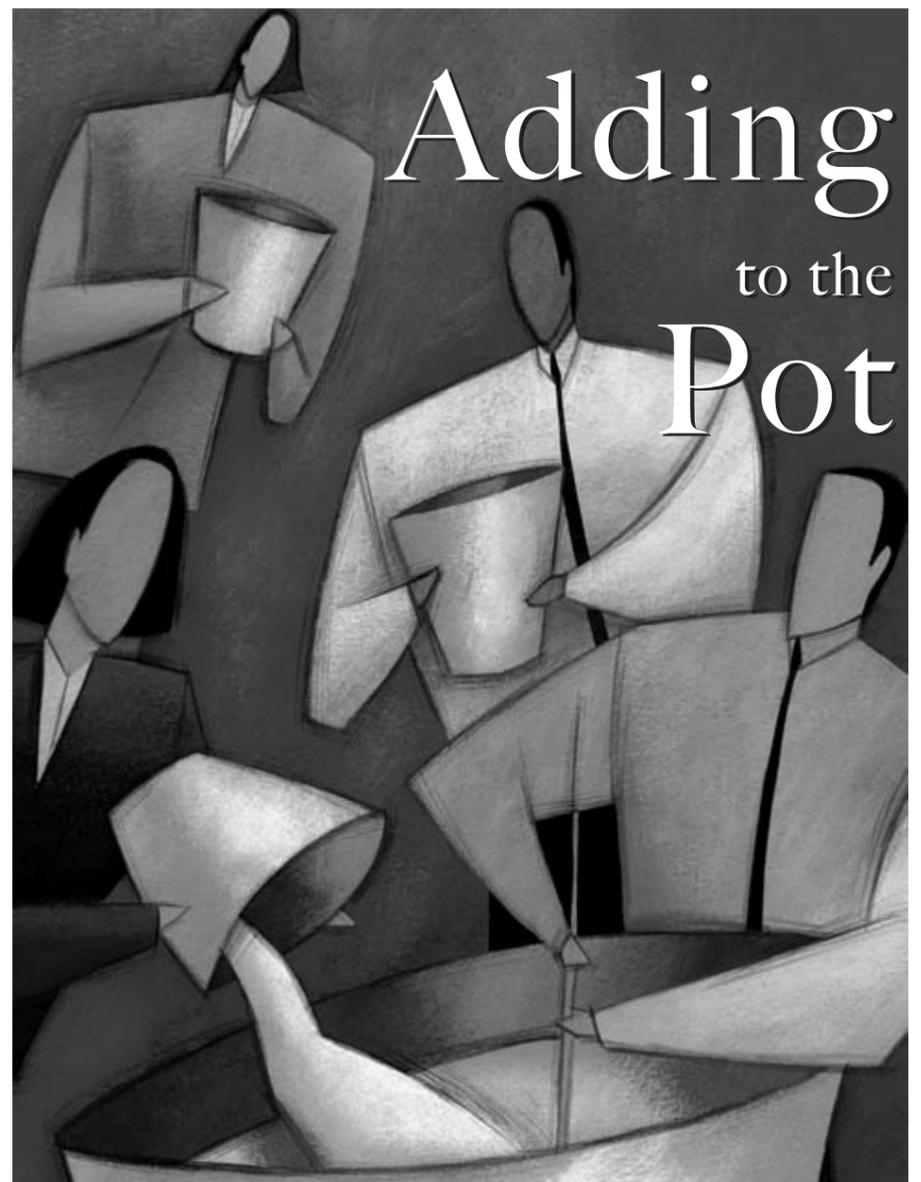
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**NON-COMPETE continued from page 11**

have expired. Instead of obtaining a full year under the covenant, unless tolling language is contained in the covenant, your client will only obtain four months of protection. In order to avoid this disastrous result, all covenants under Pennsylvania law should include a tolling provision, stating that "the duration of the covenant shall be extended by the period equal to the time during which the employee is in breach." In the above example, although the employee has violated the covenant for eight months, with the appropriate tolling provision, the employer will be able to enforce the agreement for a full 12 months. See *Worldwide Auditing*

*Serv., Inc. v. Richter*, 587 A.2d 772 (Pa.Super. 1991).

In summary, there are many nuances that scriveners should consider when drafting non-compete agreements. If done properly, non-competes are effective tools to preserve your clients' most valuable assets. If done improperly, your client will be without a remedy and you may ultimately lose an important client relationship. ■

*Jay D. Marinstein litigates complex, commercial litigation cases on a national basis for Fox Rothschild. His work has ranged from trade secret, restrictive covenant, and breach of contract cases to securities cases, fraud cases, partnership and share-*

*holder actions, and executive compensation cases. He is the office managing partner of Fox Rothschild's Pittsburgh office and he co-chairs the litigation group for the Pittsburgh office.*

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