Steve Turner Named Government Lawyer of the Year

By Mary E. McDaniel, Chief Counsel, Office of the Speaker

In November, the highly coveted ninth annual Government Lawyer of the Year Award was bestowed on a prominent Harrisburg attorney.

The recipient of this honor must be a government lawyer who has made a substantial difference in the legal profession, as well as for the people of Pennsylvania. The Government Lawyers Committee is tasked with selecting one winner — among the many talented and dedicated public servants — who is the shining example above all others. Past winners included then-Insurance Department Chief Counsel Heidi Hamman Shakely, Chief Deputy Attorney General David DeVries, Department of Public Welfare Chief Counsel Jack Kane and Deputy General Counsel Greg Dunlap.

This year’s winner was the affable Steve Turner. Anyone who has met Turner soon realizes that his charm and wit, combined with his devotion to serving the public, have helped make a difference in the lives of many Pennsylvanians. Currently, Turner is chief counsel for the Pennsylvania Office of Inspector General. His previous professional experience included service within the Pennsylvania Crime Commission and Office of General Counsel. He also has more than 10 years of experience in private practice.

In addition to his day job, Turner has provided pro bono representation for many women and children in protection from abuse (PFA) cases and has coordinated educational sessions between the PBA and the Pennsylvania Coalition Against Domestic Violence to encourage other lawyers to take on similar cases. He is co-founder of the Men Against Domestic Violence program at the YWCA of Greater Harrisburg and teaches municipal police officers about the legal issues surrounding domestic violence, sexual assault and child abuse.

In addition to his pro bono work, Turner is frequently involved in various community projects. He has volunteered at Penn State Children’s Hospital and the Ronald McDonald House, both located in Hershey. Turner is also active in PBA committees and received a 2002 PBA Pro Bono Award for his ongoing commitment to public service.

The Government Lawyers Committee wishes to thank everyone who helped make the selection of this award-winner a memorable experience.
From the Editors’ Desk

We are excited to present you with this new, revitalized Government Lawyer’s Committee newsletter. It’s been quite some time since you’ve received one of these updates. As we contemplated the best avenues for reaching our members, we immediately thought an online newsletter would provide information in the most immediate and, hopefully, relevant way possible. One advantage of the electronic format is that we can now provide you with hyperlinks that take you directly to relevant information in the articles. We hope you will enjoy it!

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Our goal is to provide government lawyers with a collection of informative and interesting news items and articles geared specifically to your needs. One item we will all have to deal with sooner or later is electronic file retention as it may relate to pending actions. The featured article on electronic document retention policy and e-discovery will give you a preview of what you might expect as this expanding area of the law becomes part of our daily routine.

Please take a few minutes also to review the information on the upcoming Committee-sponsored events, including our team for the Relay for Life, pro bono training on handling PFA cases, and upcoming Lunch and Learns, as well as the updates on the reorganization of our subcommittees. We hope that this newsletter will enable you to stay abreast of all of the benefits our Committee has to offer and that it will motivate you to be an active participant in our Committee’s activities.

On behalf of all who have contributed to our efforts, we ask for your support and cooperation in making our Committee a success this year. Please contact us with any suggestions or other thoughts you may have for improving this newsletter or any other committee projects. Send your comments to any of the editors: Linda Laub, llaub@state.pa.us; Mary McDaniel, mmcdaniel@speakerobrien.com; or Jan Matthew Tamanini, jtamani@state.pa.us.

Thanks for your attention — and enjoy!
The Professional Development Subcommittee will hold a “lunch and learn” April 17, at the Dauphin County Bar Association, on the “ins and outs” of retirement from the commonwealth, featuring State Employees Retirement System Deputy Chief Counsel Joe Marcucci.

**Professional Development Subcommittee**

Professional Development Subcommittee Chair Bob Shea reports the subcommittee will hold a “lunch and learn” April 17, at the Dauphin County Bar Association, titled “What You Do When It’s Time to Say ‘Goodbye’: The ‘Ins and Outs’ of Retirement from Commonwealth Service,” featuring State Employees Retirement System Deputy Chief Counsel Joe Marcucci. The program is the first of a series the subcommittee is developing focusing on practical skills and information of interest to government lawyers.

Provided that there is sufficient interest, the subcommittee’s goal is to have two or three lunch and learn programs each year. The subcommittee is also continuing with its law school visits, with the next scheduled stop at Widener Law School in late April, when a panel of government lawyers from across the spectrum will speak to Widener students about work in the government sector.

**Membership Subcommittee**

The PBA Government Lawyers Membership Subcommittee met on two occasions to discuss its mission to attract new members and retain existing ones and to promote the Government Lawyer of the Year Award. Co-chair Vicci Madden reports that members attending the subcommittee’s Jan. 30 brainstorming meeting discussed adding new members through receptions, CLE programs, guest speakers at PBA Committee/Section Day meetings, and use of teleconference equipment to reach government lawyers in various regions of the state.

On Feb. 20, the members discussed suggested improvements for the process of selecting the Government Lawyer of the Year. The subcommittee is developing a survey to solicit input from all Government Lawyers Committee members to ensure the award reflects the Committee’s intentions.

If you have any other ideas or suggestions that might assist the Membership Subcommittee, please contact co-chairs Tracy McCurdy (tmcurdy@state.pa.us) or Vicci Madden (Vmadden@state.pa.us). Any and all input is welcome!
To Keep, Or Not To Keep?
Electronic Files and Discovery Policies In Government Practice

By Jan Matthew Tamanini,
Senior Counsel, Department of General Services

As any government lawyer for any type of government entity — large or small — knows, with the near-universal use of computers in government offices it has become more than a small challenge to keep track of all of the information coming across our clients’ desks. One expert estimates that since 1995, over 90 percent of all documents have been created in digital form.

Where the biggest issue in electronic file management not so long ago was how to maintain records of all of the letters and memos we and our clients generated via computer (rather than typing or handwriting as we did as recently as 10 or 15 years ago), we’ve now added vast electronic databases of contract information, licenses, permits, docketing and other specific legal filings. Throw in e-mail and instant messaging, plus the use of PDAs and cell phone technology, and anyone can see the difficulty in ensuring that our clients’ records are complete and accurate.

Changes to the Federal Rules of Civil Procedure

The Dec. 1, 2006 revisions to the Federal Rules of Civil Procedure illustrate some of the difficulties in dealing with the wealth of electronic information we use in everyday government practice. For the first time, the Rules include detailed requirements dealing specifically with “electronically stored information” within their scope. The Committee notes included with that rulemaking shed some light on the considerations involved.

The first overt consideration the Federal Rules gave to electronic data occurred in the 1970 revision to Rule 34(a) ...

The recent changes to Federal Rules 16(b) and 26(f) go hand-in-hand to direct both the parties to litigation and the presiding court to consider any issues related to discovery of electronically-stored information early on in the case, in any event at least 21 days before any scheduling conference or order. The Rules also encourage the parties to reach an early agreement on such issues as waiver of privilege, reasonable scope of discovery, the form in which electronic information must be produced, and identifying what electronic information is “reasonably accessible,” taking into account factors such as the time and costs required for production. The Committee note to Rule 26(f) adds the following helpful context to the changes:

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. ...For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party’s control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information.

Another change adds a new Rule to the mix: because computer systems routinely alter and delete information in the course of ordinary use, Rule 37(f) specifically provides that a court may not impose any sanctions under the Rules “for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.” As the Committee note to this provision states, however, this does not affect the court’s authority to impose sanctions under other rules, such as the Rules of Professional Conduct.

Developing Electronic File Management Policies

How are government attorneys responding to the need to track and maintain this explosion of electronic information? The two main legal arms of the Commonwealth of Pennsylvania are working together to address client needs, with the Federal Rules providing the added impetus to develop a uniform and coherent policy that will well serve all commonwealth agencies. Though this is specific to these two offices, government attorneys at any level, from a local solicitor to the U.S. Attorney’s office and the judiciary, can get some tips on how to manage any practice information base from their examples.

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Late last year, the Offices of General Counsel and Attorney General formed a team to address electronic file issues, particularly as they relate to “e-discovery” in light of the Federal Rules changes. Chief Deputy Attorney General Susan Forney, who manages the Office’s Civil Litigation Section, and Executive Deputy General Counsel Jeffrey Cooper, who runs the Office of General Counsel’s litigation practice, are jointly chairing this commonwealth legal counsel team effort. I recently spoke with Forney and Cooper to get some progress notes on their work. Here’s what’s happening now, as well as some of what you can look forward to in the future as their efforts progress.

Both recognize that the commonwealth has kept data electronically and produced large quantities of information in electronic and other non-paper forms for quite some time. Forney is currently working with agency attorneys to identify how best to handle electronic data storage systems used in the commonwealth’s everyday course of business. One of the biggest challenges is the sheer number of systems to be managed. “There are some common systems, but there also are many variations from one agency to another,” she says. “Every variation presents another wrinkle in dealing with the data management.”

Jeff Cooper agrees. “We’re currently in the process of gathering information about the commonwealth’s computer systems. This is a complex issue, because there are enterprise systems common among most executive agencies as well as systems specific to each agency. We’re trying to sort through information and sort through what types of electronic data exist, so we will have a good idea of what is available. I suspect that process is going to take another couple of months, after which we’ll be able to better advise agency counsel and litigation counsel.” After the systems analysis is complete, Cooper anticipates using a software program that will automatically capture the desired electronic information.

One memo has already gone out to make commonwealth attorneys aware of the project. “What we’ve done so far is issue a memo for the agency chief counsel laying out what the Rules require and what our expectations are, both of agency counsel and of our attorneys,” Forney notes, adding that, to date, she is unaware of any court in Pennsylvania that has imposed sanctions on the commonwealth or any other government agency related to its data management.

Even so, Forney acknowledges that she has stepped up her office’s efforts in advising agencies to be careful of their electronic data management when a matter enters litigation. Her office has developed memoranda and letters to clients (both individuals and agencies) to be sent as soon as a complaint is filed, advising the agency of its responsibility to maintain electronic documents related to the pending matter. Forney and Cooper are also working together to develop and coordinate an electronic file retention policy for use in litigation. In addition, each office is in the process of developing its own policies on the handling of electronic data.

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One of the ways in which the attorney general has already seen plaintiffs bring actions against the commonwealth and use the electronic discovery rules to their advantage is to short-circuit or derail regulatory enforcement actions. According to Forney, “We’ve seen cases brought against agencies, such as DEP (Department of Environmental Protection), who are engaged in administrative proceedings against a business. That business will get fed up and turn around and go into federal court to charge the agency with malicious prosecution or retaliatory action.”

“I think where we are with the issue is that the plaintiff’s bar is wrapping its head around this as we [as government counsel] are trying to grapple with it, so we really haven’t been inundated yet. But I’d imagine it’s just a matter of time,” she says.

What’s Next?

Cooper says that agency chief counsel already recognize that electronic file management is something that has to be addressed immediately. He says the agency counsel are looking for assistance in understanding the issue. Cooper’s team of computer counsel and consultants are in the process of meeting with agency legal offices to provide an overview of the issues and to offer direct, agency-specific assistance in data management.

After meeting the initial challenge of understanding of the variety and complexity of the commonwealth’s computer systems, Cooper sees the team’s next challenge as making sure that commonwealth attorneys and their government clients fully understand that electronic communications are now equivalent to written communications with respect to litigation and discovery. “It’s a change in attitude, just being able to deal with the quantity of electronic communications,” he says. “The sheer volume is much greater now, especially with virtually everyone using e-mail.”

Forney is also mindful of necessity to meet the challenge of maintaining good information for use in potential litigation. “One of the trickiest issues, really the biggest thing we have to deal with, has been e-mails, and how to decide how to go about retaining particular e-mails and preventing the automatic deletions that occur in most e-mail systems.”

Another universal issue is that e-mail, being more immediate and informal than most written communications in the past, tends to capture the sender’s thoughts with more immediacy — and consequently less considered thought — than was the case in the past with hard copy documents. Cooper

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explains, “On both sides of a case, you’re likely to find more candid discussion of people’s thoughts in an e-mail than you would see in a written memo. That can be both good thing and bad thing. People are also more likely to forward e-mails than written documents, even when they have privilege markings on them. That’s a problem.”

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When asked for one piece of general guidance he would most like to give to government attorneys, Cooper responds, “What government lawyers particularly need to do is to be collaborative with their IT people. This is a process that isn’t just a legal one; you have to bring in expertise from other professionals. I think that’s sort of a new challenge for lawyers, to be able to understand and deal with IT folks. I just hope people will be sensitive to that.”

For a complete copy of the revisions to the Federal Rules of Civil Procedure including the extensive Committee notes, go to www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.


Please Mark Your Calendars for These Upcoming Events

April 17  
Government Lawyers Committee  
“Lunch and Learn”  
Dauphin County Bar Association, Harrisburg  
featuring State Employees Retirement System  
Deputy Chief Counsel Joe Marcucci

April 19  
Government Lawyers Committee Protection from Abuse (PFA) Case Training  
Pennsylvania Coalition Against Domestic Violence Training Center, 6400 Flank Drive, Harrisburg  
For more information or to register, contact PCADV at (717) 545-6400.

April 24  
PBA/YLD10th Annual Day on the Hill  
State Capitol Complex, Harrisburg

April 25, 11:00 a.m. - 12:30 p.m.  
Government Lawyers Committee Meeting  
Radisson Penn Harris Hotel & Convention Center, Camp Hill  
Part of PBA Committee/Section Day

May 24, 9:45 a.m. - 4:00 p.m.  
PBA Outreach to Children Committee Interdisciplinary Summit  
Harrisburg Hilton and Towers

June 20 - 22  
PBA Annual Meeting  
Sheraton Philadelphia City Center Hotel, Philadelphia

Unless otherwise noted, call the PBA at (800) 932-0311, or visit www.pabar.org for more information.
In the Spotlight

By Carol Mowery, Assistant Counsel, Department of Labor & Industry

Appointments
Geoffrey W. Melada, a 2006 graduate of Duquesne Law School and a former law clerk to Barbara Christie, chief counsel to the Pennsylvania State Police, has become an assistant district attorney in Allegheny County.

Honors
Barbara Grabowski, assistant counsel in the Department of Environmental Protection’s Pittsburgh office, competed in the U.S. Cycling Federation Masters National Cycling Championships in Seven Springs last July. She finished sixth in the individual time trial, ninth in the criterium race, and fourth in the road race.

Gina Thomas, assistant counsel in the Department of Environmental Protection’s Southeast Regional Office, has been selected as a first soprano in the prestigious choir of the Cathedral Basilica of Saints Peter and Paul in Philadelphia. The cathedral is the principal church of the Philadelphia Archdiocese and Cardinal Justin Regali. Its choir performs for all liturgical holidays as well as weekly services.

Meg Murphy, assistant counsel in the Department of Environmental Protection’s Office of Chief Counsel, was recently profiled in the Harrisburg Patriot-News as a vocalist for the Knife and Fork Band.

Births
Michael Braymer, assistant counsel in the Department of Environmental Protection’s Meadville office, and his wife, Amy, welcomed Rylie Joy to their family on February 20.

The Projects and Outreach Subcommittee of the PBA Government Lawyers Committee is attempting to re-form the PBA Government Lawyers team to participate in the annual American Cancer Society’s Relay for Life. There are two potential locations/dates: Roof Park in Etters from 4:00 p.m., Saturday, May 18, to 4:00 p.m., Sunday, May 19; and Messiah College on May 4-5, (times to be determined).

Relay For Life is a fun-filled overnight event designed to celebrate survivorship and raise money for research and programs of the American Cancer Society. During the event, teams of people gather at schools, fairgrounds, or parks and take turns walking or running laps. Each team tries to keep at least one team member on the track at all times. Team members are responsible for their own fundraising.

We are hoping to get at least 24 people to commit to the team so that each person only has to walk for one hour, but more team members will reduce walking shifts and also allow for two team members to walk at the same time (to keep each other company).

If you are willing to commit to this worthwhile cause, please respond by e-mail to Carol Mowery at camowery@state.pa.us as soon as possible and indicate which date/location is preferable. If we get enough interest, we will choose the date/location most convenient for the majority. Thank you in advance for your support!
Pennsylvania Appellate Court News

Case Selections and Summaries by Maisie Seiverling, Assistant Chief Counsel, Department of General Services, and Jan Tamanini, Senior Counsel, Department of General Services

Highlights from the current Pennsylvania Commonwealth and Supreme Court sessions, with links to the opinions:

A three-judge panel of Commonwealth Court overruled the Unemployment Compensation Board of Review’s finding that a corrections officer who feared for his own safety had good cause to violate the Department of Corrections’ work rules. In his opinion, President Judge Colins noted, “...it shocks the conscience of this court that the Board concluded that a corrections officer who refuses to report a threat of violence against an inmate and refuses to render aid to an inmate being beaten could use fear for his own personal safety as good cause justification for his refusal to render aid.”
www.courts.state.pa.us/OpPosting/CWealth/out/1205CD06_2-28-07.pdf

The Allegheny County Court of Common Pleas dismissed as frivolous an inmate’s pro se complaint against SCI-Pittsburgh employees for compensation for damages to his TV, placed in storage while the inmate was confined to the institution’s restricted housing unit. The inmate based his claim on three theories: intentional tort, negligence and implied contract. While the lower court sua sponte found that the employees were immune on all three counts, the Commonwealth Court on appeal held that, although sovereign immunity prohibits imposition of liability on the commonwealth for intentional tort claims, there is no such prohibition against claims for negligence in the care of personal property due to the waiver provided in Section 8522(b)(3) of the Sovereign Immunity Act or for contract claims, as the commonwealth has waived its immunity in such cases. Accordingly, the court remanded the case to the lower court on those two counts.
www.courts.state.pa.us/OpPosting/CWealth/out/1786CD06_2-28-07.pdf

The Pa. Supreme Court, per curiam, denied PHEAA’s petition for allowance of appeal from Commonwealth Court’s decision ordering the agency to turn its financial and other records related to attendance at numerous conferences over to three reporters who petitioned for access to the records under the Right-to-Know Law. The decision killed PHEAA’s attempt to withhold its financial records from the news media on the grounds that they were “trade secrets,” “legislative acts” and protected by the right to privacy.

In this opinion, the Pa. Supreme Court essentially smacked down the Commonwealth Court for second-guessing an executive agency in promulgating and interpreting its own regulations. In the unanimous opinion reinstating the Environmental Hearing Board’s original decision, Justice Castille wrote, “When a court reviews a regulation issued pursuant to an agency’s legislative rule-making power, the court may not substitute its own judgment for that of the agency....The Commonwealth Court advanced [its] opinion without discussing the mandates of the [Board’s statutory authority], or whether the administrative interpretation was reasonable or consistent with the regulation. In doing so, the panel plainly erred.”

A public employee’s Weingarten rights under the Pa. Public Employee Relations Act to be accompanied by a union representative to an interview (where the employee reasonably fears that discipline may be an outcome) include the employee’s pick of representation, according to the Pa. Supreme Court. “[...W]e conclude that the right of accommodation during an investigatory interview includes the employee’s choice of union representative — when the union representative is reasonably available and there are no extenuating circumstances.”

Does an appellant’s failure to raise an issue in an administrative proceeding constitute a waiver of that issue on appeal? Only if the agency has adopted a rule to that effect, according to the Pa. Supreme Court. Referring to the Court’s 1974 decision in Dilliplate v. Lehigh Valley Trust Company (322 A.2d 114), Justice Castille wrote, “Dilliplate did not delve into the administrative law arena, and the issue preservation rule this Court adopted in the Dilliplate line was a function of our rule-making authority for the judicial system. It is one thing to say that an administrative agency may adopt an internal issue preservation requirement, and quite another to say that a judicial doctrine requires that such a procedural rule be adopted or employed by an agency. That requirement, if there is to be any, is for the Board to determine, at least as an initial matter.”
The ninth annual holiday reception of the Government Lawyers Committee was filled with good friends and good food — not only for those attending, but also for clients of the Bethesda Mission, who benefited from the generous donations of the committee members.

Government Lawyers Co-chairs Dave DeVries and Alexis Barbieri join Projects and Outreach Subcommittee Co-chairs Shawn Weis and Stephanie Latimore, flanking PBA Executive Director Barry Simpson in front of the holiday tree.

The committee’s donations of food and personal hygiene items helped the homeless at the Bethesda Mission, as well as several needy Harrisburg-area families, have a merrier holiday season last year.

Stephanie Latimore, Alexis Barbieri, and Shawn Weis check out some of the donations.