Smith Named “Government Lawyer of the Year”

Jessie L. Smith (center) is congratulated on her “Government Lawyer of the Year” Award by PBA President Tim Carson (left) and Governor’s General Counsel and Government Lawyers Committee Chair James M. Sheehan (right).

The Pennsylvania Bar Association Government Lawyers Committee honored Harrisburg-based Deputy Attorney General Jessie L. Smith with the 2002 “Government Lawyer of the Year” Award during the PBA Committee/Section Day luncheon in Harrisburg on Nov. 21.

“Throughout her career, Jessie Smith has been involved in educating younger and less experienced attorneys, and lobbying for programs and training to benefit government lawyers,” said Governor’s General Counsel and Government Lawyers Committee Chair James M. Sheehan. “She has been an advocate for enhancing the image of government lawyers and for improving their overall performance and capability. She has demonstrated, by her own achievements, that an attorney in government service can still serve in the most sought after and most prestigious positions of the bar. She truly exemplifies the highest standards of government practice.”

Smith joined the Office of Attorney General in 1986 as deputy attorney general in the statewide Torts Litigation Section and was promoted to chief of the section in 1988.

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From the Editors’ Desk

Treat yourself to a weekend getaway at the Harrisburg Hilton & Towers, compliments of the Membership Subcommittee, by simply recruiting new members for the Government Lawyers Committee. We urge you to take advantage of this win-win opportunity for both you and the committee.

This is the first time the Membership Subcommittee has undertaken a recruiting campaign and we hope everyone will do his or her part to make it a success. If every current member recruited just one new member, we would have an impressive total membership of more than 700. With a membership that large, we could become an even bigger voice in the PBA.

There is less than a month left in the recruiting campaign, so do not miss your chance to win the grand prize while doing your part for the committee. The winner’s name will be announced in early February. We wish you all the best of luck!

For more details, see the ad below and the Membership Subcommittee Report on Page 3 of this newsletter, or contact Michael Shatto at the PBA at (717) 238-6715, ext. 2243.

We look forward to seeing all of you — and all of our new members — at the PBA annual meeting April 23-25 in Philadelphia.

Enter the PBA Government Lawyers Committee Membership Drive Weekend-Giveaway Drawing

It’s your chance to win a weekend getaway for two at the Harrisburg Hilton & Towers
Help other Government Lawyers discover the benefits of committee membership and the opportunities for service, leadership, friendship and greater participation in the profession.

The more new members you recruit, the better your chance of winning!
Prize includes a two-night weekend stay for two and complimentary breakfast buffet at Raspberries.
Tax included. Subject to availability. Gratuities not included.

To enter, simply recruit a new Government Lawyer Committee member. Each time you recruit a new member, your name will be entered in the drawing.
Drawing to be conducted at PBA Headquarters after 2/1/03.

Deadline for entries: February 1, 2003
Print the enrollment/entry form at
www.pabar.org/pdf/glweekendcontest.pdf, or contact Michael Shatto at the PBA at (800) 932-0311, ext. 2243 or michael.shatto@pabar.org.
The Services to Members Subcommittee has completed the Government Lawyers Career Information Center Web page, which can be accessed through the PBA Web site. The Web site is a directory of public sector legal jobs within Pennsylvania. To view the Career Information Center Web page go to www.pabar.org and click on Committees Info/Government Lawyers/Career Information Center. Now that the Web page is completed, the subcommittee is turning its attention to producing a second edition of the Pennsylvania Government Lawyers Directory.

### Membership

The Membership Subcommittee announced a new recruiting campaign designed to encourage each government lawyers committee member to help recruit new members. The campaign offers those members who recruit new members an opportunity to win a weekend for two at the Harrisburg Hilton & Towers. The package includes a two-night weekend stay and complimentary breakfast. Each time you recruit a new member, your name will be entered into a drawing to win the weekend getaway. The campaign runs through Feb. 1, 2003. As part of the campaign, the subcommittee developed a new recruiting form, which is available online at www.pabar.org. The form provides space for the name of the individual who recruited the new member. The PBA is also mailing a copy of the form to each committee member. For more information contact Michael Shatto at the PBA at (717) 238-6715, ext. 2243. Also see the campaign ad on Page 2.

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**Keglers Wanted**

The Department of Environmental Protection’s (DEP) legal office is seeking keglers (if you do not know what this word means, this event is for you!) to participate in one of the largest fundraising efforts benefitting kids. The program, Bowling for Kids’ Sake, is sponsored by Big Brothers/Big Sisters. Last year, employees from DEP’s legal office participated in the event and raised nearly $1,000. DEP is hoping to sponsor two or more teams for this year’s event, which will be held at a Harrisburg-area bowling alley in March or April 2003. Complimentary pizza, drinks and shirts will be provided.

For more information, please contact Patrick Bair at (717) 787-1956 or pbair@state.pa.us.

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**Smith Named “Government Lawyer of the Year”**

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During her 16 years of government service, Smith has been actively involved in educating and lobbying for activities and initiatives of importance to government lawyers.

In addition to her government work, Smith is a past president of the Dauphin County Bar Association and served as an arbitrator for the Dauphin County courts. She also was an adjunct faculty member for The Dickinson School of Law of The Pennsylvania State University where she taught trial advocacy. Currently, Smith serves as a board member of the Harrisburg Humane Society and Danzante, a Latino dance group.

The “Government Lawyer of the Year” Award honors a government lawyer who has made a significant singular contribution or has dedicated his or her career to outstanding service to the profession for the benefit of the public or a governmental entity.

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**From the Chair**

(Continued from Page 1)

matters of significance to them. The Services to Members Subcommittee did an amazing job of designing and developing a Web site geared specifically to educate users about lawyers in government practice.

The Special Projects Subcommittee drafted a model Management Directive that encourages governmental agencies to use mediation in settling appropriate disputes. As a result of their efforts, the Commonwealth now has in place a first-of-its-kind mediation program. The Public Relations Subcommittee continues to keep members informed through the publication of *News & Views* and has successfully raised the visibility of the Government Lawyer of the Year Award.

In addition, the Social Subcommittee has changed its focus from being purely social to raising social awareness. Over the years, the subcommittee’s efforts have raised a tremendous amount of money for numerous charitable organizations.

Finally, the Membership Subcommittee has worked diligently to attract new members to the committee. Due in no small part to the subcommittee’s efforts, our membership now tops 350.

I thank all of you who have participated in the committee and its sponsored events and urge those of you who have not yet taken an active role to participate in the year ahead. It is only through your involvement that you can truly appreciate all the committee and the PBA have to offer.

I extend my best wishes to you for a happy and healthy new year.
Meet One of Commonwealth Court’s Newest Members

A Profile of Judge Mary Hannah Leavitt

By Alexis Barbieri, Executive Deputy Attorney General, Office of Attorney General

Mary Hannah Leavitt was commissioned as a judge on the Commonwealth Court of Pennsylvania on Dec. 20, 2001, and took office on Jan. 2, 2002. Interestingly, the road to this significant legal achievement was not a straight one. At the girls school Leavitt attended in Cleveland, Ohio, the criterion for success was a place in academia. Consequently, after receiving her B.A. in Classics (Latin and Greek) at Connecticut College for Women, she pursued a Masters degree in Classical Archeology at The University of Pennsylvania.

Later, after marrying a lawyer (also a Classics major), she became interested in the law and went back to school to get a law degree at Dickinson Law School, where she was a member of the Law Review. Her legal career began with an appointment as an assistant attorney general assigned to the Insurance Department by then Acting Attorney General Gerald Gornish. Shortly thereafter, as a result of constitutional changes, the office was reorganized; she remained at the Insurance Department but under the auspices of the General Counsel’s Office. She remained at the Insurance Department until 1987, ending her service as chief counsel (having been appointed to the position by Gov. Dick Thornburgh).

In addition to the traditional legal skills of cross-examining experts and brief writing, insurance cases required her to develop an understanding of actuarial science in order to handle rate cases, and economics and statutory accounting principles to handle insurance company acquisitions or mergers. She describes her insurance regulatory practice as combining aspects of a securities practice and a utilities practice, but because of the broad mission of the Insurance Department, it also led her into consumer protection, rate and policy issues, agent dismissals, and insurance company insolvency. It was a long way from the study of Latin.

One of the more interesting matters that she handled was defending the Insurance Commissioner’s decision to end gender-based rating of automobile insurance. The case generated a great deal of resistance and, at the time, was controversial. Experts from the Wharton School and Arthur Little, actuaries and other economists appeared at the hearing. Ultimately, she succeeded in persuading both the Commonwealth and Supreme Courts to uphold the commissioner’s decision.

When Leavitt left government service, she went into private practice at the Harrisburg office of what was then Baskin, Flaherty, Elliot and Manino. After one year, the Harrisburg group moved to Buchanan Ingersoll, and she was elected a shareholder in 1990. She stayed with the firm until her election to the Commonwealth Court. She was a member of the firm’s Litigation Section and continued to focus on insurance regulatory issues. She represented the Texas State Board of Insurance’s Liquidation Office; insurance companies with a wide range of regulatory challenges ranging from market conduct to routine regulatory approvals; and, from a different perspective, insurance agencies in conflict with their underwriter or the Insurance Department. She represented all types of insurers, including a group of title insurers that established a licensed rating bureau after a 10-year hiatus. Not all work involved the insurance industry. She also handled a variety of commercial litigation, including, for example, public contract and employment cases.

Her private practice had two litigation highlights. She represented Aetna in a market conduct case from the administrative hearing to the appeal to the Pennsylvania Supreme Court. It resolved several statutory construction issues and established that in the course of an appeal of an agency action, the agency cannot impose civil penalties. Penalties can only be imposed if the agency institutes an enforcement proceeding. The other highlight was her successful Section 1983 action brought against the Oregon Insurance Commissioner to enjoin enforcement of a state law that had been pre-empted by Congress. The Ninth Circuit unanimously affirmed the district court’s decision. The Oregon Attorney General sought certiorari from the U.S. Supreme Court, but it was not granted. This was fortunate because by the time certiorari was denied, Leavitt was in the midst of her judicial campaign.

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Government Lawyers' Participation Proves Mutually Beneficial

By Catherine Nolan, Assistant Counsel, Governor’s Office of General Counsel assigned to the State Employees’ Retirement System

Former PBA President Reg Belden observed that the perception of government lawyers has changed for the better, and government lawyers are respected for their abilities and professional contributions today more than ever. The positive change is due, in part, to increased participation in the Pennsylvania Bar Association.

Belden spoke of the role of government lawyers at the Nov. 6 “Lunch and Learn” presented by the Career Enhancement Subcommittee of the Government Lawyers Committee. “Look around and you’ll see government attorneys in leadership positions everywhere throughout the organized bar,” Belden said. He added that government lawyers currently serve as members of the PBA’s Board of Governors and House of Delegates and chair or co-chair several committees.

The increased participation of government attorneys in the PBA has proved beneficial to the private bar, too. The professional relationships that have developed as a result of government lawyers’ increased presence in the PBA have positively impacted the practices of attorneys across the Commonwealth, adding professionalism and civility. For example, the networking has facilitated negotiations in litigation that would not have been feasible in the absence of that relationship. Belden noted that government lawyers contribute to the profession and form the perspective of private attorneys by providing valuable input on ethics issues in particular.

Belden also credits government lawyers with invigorating the PBA. “The participation of government attorneys is the best thing we’ve got going,” noting the excitement and energy government attorneys have brought to the organization. He spotlighted the Government Lawyers Committee Career Information Center Web page as a terrific way for private sector attorneys and law students to learn about the variety of work and challenges government attorneys handle.

The continued and active participation of government lawyers is important to the vitality of the PBA, and Belden encouraged members of the audience and our colleagues to continue and to enhance our involvement in the PBA.

Ethics After Enron

By Judy Gilroy, Assistant Counsel, Governor’s Office of General Counsel assigned to the Department of Labor & Industry

While it is true that the corporate scandals of the past few years have focused primarily on the accounting profession, lawyers are hardly immune from the fallout. At a recent “Lunch and Learn” sponsored by the Career Enhancement Subcommittee, Sheila Dow Ford, executive vice president, Pennsylvania Higher Education Assistance Agency, explained some of the new issues that have developed as a result of the Enron scandal and its impact on existing issues that are today even more pertinent to the practice of law.

For example, a major misconception of many clients and some attorneys is that the attorney-client privilege includes any advice that the attorney gives the client. In an era where attorneys frequently give as much business advice as legal advice, both parties must be aware that the business advice is not privileged. To protect the attorney-client privilege, the attorney must make sure that business and legal advice are discussed separately.

The Sarbanes-Oxley Act, passed by Congress in response to Enron and the other corporate scandals, requires enhanced disclosure of corporate activities and increased oversight of corporate audits. Government lawyers who chose to serve on corporate boards (including nonprofit corporations) must be aware of the act’s requirements. It is important that attorneys who serve on corporate boards make it clear that they are not representing the corporation as counsel.

On a subject not related to Enron, Dow Ford also cautioned government attorneys to remember that their particular agency and the Commonwealth are their clients and that our duty of loyalty runs to them, not to any particular individual within the organization. She also suggested government attorneys be mindful of other provisions governing their conduct, including the conflict of interest and political activity provisions of the Governor’s Code of Conduct.

Dow Ford observed that ethical considerations are becoming more and more complicated everyday. In light of this, she reinforced the need for all attorneys to be aware of possible pitfalls in order to avoid them.
Government Lawyers Find Fulfillment in the Classroom

By Erin Verano, Assistant Counsel, Governor’s Office of General Counsel assigned to the Department of State

After a long day serving the public, many government lawyers are happy for the opportunity to go home and relax, or spend their evenings in non-legal pursuits. However, some put away their briefcases and pack up their school bags to head out and share their knowledge and expertise by teaching law students and college undergraduates.

The Government Lawyers Committee recently asked some of its members to share their experiences as both practicing government lawyers and teachers. All the government lawyers interviewed commented on how much time and effort teaching requires, between class preparation and actual class time. However, it was evident from the interviews that their love of teaching and pride in the contributions that they are making to the education of future lawyers, law enforcement officials, social workers and citizens far outweighs the hard work.

“One of the best parts about teaching is running into a former student who is now a practicing lawyer.”

One of the most satisfying aspects of teaching is the connection the government lawyers make with their students. Neil Wise, who is an adjunct professor at Rutgers University School of Law and Director of the Office of Remediation Enforcement for the Environmental Protection Agency in Philadelphia, stated that one of the best parts about teaching is running into a former student who is now a practicing lawyer.

Teaching has always been in Wise’s blood and his dream to someday teach at a law school came true when he was hired as an adjunct professor at Rutgers. He says his biggest challenges as a professor are finding the time to devote to classroom preparation and ensuring that he has adequate material for each class. He observed that while this gets easier with experience, preparation is the key to being a good professor and is required in order to teach the latest developments in the law.

Patrick Carmody, who is an adjunct professor in West Chester University’s Criminal Justice Department and First Assistant District Attorney in Chester County, noted that one of the most rewarding parts of teaching is being able to reach a particular student and see the student become excited about the topic being taught. He finds that he learns as much from the students as he teaches them. He also tries to bring in people involved in the criminal justice field to give the students that real-life perspective.

Christopher Carusone, an adjunct professor at Widener University School of Law in Harrisburg and assistant counsel for the Pennsylvania State Police, has been teaching for three years. He says he enjoys interacting with the students and engaging them in lively discussions about the materials being covered. Chris, who teaches legal methods, says the key to being a good teacher is finding out what motivates each student. For some, it can be the fear of being unprepared for their second semester oral argument, for others it can be the drive to earn the top grade. He observed that teaching has helped him become a better lawyer, explaining that the need to be methodical and organized in the classroom has enhanced his ability to be more methodical and organized on the job.

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Nancy Kippenhan, another adjunct legal methods professor at Widener’s Harrisburg Campus, agrees with Carusone. Kippenhan, who is an assistant counsel at the Department of Community and Economic Development, also feels teaching helps keep her legal skills fresh. She hopes that her interaction with students will have a positive influence on the next generation of lawyers in terms of both their legal skills and professionalism. According to Kippenhan, the hardest part of teaching as an adjunct is juggling your schedule.

One of the most important things a practicing attorney brings to the classroom is practical legal experience. John Able, adjunct professor at Rosemont College and Eastern University and senior deputy attorney general, says that his students appreciate his willingness to share with them examples from the real life cases he handles. These stories bring to life the legal concepts the students are being taught. Able enjoys teaching his students, who are generally non-traditional students with jobs and families, because they bring their own life experiences to the classroom.

His students appreciate his willingness to share with them examples from the real life cases he handles. These stories bring to life the legal concepts the students are being taught.

All of the attorneys interviewed began teaching either because it was a life-long dream or because they came from backgrounds in education, and teaching was the perfect accompaniment to their legal practice. The lawyers agree that one of the benefits of having adjunct professors like themselves is that it exposes the students to lawyers who day in and day out are engaged in the practice of law. From “war stories” to practice tips, the lawyers are able to supplement course work with practical advice that they have learned on the job.

It is good to know that government lawyers are hard at work in Pennsylvania’s law schools and colleges, passing on their knowledge and setting good examples for the lawyers and other professionals of tomorrow.
The No-Longer Forgotten 11th Amendment

By Robert C. Power, Vice Dean, Widener University School of Law, Harrisburg campus

Not too many years ago, lawyers often treated the 11th Amendment as if it was arcane and unimportant. To plaintiffs raising claims under federal law, it was almost always possible to evade it; to defendants, it was a useful defense primarily in the sort of case that fell apart for other reasons. The ability to bring civil rights actions in federal court, state waivers for certain tort claims, and the power of the federal government to bring enforcement actions against states further eroded the protections of state governments in federal court.

No more. In the modern era, the 11th Amendment has become one of the more significant principles of federalism. Government attorneys can rely on it in many more cases, and plaintiff’s attorneys must rethink their litigation strategies in suits against public entities. The U.S. Supreme Court decided three 11th Amendment cases during the 2001-2002 term. Together they indicate the complexity of the issues, illustrating the message that the 11th Amendment is a potential trap for plaintiffs, yet at the same time a tool that must be used carefully by defendants.

The most important of the three cases is Federal Maritime Commission v. South Carolina State Ports Authority, 122 S.Ct. 1321 (2002). The court held that principles of federalism render the states immune from certain federal administrative proceedings. The underlying dispute was fairly mundane. The Authority barred a company from berthing its ships at a state port. The company complained to the Federal Maritime Commission (FMC) that this constituted discrimination. The FMC commenced a hearing to consider issuing a cease and desist and reparations order. The Supreme Court affirmed the Fourth Circuit in concluding that this administrative action was so similar to a private judicial action that states should have the same immunity. What is most noteworthy is that the court did so without relying directly on the 11th Amendment. Accordingly, the case underscores the notion that state immunity commands greater respect than in the past, for the principle of sovereign immunity now has independent unenumerated constitutional authority, and bars more actions than are suggested by the constitutional language.

Justice Thomas’s opinion for the court is rooted by the conclusions that dual sovereignty is “a defining feature of our nation’s constitutional blueprint” and that 11th Amendment immunity is just one manifestation of state sovereignty. To a great degree this approach is reminiscent of Justice Thomas’ dissenting opinion in U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995). There he argued that all powers not clearly delegated to the federal government in the Constitution are retained by the state governments. Now in FMC, Justice Kennedy joins the four justices taking that position in Term Limits to hold that a reservation of state immunity in the 11th Amendment was unnecessary because the Constitution grant-

ed no authority to the national government to provide a forum for private actions against the states. Idiosyncratic aspects of Term Limits make it unreliable as a gauge to the views of the rest of the court. Yet FMC reasserts the position, and now prevails with the same 5-4 split on the court that appears in many other recent federalism cases.

The practical impact of FMC is uncertain. Commentary from law professors on administrative and constitutional law e-mail discussion lists ranged from “this is the way it’s always been” and “few administrative schemes operate in this fashion” to “this changes everything” and “federal administrative jurisdiction will be gutted.” The reality, as usual, is probably somewhere in between. The theoretical implications of the case are broad, but the court has a long history of refusing to carry through on theoretical implications, as those who remember the fates of the reinvigorated delegation doctrine and the “independent agencies are unconstitutional” theory well know.

The second and third cases reaffirm the suspicion that the more things change, the more they remain the same. In a case dealing with the relationship between 11th Amendment immunity and removal to federal court, the court held that removal constitutes a waiver of sovereign immunity. Lapides v. Board of Regents, 122 S. Ct. 1640 (2002). Here the board removed a case raising federal and state law claims to federal court. It then moved to dismiss on 11th Amendment grounds. The Supreme Court said no. Choosing to remove an action to federal court serves to waive sovereign immunity objections to federal court authority. As the federal law claims were dismissed on other grounds, the court’s holding is limited to state law claims subject to state court jurisdiction. Thus, the case does not expand state submission to judicial process as a whole, but merely allows federal courts to consider cases subject to state court jurisdiction but removed to federal court. An interesting aspect of the case is the terse treatment of the state’s argument that the attorney general, who makes litigation decisions such as removing to federal court, lacks power to waive sovereign immunity. The court concluded that litigation attorneys have power to waive sovereign immunity in this fashion notwithstanding state law to the contrary. A similar issue exists under Pennsylvania law, as our constitution reserves the power to waive sovereign immunity to the legislature.

The third of the term’s cases was Verizon Maryland, Inc. v. Public Service Commission, 122 S. Ct. 1753 (2002). Here a dispute about duties under the Telecommunications Act of 1996 turned into an 11th Amendment dispute when the commission ordered Verizon to make payments pursuant to an agreement created under that act. Verizon challenged the commission’s order in a federal action against the commission, its members, and various private entities. In an opinion by Justice Scalia, a unanimous court upheld the action as against the commissioners under the Ex Parte Young doctrine. Refusing to

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Heroes in Our Midst

Sean Creegan, deputy chief counsel, Governor’s Office of General Counsel assigned to the Department of Labor and Industry, was recently awarded a Citizen Commendation by Harrisburg Mayor Stephen Reed. Creegan was one of three passers-by in Riverfront Park on May 31 when a disabled woman fell into the Susquehanna River after she lost control of her motorized wheelchair. The three prevented her from drowning by keeping her head above water until help arrived.

Kenneth J. Suter, assistant counsel, Governor’s Office of General Counsel assigned to the Department of Public Welfare was also recently honored by the City of Harrisburg. He and several other individuals were recognized for assisting Harrisburg police in the apprehension of a hit-and-run driver. Thanks to Suter and the others, the driver was unable to flee the crime scene.

Honors/Awards

John T. Henderson Jr., chief counsel, Governor’s Office of General Counsel assigned to the Department of State, recently received two honors. First, Henderson was awarded a life membership in the New Cumberland Fire Department in recognition of his 16 years of active membership, which included serving as president and being certified by the Department of Health as an Emergency Medical Technician. Henderson was also awarded a Yellow Merit Star by the National Ski Patrol “in recognition and acknowledgement for outstanding organizational skills, member services and involvement as the Eastern Pennsylvania Region Legal Advisor-Counsel from 1999 to 2002.” The Yellow Merit Star is given by the National Ski Patrol to recognize an outstanding act or service to the National Ski Patrol.

Donna J. Mouzayck, first deputy city solicitor, Office of the City Solicitor for Philadelphia, was chosen as this year’s recipient of the International Municipal Lawyers Association’s Distinguished Public Service Award. The award, established to honor a local government attorney for significant and surpassing achievements in the field of local government law, was presented to Mouzayck during a ceremony that took place in Denver in October.

Stella Tsai, chair of Administrative Law at the Office of the City Solicitor, Philadelphia, was named the National Asian Pacific American Bar Association’s (NAPABA) Best Lawyer Under 40 in November. NAPABA is the United States’ only national association of Asian Pacific American attorneys, judges, law professors, and law students providing a national network for its members and affiliates.

Elections/Appointments

Jacqueline Conforti Barnett, university legal counsel, State System of Higher Education, was elected president of the Board of Directors of the National Alumni Association of her alma mater, Marywood University in Scranton.

The Office of the City Solicitor of The Philadelphia Law Department announced the appointment of Romulo “Romy” L. Diaz Jr. as acting chair of Regulatory and Government Law in March. Diaz, a nationally renowned public servant, brings his extensive knowledge of energy regulation, environmental protection, and economic development to Philadelphia’s Law Department.

In October, Mark A. Pacella, chief deputy attorney general, Charitable Trusts & Organizations Section, was elected vice president/president-elect of the National Association of State Charity Officials (NASCO) for 2002-2003 at the NAAG/NASCO annual conference held in Minneapolis.

In July, the Office of the City Solicitor of The Philadelphia Law Department announced the appointment of Eva M. Plaza as chief deputy solicitor of its new Neighborhood Transformation Initiative Unit. A graduate of Harvard University and Boalt Hall School of Law at the University of California, Berkeley, Plaza has led a distinguished legal career in the public and private sectors.

Speaking Engagements

Alexis L. Barbieri, executive deputy attorney general, spoke on the topic of generic drugs at the Pennsylvania State Association of School Retirees’ October meeting.

Barbara L. Christie, chief counsel, Governor’s Office of General Counsel assigned to the Pennsylvania State Police, spoke at The Dickinson School of Law of The Pennsylvania State University in November regarding women in the legal profession and her career in government practice. The program was sponsored by the Women’s Law Caucus.

Jill C. Fluck and David B. Farney, both assistant counsel, Governor’s Office of General Counsel assigned to the Department of Corrections, presented a workshop on political correctness at the Pennsylvania Prison Warden’s Association’s Fall Symposium in Erie. They also presented two workshops on this topic in State College in October at the Department of Corrections’ Symposium on Empowering our Future: Women and Men.
In the Spotlight
(Continued from Page 8)

Cara Bushman Greenhall, senior deputy attorney general, Torts Litigation Section, Pennsylvania Office of Attorney General, participated as a panel member speaking on “Can You Successfully Sue State & Local Government?” for the Pennsylvania Bar Institute in Philadelphia and Mechanicsburg.

In August, Shawn Kenny, assistant counsel, Governor’s Office of General Counsel assigned to the Department of Corrections, conducted a CLE presentation at the Dauphin County Bar Association on the Pennsylvania Heart & Lung Act.

Joanna N. Reynolds, assistant counsel, Governor’s Office of General Counsel assigned to Pennsylvania State Police, recently spoke at a Pennsylvania Bar Institute program on “The Law of Guns in Pennsylvania.” The seminar was held at four different locations in Pennsylvania. In addition, Reynolds spoke on the Pennsylvania Uniform Firearms Act and the Pennsylvania Instant Check System.

Lawrence M. Sherba, senior deputy attorney general, was part of the faculty of “Top Gun” for drug investigators and prosecutors at the Northeast Counter Drug Training Center, Fort Indiantown Gap. Sherba lectured on the use of electronic surveillance in drug investigations.

Publications
Timothy P. Wile, assistant counsel in charge of the Appellate Section of the Vehicle and Traffic Law Division, and Michelle A. Fioravanti, assistant counsel with the Governor’s Office of General Counsel assigned to the Department of Transportation, had an article published in the October issue of the Pennsylvania Bar Association Quarterly entitled “An Update on Pennsylvania’s Implied Consent Law.”

Marriages
Tracy McNamara, assistant counsel, Governor’s Office of General Counsel assigned to the Department of State, married Dan McCurdy Jr. on Sept. 13, at the top of the Empire State Building in New York City. They celebrated their honeymoon in Aruba.

Of Interest
Five attorneys from EPA’s Office of Regional Counsel in Philadelphia — Susan Extein, Andrew Goldman, Denise Harris, Renée Sarajian, and Heather Gray Torres — provided critical legal support for EPA’s emergency response to the anthrax attacks in Washington, D.C., and cleanup of the Hart Senate Office Building. EPA’s “anthrax attorneys” dealt with a wide range of issues, including decontamination and disposal of hazardous waste, contracts, interagency cooperation, handling of confidential documents, and potential governmental liability for personal injury and property damage.

This past summer, J.P. McGowen, senior deputy attorney general, appeared with his wife, Jeannine, and daughter, Laura, in a community theater production of “Murder Takes the Stage,” a comedy-mystery about the murder of an actress. Laura had a leading role while McGowen played an actor playing the butler.

Stephanie Michel-Segnor, assistant counsel, Governor’s Office of General Counsel assigned to the Department of Health, completed her first marathon in October by running in the 27th Annual Marine Corps Marathon in Washington, D.C. ■

Worth Reading

By Gregory E. Dunlap, Deputy General Counsel, Governor’s Office of General Counsel

The Pa. Supreme Court on Dec. 10, 2002, issued an important opinion explaining the standards of judicial review under the Administrative Agency Law, 2 Pa. C.S. sections 501-08, 701-04. In a case involving an appeal from the decision of a workers’ compensation judge, the court in Leon E. Wintemmyer, Inc. v. WCAB (Marlowe), No. 41 MAP 2001 (Pa. Dec. 10, 2002)(per Saylor, J.), endeavored to clarify the use and application of the so-called “capricious disregard” standard of judicial review in relationship to the “substantial evidence” standard of review expressly prescribed by Section 704 of the Administrative Agency Law, 2 Pa. C.S. section 704.

Though a review of an agency’s adjudicative findings of fact will always be assessed under the statutory-mandated “substantial evidence” test, Justice Saylor said for the court, “review for capricious disregard of material, competent evidence [by an adjudicator] is an appropriate component of appellate consideration in every case in which such question is properly brought before the court. As at common law,” however, capricious disregard “review will generally assume a more visible role on consideration of negative findings and conclusions,” i.e., refusal to accept uncontradicted material, competent evidence, particularly where there is no rational explanation for the adjudicator’s rejection of the evidence. Slip op. at 15-16 (footnote omitted). Review for capricious disregard of the evidence, the court explained, “serves as only one particular check to assure that the agency adjudication has been conducted within lawful boundaries — it is not to be applied in such a manner as would intrude upon the agency’s fact-finding role and discretionary decision-making authority.” Slip op. at 16.

Justice Cappy, joined by Justice Nigro, joined Justice Saylor’s opinion but wrote separately to amplify the meaning of the court’s decision. Explained Justice Cappy:

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overrule or limit Young, as had been hinted in a plurality opinion in Idaho v. Coeur d'Alene Tribe, 521 U.S. 261 (1997), the court held that an action against state officials can be maintained despite the 11th Amendment where a “straightforward inquiry” reveals that the complaint alleges an ongoing violation of federal law and seeks prospective relief. Even though the litigation of Verizon’s claim would inevitably determine the legality of past practices and open private parties up for liability, the Young inquiry is a fairly simple one. Where a dispute is ongoing and injunctive relief for future violations is sought, a plaintiff may bring state officials into federal court despite the 11th Amendment. A similar case involving the Pennsylvania Public Utilities Commission raised some of the same issues. MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania, 271 F.3d 491 (3d Cir. 2001).

The long-term meaning of these cases remains uncertain. FMC constitutes another 5-4 victory for states seeking a robust immunity from judicial authority, but the extent of federal administrative disputes no longer cognizable is doubtful and nothing in the case implies immunity from agency-instituted enforcement actions. Lapides and Verizon are more important for their unanimity and what they do not do, as both essentially reaffirm existing rules and understandings concerning the limits of immunity.

The more significant lesson from these and other federalism cases is something exceptionally important to government attorneys and their client agencies. Eleventh Amendment immunity (and the more general immunity of FMC) is not a release from substantive obligations of federal constitutional or statutory law. Unlike 10th Amendment immunity of states from Congressional lawmaker power under the commerce clause, as recognized in Printz v. U.S., 521 U.S. 898 (1997), which struck down portions of the Brady Gun Control Act, the immunity addressed in these cases is simply immunity from federal adjudicative authority. The Young doctrine and the constructive waiver of Lapides are reminders that states and state officials are required to comply with the law, and may be held accountable in federal court in some situations. Even where immunity is probably applicable, government attorneys retain the duty to recognize this distinction and to explain to their clients their legal obligations regardless of judicial authority to enforce those obligations. This is another one of those areas in which all lawyers have to be extremely careful in giving advice, and government lawyers even more so.

Principles get established and issues resolved, but they have a way of reappearing.

One thing that she has come to appreciate is that there are old legal battles that seem to need readressing. Principles get established and issues resolved, but they have a way of reappearing. She has found it interesting the way that issues, which she had thought were totally laid to rest, get new life.

Now that the campaign is behind her, Leavitt has time to spend on some other activities of interest to her. She has been on the board of Preservation Pennsylvania and on her church vestry. She now has more time for her husband and her two children, one of whom is a lawyer and the other a teenager. On occasion, she and her husband still pull out their Latin texts.
Thrill of Competing Inspires Ironman

By Mary Wyatte, Chief Counsel, Independent Regulatory Review Commission

Pink and blue sunsets, vibrantly colored flowers, long relaxing afternoons on a private stretch of white beach, surfing in waves two stories high, waving grass skirts, and a welcome luau upon arrival. That’s the image a week in Hawaii conjures up for most of us. But not for Sean Robbins. Sean, an assistant counsel in the Department of Environmental Protection’s Wilkes Barre office, spent a week in mid-October in Kailua-Kona to participate in the Hawaiian Ironman. This Triathlon World Championship is considered to be the world’s most famous endurance event.

The Ironman begins with a 2.4-mile ocean swim. After emerging from the surf and gulping a quick drink, participants hop on a racing bike for a 112-mile race. No sooner is the race completed and the bike racked, then the participants embark on a 26.2-mile marathon. All three events must be completed in 17 hours.

Only a fraction of the 50,000 athletes who attempt to qualify are actually selected. Participation is limited to 1,500. Athletes may qualify in one of two ways. They are either one of 150 selected by lottery or they must successfully complete a World Championship qualifying event.

Sean pursued the latter route. He competed in the Ironman at the Blackwater-Eagleman Triathlon in Cambridge, Md., which consists of a 1.2-mile swim, 56-mile bike ride and a 13.1-mile run — distances exactly one-half those of the Hawaii race. Although only a half-Ironman-distance competition, the Blackwater-Eagleman event was truly a harbinger of the endurance Sean would have to muster to compete in Hawaii. Water conditions were choppy and cold. The bike and race courses, though mostly over flat territory, were both windy and hot, with little shade along the way.

Approximately two months after successfully completing the Blackwater-Eagleman, Sean competed in a full Ironman triathlon in Lake Placid, NY. His finish in this event was enough to qualify for the trip to Kona in October.

Sean completed the Hawaiian Ironman in 10 hours and 58 minutes, far less time than the 17-hour allotment. He estimates his placement to be about 500, which puts him in the top-third. This event was televised on November 23.

A look at Sean’s schedule illustrates his devotion to this endeavor. Besides frequently working a 10-hour day as a litigator, Sean runs two to three hours. Swims and bike rides are also mixed into his training routine. In addition to concentrating on racing and training, Sean participates in charitable events. Recently, he completed the Janus Charity Challenge at Ironman, USA, which is a program designed to use Ironman events as a unique platform for raising financial support for charity. His efforts resulted in a contribution of approximately $3,200 for the Make-A-Wish Foundation of Northeastern Pennsylvania.

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It takes years of competing in triathlons to build up the strength to take on even a half-Ironman-distance competition. Sean’s first triathlon was the Wilkes Barre Triathlon in 1994. Since then, he has been a tireless competitor. What keeps Sean focused on his goals? He says “It’s the balance you need to maintain between having a professional life and a life outside the profession. That rule applies no matter what you choose to do outside of work. Racing is something that I really enjoy, although it’s a significant commitment. I just love the thrill of competing.”

After the Ironman, the next event in store for Sean was the nine-mile Run for the Diamonds on Thanksgiving Day in Berwick, Pa. His 2003 season will kick off with the Blackwater Traverse Duathlon in April. After that Sean hopes to compete in the St. Croix half-Ironman in the U.S. Virgin Islands. He is also scheduled to return to Lake Placid in July to compete at Ironman U.S.A. for the fourth consecutive year. Obviously, Sean shows no signs of slowing down. ■
While a capricious disregard review has a component consideration of the evidence offered at a hearing, it is not an inquiry regarding an agency’s affirmative findings of fact. Rather, it is a review of the agency’s legal conclusions to determine whether in making those legal conclusions, the agency capriciously disregarded evidence of record that would have clearly and beyond doubt commanded a different result. Being a review of legal conclusions, consideration of whether a tribunal capriciously disregarded evidence is a component of the in accordance with law review.

Concurring op. at 3 (Cappy, J., concurring).

Chief Justice Zappala did not join the majority opinion, but he agreed with the result in a concurring opinion. The Chief Justice said that he would adhere to the Commonwealth Court’s long-standing rule that the “capricious disregard” standard can be applied “only where the party with the burden of proof is the sole party to present evidence, yet does not prevail before the fact finder.” Concurring op. at 2 (Zappala, C.J., concurring) citing Russell v. WCAB, 550 A.2d 1364 (Pa. Commw. Ct. 1988).

Justice Newman also wrote a concurring opinion to state her view that “there is no capricious disregard standard of agency decisions.” Concurring op. at 1 (Newman, J., concurring). Rather, the review of agency assessment of evidence must be conducted under the rubric of the substantial evidence standard of review, she said. ■