



FOR PENNSYLVANIA YOUNG  
LAWYERS, HERE'S WHAT'S...



# AT ISSUE

A PUBLICATION BY AND FOR THE YOUNG LAWYERS DIVISION  
OF THE PENNSYLVANIA BAR ASSOCIATION

FALL 2003 VOL. 27 NO. 3

## THE BEGINNINGS OF JUROR NOTE TAKING IN PA

By Jane T. Smedley

As of Sept. 1, 2003, jurors in county courthouses across the state are permitted to take notes during civil trials lasting more than two days, at least until the end of 2005. No longer will jurors have to endure long, drawn-out, complex trials with many witnesses and tons of documents without any memory assistance! The Pennsylvania Rules of Civil Procedure were amended to allow note taking during trial proceedings in civil cases; a court may, in its discretion, permit note taking when the trial is less than two days. Specifically, Rule 223.2 provides as follows:

(a)(1) Whenever a jury trial is expected to last for more than two days, jurors, except as otherwise provided by subdivision (a)(2), may take notes during the

proceedings and use their notes during deliberations.

Note: The court in its discretion may permit jurors to take notes when the jury trial is not expected to last for more than two days.

(2) Jurors are not permitted to take notes when the judge is instructing the jury as to the law that will govern the case.

(b) The court shall give an appropriate cautionary instruction to the jury prior to the commencement of the testimony before the jurors. The instruction shall include:

(1) Jurors are not required to take notes and those who take notes are not required to take extensive notes,

(2) Note taking should not divert

jurors from paying full attention to the evidence and evaluating witness credibility,

(3) Notes are merely memory aids and are not evidence or the official record,

(4) Jurors who take few or no notes should not permit their independent recollection of the evidence to be influenced by the fact that other jurors have taken notes,

(5) Notes are confidential and will not be reviewed by the court or anyone else,

(6) A juror may not show his or her notes or disclose their contents to other jurors until deliberations begin, but may show the notes or disclose the contents during deliberations,

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## SO YOU'RE THINKING OF GOING OUT ON YOUR OWN

By Jeffrey DuBois

At one time or another in his or her career every lawyer ponders whether to go it alone and start his or her own practice. For me, that thought process began approximately two years ago — that is how long I labored over it before finally taking the solo leap.

Making my decision difficult, to say the least, was the fact that for the past few years I had been practicing law with a small firm of only five lawyers. In that time, I forged some great relationships with the people in the firm and my overall experience with the firm was a very good one. Not to mention that the firm was extremely well respected in the area,

and under its tutelage I greatly expanded my knowledge base and garnered tremendous experience.

Despite my comfortable firm life, the question of whether I should remain in those circumstances gnawed at me. Hence, the debate within me began.

In struggling with whether I should hang out my own shingle, I weighed the pros and cons of staying versus opening my own practice. The most prominent advantage of staying with the firm was, of course, the security of a steady salary, which disappears when you are responsible for marketing and attracting business yourself. For me, this was probably the

most difficult hurdle to overcome. For one who is admittedly anal retentive to some degree, expecting things to be orderly and predictable, the challenge of opening my own practice was especially awesome.

What finally convinced me to take the leap of faith was this: The idea that I would be in control of my own professional destiny, guiding my practice areas and selecting the types of clients I would represent. Ultimately, when I look back on my career path and on my practice, I will have been solely responsible for my

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**DO YOU KNOW ABOUT THE  
YLD'S LATEST PROJECT?**

**READ 'WHAT'S AT ISSUE'  
ON PAGE 2.**

**DISCRIMINATION & FAIR  
HOUSING PRACTICES**

**GET THE DETAILS ON PAGE 4.**

**DISCLOSING PRIVILEGED  
INFO ISN'T GOOD.**

**GO TO PAGE 7 TO SEE IF YOU  
CAN FIX IT.**

## WHAT'S AT ISSUE

Most of us have heard the old joke, "Good lawyers know the law, but great lawyers know the judge." While this comment may have its roots in a cynical



**Seelig**

statement, lawyers know the benefit of appearing in front of a judge many times and getting to know that judge's preferences. Lawyers deal with a variety of judges, and to a certain extent each judge has his or her own preferences that may not be found in a local rule. For a newcomer, whether a young lawyer or an experienced attorney practicing outside his or her "home" county, there is a constant fear of appearing in front of a judge for the first time and finding out, "This is not how it is done here."

Many times these individual preferences are not covered by a local rule of procedure, including a judge's preferences regarding contacting the judge's office, settlement conference procedures, exhibit marking, serving courtesy copies of motions to the judge and motions in limine preferences. One example of these differing preferences is how the judge conducts voir dire. In front of some judges, attorneys submit written questions and are permitted to question the jury themselves. Other judges prefer to ask almost all the questions, with little or no involvement from the attorneys. And in some counties, the judge is not in the room during voir dire, becoming involved only if there is an objection or a dispute arises.

Many attorneys try to find out the preferences of a particular judge by contacting an attorney who has practiced in front of that judge for many years. However, many lawyers are not lucky enough to have such a contact and are forced to enter the courtroom without any prior source of knowledge about the judge's preferences. Shouldn't there be a source for attorneys to provide them with a particular judge's preferences, which might not be covered by a local

rule? The PBA Young Lawyers Division (YLD) believes there should be a source, and therefore we have created the Judicial Reference Guide.

In developing this guide, the YLD created a committee whose members consisted of common pleas court judges, experienced trial attorneys, law clerks and young lawyers. In researching the preference guide, the YLD fashioned a preference questionnaire for judges to complete. The questionnaire inquired into areas similar to the information provided in other preference guides for the Federal District Courts of Pennsylvania and 3rd U.S. Circuit Court of Appeals, which are currently available on their respective Web sites and have been found quite helpful.

After several drafts were circulated to judges and attorneys for feedback, the guide was first introduced to almost all president judges in each county and the State Trial Judges Conference this past summer, where it received much enthusiasm and support. After garnering additional feedback and several more drafts, on Nov. 14, 2003, the Judicial Reference Guide went "live" on the PBA Web site. On the same day, every common pleas court judge was mailed a password that will allow him or her direct access to fill in the questionnaire online. To date, only one judicial district has declined to participate in the judicial guide. We are hopeful that we will eventually have all counties and judicial districts participating and contributing preferences to the guide.

The guide will provide practitioners with judicial preferences for practice as well as a link to the United Judicial System (UJS), which contains the local rules of practice. Significantly, the Pennsylvania Supreme Court announced recently that a series of new civil procedural rules will be implemented to unify the commonwealth's judicial process further and to allow litigants to obtain details of a local court's practices as well as enumerating the court's pre-trial processes. According to the high court, this information will be published on the UJS Web site. Accordingly, the YLD judicial guide will provide "one-stop shopping": practitioners can easily discover an individual judge's preferences as well as link directly to information published on the UJS Web site. The guide also contains other helpful links, including a current link to all workers' compensation judges' preferences across the state. And the guide will continue to

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## AT ISSUE

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evolve, adding new information and links as they become available. This guide will serve as a link between the bench and the bar, providing information aimed at increasing the knowledge base of counsel and, ultimately, the efficiency of practice before the participating judges.

The YLD has recruited a large group of young lawyers to work on this project, and each young lawyer will be responsible for contacting local judges to assist

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# JUROR NOTE TAKING

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(7) Jurors shall not take their notes out of the courtroom except to use their notes during deliberations, and

(8) All juror notes will be collected after the trial is over and immediately destroyed.

(c) The court shall

(1) provide materials suitable for note taking,

Note: The materials provided by the court are the only materials that jurors may use for note taking.

(2) safeguard all juror notes at each recess and at the end of each trial day, and

(3) collect all juror notes as soon as the jury is dismissed and, without inspection, immediately destroy them.

(d) (1) Neither the court nor counsel may (i) request or suggest that jurors take notes, (ii) comment on their note taking, or (iii) attempt to read any notes.

(2) Juror notes may not be used by any party to the litigation as a basis for a request for a new trial.

Note: A court shall immediately deny a litigant's request that juror notes be placed under seal until they are reviewed in connection with a request for a new trial on any ground, including juror misconduct. The notes shall be destroyed without inspection as soon as the jury is dismissed.

(e) This rule is rescinded as of December 31, 2005.

This rule simply allows jurors the

option to take notes; it does not require all jurors to take notes, nor does the rule require any particular quantum of personal note taking. However, if a juror should choose to take notes, he or she still must be able to devote full attention to the evidence in order to evaluate a witness' credibility.

Jurors are allowed to take notes during all portions of the trial except during jury instructions. As a means of protection, each court is to provide jurors with materials suitable for note taking and is responsible for collecting and destroying all notes without inspection. This is to ensure that a juror's notes are his or her own personal thoughts and interpretations and cannot be used for any purpose other than to jog the memory.

Notably, the comments to the new rule contain proposed instructions for the court to read to the jury prior to trial. That comment (too lengthy to reprint here) is enlightening as to how the jurors will be instructed regarding note taking and their conduct during the trial. For example, the comment suggests that the judge instruct jurors that they should not allow note taking to keep them from scrutinizing the testimony of witnesses to evaluate credibility as well as the facts of the case; jurors should not miss the "big picture." Also, jurors should be informed that if they choose to take notes, their recollection of the evidence would be no more or no less reliable than that of other

jury members who choose not to take notes.

In the federal courts, some judges in the middle district of Pennsylvania permit jurors to take notes, while others do not. If you have a trial in federal court, you should check the Web site for judicial preferences or contact the judge's chambers (with opposing counsel on a conference call) to inquire about that judge's particular practice. You should know what the court's practice is regarding juror note taking before going into trial; it may affect your trial presentation.

In short, this new rule provides the opportunity for those jurors who retain more information when taking notes to be better informed and more involved in jury deliberations. The challenge for trial attorneys is, of course, to evaluate the amount and style of evidence presentation, taking into account that now some jurors will be writing notes. Regardless, attorneys should always avoid a lecture-type presentation during a trial!

In Lackawanna County, I observed a products-liability trial before Judge Robert A. Mazzone where the jury was allowed to take notes. The materials were provided by the court and collected at the end of each day. Watching the jury throughout the trial, only some of the jurors chose to take notes, especially during the expert reports. Each juror was still attentive throughout the proceedings. Each of the jurors was allowed to take his or her notes into deliberations, and the notes were immediately collected and destroyed when the jury reached a verdict.

Pennsylvania Rule of Civil Procedure 223.2 is effective until December 2005 in order to permit an assessment as to whether note taking in civil cases is beneficial to our system of justice. There is also the very real possibility that note taking will be permitted in criminal cases very shortly. It will be interesting to review the statewide reaction from both those sitting on the juries and those presenting a case before them on the utility of juror note taking.

# WHAT'S AT ISSUE

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with completion of the questionnaire. To make this process as efficient as possible, there are several ways in which this guide can be filled out by a judge. First, a judge may access this form from the PBA Web site home page; the section is in the upper left-hand corner, "YLD Judicial Reference Guide Form." After entering a password and user ID, a judge, judge's law clerk or other authorized staff person can easily access the questions and click on the appropriate answers. The judge may also continue to use the password to update or change the form in the future. If the judge prefers, a young lawyer will interview the judge for approximately 10

minutes, gather the necessary information and complete the responses for the judge online. Young lawyers will be contacting judges' staffs in the upcoming weeks to see if we can help!

This is another voluntary project evidencing a great cooperative effort between the young lawyers and the common pleas court judges. Please check out the Judicial Reference Guide at the PBA Web site, [www.pabar.org](http://www.pabar.org). Notice the new layout of the YLD home page, which will provide continuing updates on the progress of the guide as well as other pertinent information about the YLD and our activities!

## Upcoming Events

Jan. 21-25 — PBA Midyear Meeting, The Breakers, Palm Beach, Fla.

March 4-6 — YLD New Admittee Conference, Hershey Lodge & Convention Center, Hershey

# WHEN IS DISCRIMINATION NOT DISCRIMINATION?

By Brett M. Woodburn

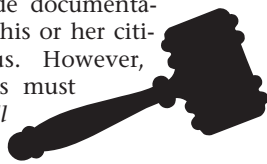
Whether you are representing clients who are landlords or are a landlord yourself, fair housing laws are of premium concern. In wading through the myriad laws and ordinances, have you ever stopped to ponder, "When is discrimination not discrimination?" The answer is: "When it is applied to everybody in the same way." This is of course an oversimplification of the concept of discrimination, and one that is not entirely accurate. However, if you keep this principal in mind when reviewing applications of prospective tenants or counseling your clients on how to avoid bad tenants, you will avoid many of the pitfalls that can land you on the wrong side of a complaint for unfair housing practices.

Conscientious landlords (and owners, property managers, etc.) avoid housing practices that run afoul of the civil rights laws. In doing so, those landlords who hire attorneys or licensed real estate professionals expect that whomever they hire is well versed in acceptable housing practices. When leasing residential real estate, there are often attempts to limit the number of tenants who pose high risks of being poor tenants. Landlords need to know what questions they can ask to screen applicants effectively and legally.

Since the terrorist attacks on Sept. 11, 2001, many landlords worry about renting to potential terrorists. Some operate under the perception that illegal aliens are more likely to be terrorists than are U.S. citizens. However, screening applicants improperly will raise concerns about discrimination based on an applicant's race, religion or national origin, with an increased likelihood of discrimination directed toward people perceived to be of Middle-Eastern or South-Asian descent or Muslims. Can property owners do anything to protect themselves from renting to potential terrorists without violating fair housing laws? The answer is a qualified yes.

The fair housing laws prohibit an owner or property manager from refusing to rent to an applicant because of, among other things, that individual's race, religion or national origin; in January 2003, the U.S. Department of Housing and Urban Development (HUD) issued a memo advising that it is unlawful to

screen applicants in this way. However, nothing in the Pennsylvania Human Relations Act or any of the federal civil rights laws prohibits discrimination based solely on citizenship status. Therefore, including a question on an application regarding an applicant's citizenship is not per se illegal discrimination. Likewise, it is not a violation of the civil rights laws to ask an applicant to provide documentation verifying his or her citizenship status. However, such questions must be asked of *all* applicants.



**Knowing** that you can refuse housing to someone based on his or her citizenship status is not carte blanche to deny housing to someone based upon the country you *believe* they are from. In that January memo, HUD suggested several rules that, if followed, may shield an owner or property manager from being found guilty of unlawful discrimination. As counsel, you should check with your local and state fair housing offices to see if there are any rules, regulations or ordinances that prohibit the following HUD-recommended rules:

*Rule 1:* You may ask whether an applicant has the legal right to be in the United States and what the basis for that right is.

*Rule 2:* If the applicant indicates that he or she does not have a legal right to be in the United States, you may reject his or her application on that basis.

*Rule 3:* If the applicant claims to be a U.S. citizen, you may ask for proof of citizenship.

*Rule 4:* If the applicant claims to be a noncitizen with a legal right to be in the United States, you may ask for proof of his or her right to be in the United States.

*Rule 5:* If an applicant cannot prove that he or she has a legal right to be in the United States, you may reject the applicant.

*Rule 6:* You may ask all applicants for current government-issued photo identification.

*Rule 7:* Be consistent in your screening.

Realistically, Rule 7 should be a subset of each of the preceding six rules. If a

landlord applies different requirements to applicants in similar situations, the landlord may be violating fair housing laws. In other words, if you advise a client to screen applicants based on their citizenship status, then your client must screen *every* applicant, regardless of his or her claim to be a U.S. citizen. Landlords absolutely cannot inquire into someone's citizenship selectively simply because the applicant "looks foreign." Such practices most assuredly violate fair housing laws.

A simple example illustrates this requirement: Your client is a property manager for a company that implements a policy asking all applicants if they have a legal right to be in the United States. The company requires documentary evidence from all applicants who answer "yes." A former resident who wants to move back into the community speaks with your client in the rental office. Your client is a personal friend of this individual and knows for a fact that the applicant is a U.S. citizen.

**Query:** Because your client has personal knowledge of this person's citizenship, does he have to get proof of citizenship? The answer is an unqualified yes. Failure to request the same information from every applicant — notwithstanding the fact that you may have personal knowledge of that applicant — amounts to different treatment for your friend as compared to the other applicants. While seemingly innocent, this nonetheless is a violation of fair housing laws and could lead to sanctions.

Make no mistake; refusing housing to applicants based on their citizenship is discrimination. However, if the screening criteria are applied equally to all applicants and the decisions granting or denying tenancy are made regardless of who the applicant is, what he or she looks like or what country he or she comes from, then discrimination based on citizenship is not illegal.

So, when is discrimination not discrimination? Generally, when the selection criteria are equally applied to all applicants. Again, this guideline is a dramatic oversimplification and may not always ring true. Prior to advising a client to implement any such screening policy, you must review the policies and ordinances of all applicable local and state fair housing offices.

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# OUT ON YOUR OWN

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failures and, hopefully, my far more numerous successes.

Each of you who may be considering going solo has to make your own list and decide what is right for you. It is really going to come down to your particular situation — the timing and what it is you really want in your career. The following questions may be helpful in the early stages of wrestling with this issue.

1. Do I fit in where I am currently?
2. Do I *want* to fit in there?
3. Where do I want to be in five or 10 years?
4. What are my goals?
5. How do I get there?

If your answers to those questions lead you to believe you're ready and, more important, willing to take the solo practice plunge, here are some practical pointers for you to consider:

1. **When:** If you have decided to go out on your own, you first have to decide the right time for the move. I suggest that you choose a date at least four months ahead from the day you initially make your decision, since you will see that there are many things to be accomplished before you can set out on your own.

2. **Notification:** If you are currently in a firm, you will have to notify the partners of your impending move. Notification is not only required by the rules of ethics, it also makes sound business practice: It is never a good idea to burn bridges!

The \$64,000 question then becomes when do you tell the firm? This will depend on the size of the firm and, more important, your relationship with the firm. You want to give enough notification so that you and the firm can notify your clients to let them make a decision about future representation as required by the ethics rules. If your situation with the firm is not good or you don't believe your announcement will be favorably received, you don't want to leave too much time between notification and the time you have planned for the move.

Under the ethics rules, you must notify the clients that you are leaving and advise them they have the option of who they wish to keep as their lawyer. Usually this is done on behalf of the firm, but you should certainly have input on the notice.

In my situation, thankfully, it was an amicable move that was well received by my firm, so the notification to my clients was done in a very courteous and professional manner. As an aside, this is obviously going to be one of the major factors in deciding to go out on your own, i.e., whether you will have a sufficient client base to survive.

3. **Office Furniture/Equipment:** This is an area where, if you are not careful, you can end up spending a lot of money before you even get started. In all likelihood, you will have a limited budget in starting your office. With office equipment and furniture, you are left with the predicament of wanting to present a nice office to your clients but not wanting to break the bank.

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*If you have decided to go out on your own, you first have to decide the right time for the move. I suggest that you choose a date at least four months ahead from the day you initially make your decision, since you will see that there are many things to be accomplished before you can set out on your own.*

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There is a lot of competition out there for office furniture, so your best bet is to shop around to get your lowest price. For example, I was able to get a great deal from a place that I didn't even know sold office furniture. In other words, do the legwork; it will pay off.

Concerning equipment, you are going to have to assess your needs, but the basic essentials are a good computer, copier and fax. You can save on costs by purchasing an all-in-one machine that can copy, fax, scan and print. This not only saves on space in your office, it also should save you money, as most of these machines are reasonably priced (under \$1,000). I would suggest, though, that you also get a separate inexpensive printer, so that you have a backup for printing your documents in case the other machine ever goes down.

Finally, one area where you should absolutely not skimp is the phone system. Depending on the system you get, it can range anywhere from \$2,000 to \$3,000. Don't panic. This is perhaps the

most important expense when starting your own office, since you will discover — if you haven't already — that the telephone is an attorney's lifeline. I would also suggest that you get multiple lines (I chose three) so clients can call in even when you and/or your secretary are on the phone. One point that I initially overlooked: When you get long distance, you will need it not only for your phone lines, but also for your fax line. Don't forget to inform the phone company of this.

4. **Library:** While a fully stocked library looks impressive, in today's world it is cost prohibitive. Luckily, I also think that it is obsolete — at least for research purposes. With the exception of maybe a few books, most of your research can be done on the computer. With competition, the price for subscribing to computer research has come down tremendously, and companies do offer packages designed for solo practitioners.

Not to be overlooked is the Pennsylvania Bar Association's InCite online research program powered by LexisNexis. InCite provides free legal research to all PBA members. If money is tight, this is an excellent member benefit for those starting out.

5. **Office Location:** Location, location, location! The location of your office is extremely important. You definitely want to research the area to decide where the best place is for you. You should search for space that is readily accessible to the public and includes free parking. Be sure that your new space is not only easy to get to by car, but also easy to find. For example, while a third floor space may be cheaper than street level, it may be much more difficult or cumbersome for your clients to get to your office. Not to mention that street level space with your sign out front will give you daily visibility with the public.

6. **Advertising:** You need to let the public know that you are out on your own and where you are located. Perhaps you will distribute postcards by mail with the new address, phone number and fax line, which should be sent out one month before you leave (provided your notifications have all been made). Send these not only to all your clients and potential clients, but also to all other entities that you do business with (such as banks and real estate companies) and

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# THE COMMON LAW MARRIAGE MESS

By Kelly A. Mroz

On Sept. 17, 2003, the Pennsylvania Commonwealth Court issued a decision that shocked family law attorneys throughout the state (and family law attorneys are not easily shocked). Before *PNC Bank Corp. v. Workers' Compensation Appeal Board* (Stamos), 831 A.2d 1269 (Pa. Commw. 2003) was decided, Pennsylvania was one of a minority of states that still recognized the doctrine of common law marriage. In *PNC*, a split decision authored by Judge Bonnie Leadbetter, the Commonwealth Court took the unusual step of abolishing the doctrine of common law marriage. The court acknowledged in its decision that while such an action is usually reserved for the Pennsylvania Supreme Court, and no direct authority from the Pennsylvania Supreme Court exists, it was the intermediate appellate court's duty (under federal precedents) to issue an "anticipatory overruling," as the Commonwealth Court felt nearly certain that the Pennsylvania Supreme Court intended to overrule common law marriage when it had the opportunity to do so. *Id.* at \*30.

This case has created questions about the validity of this "anticipatory overruling." Further, the decision has an impact on many practice areas, such as employment law, trusts and estates, family law and insurance law. For example, the valid abolishment of common law marriage would negate an employer's obligation to provide health insurance benefits for common law spouses. The court described the abolishment as "fully prospective." It is unclear whether a common law marriage initiated prior to the decision, but not yet formally recognized by a court of law is valid under that ruling.

The situation was already pretty mucky even before the Commonwealth Court summarily announced the abolishment of the doctrine in *PNC*. Most lay people operated under the common misconception that a couple is automatically married by common law simply after living together for seven years. Apparently only lawyers were privy to the knowledge that common law marriage only occurred when two individuals who were legally able to marry each

other exchanged words of their present-tense intent to enter into a contract of marriage together.

The doctrine of common law marriage was primarily invoked in the courts where a dependant spouse needed the financial protections of death benefits or divorce. It was often applied as a quasi-equitable remedy after one "spouse" passed away to provide a dependant partner with death benefits such as a workers' compensation fatal claim petition or the right to elect against the decedent's will. In such cases a rebuttable presumption that the marriage existed arose if the surviving spouse could show that the parties lived together continuously after the marriage and that they had a reputation in the community for being married.

In the context of a divorce, a common law marriage was much more difficult to prove. The law required that the spouse seeking to prove the existence of the marriage prove, by a preponderance of the evidence, that a solemnization took place and words of present intent to marry were exchanged. Not only were there seldom any witnesses, it was often difficult for the spouse seeking the divorce to recall exactly what was said after many years.

It remains to be seen whether common law marriage will survive by the hand of the Pennsylvania Supreme Court or the Pennsylvania Legislature. Several legislative attempts have been made to abolish common law marriage, but none have been enacted as of yet. In fact, in the 2001-02 legislative season, three bills were introduced that abolished common law marriage in Pennsylvania: HB 316, HB 2271 and SB 1233. As reported by the *Pennsylvania Legislative Reporter* in January 2003, although the House Judiciary Committee held a public hearing on HB 316 on July 10, 2001, no further action has been taken on the bill, and HB 2271 and SB 1233 died in the Senate Judiciary Committee. The legislative attempts failed (or stalled) at least in part due to the hardships common law spouses would suffer, according to practitioners in family law, employment law and trusts and estates law. The PBA's own

House of Delegates rejected a resolution in support of the legislative abolition of common law marriage in November 2002.

In the aftermath of the *PNC* decision, it must be made clear what the impact will be on prior common law marriages. If these marriages no longer will be recognized by the courts, in this author's opinion, there must be a period during which the prior common law marriages can be confirmed in order to ensure that the spouses entering into common law marriages in good faith can preserve the original date of their marriage. Whatever the result, it is critical that the public be educated on the outcome.

## ON YOUR OWN ——— CONTINUED FROM PAGE 5

other local businesses that may be in need of your services.

You should also send press releases to the local papers, as they may run your announcement at little or no charge to you as part of community news. If possible, include a picture of yourself with the press release, possibly of you standing outside your new office.

I hope these hints help you in evaluating your circumstances and making the decision whether or not to start your own practice. As daunting a task as this may seem right now, I can honestly tell you that once I went out on my own and started my own practice, I experienced (and still experience) an incredible feeling of self worth. Whether you move to a lavish penthouse office in New York City or a rental office by the corner drugstore on Main Street in Small Town, USA, it will be your practice. I am extremely happy that I made the decision to go out on my own. As Ralph Waldo Emerson encouraged, "Do not go where the path may lead, go instead where there is no path and leave a trail."

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# OOPS!! THE EFFECT OF INADVERTENTLY DISCLOSING PRIVILEGED MATERIALS: CAN YOU PUT THE CAT BACK IN THE BAG?

By Jennifer J. Clark

The attorney-client privilege is perhaps the oldest and most fundamental precept in the attorney-client relationship. According to the U.S. Supreme Court, the reason for the privilege is to encourage frank communication between attorney and client for the benefit of the immediate case at hand as well as to promote the broader public interest by enhancing the overall administration of justice. See *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). As we all know, communications between lawyer and client regarding matters of current or potential representation are protected from state and federal disclosure requirements during the course of litigation. But everyone makes mistakes. So what happens when your assistant unknowingly faxes to opposing counsel a two-page letter to your client regarding the nitty-gritty of some upcoming depositions, along with your personal commentary and strategies for the remainder of the case?

After you recover from the heart attack you may have suffered when opposing counsel called you and told you about the fax, what do you do next? Is it too late to put the cat back in the bag? What if you are the recipient of the inadvertent disclosure? Did you just hit the lottery in your case? Can you use the materials you received in error during the litigation to advance the position of your client? The law in Pennsylvania — and in federal courts in general — is unsettled and in some cases contradictory. Recent Villanova Law School graduates may recall this very issue as part of the school's moot court problem in 1997-98. I readily confess that I haven't thought much about this issue since then, but a recent 3rd U.S. Circuit Court of Appeals opinion attracted my attention. The 3rd U.S. Circuit addressed, in a somewhat limited yet telling nature, the memorandum and opinion of Magistrate Judge Malachy E. Mannion in the Middle District of Pennsylvania in *Sampson Fire Sales, Inc. v. Jerrell Oaks*, 201 F.R.D. 351 (M.D. Pa. July 5, 2001). (This opinion is available on the Middle District Court's Web page under Judicial Opinions, 2001.) The facts of that case resemble the fictional ones I presented to you here: The plaintiff's attorney erroneously sent a letter intended for his client to the fax number once owned by his client but which, after a transfer of assets, now

belonged to the defendant. Upon receiving the confidential fax, the defense attorney did not contact plaintiff's counsel, but instead appended the document as an exhibit to a brief he submitted to the court in further support of his client's position. Plaintiff's counsel then moved to seal the documents and sanction opposing counsel for his "knowing, grievous, blatant and disgraceful violations" of the attorney-client privilege. The magistrate judge's opinion contained a thorough review of the uncertainty of law in this area, complete with references to ethical opinions of both the American Bar Association (ABA) as well as the Pennsylvania Bar Association (PBA).

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As the court described, there are currently three approaches to resolving inadvertent disclosure problems: the waiver approach, the nonwaiver approach and the case-by-case approach. See *Making a Wrong Turn on the Information Superhighway: Electronic Mail, the Attorney-Client Privilege and Inadvertent Disclosure*, 26 Cap.U.L.Rev. 347 [1997]. To paraphrase, the waiver approach means that you can't put the cat back in the bag; once the information is inadvertently exposed, any privilege once afforded the communication is waived, and the communication is fair game for opposing counsel to use as ammunition. The nonwaiver approach means the opposite. Simply stated, any *inadvertent* disclosure of a protected communication remains protected; even though opposing counsel may know about the contents of that communication, he or she is prohibited from using that information for his or her client's advantage. This approach presents a practical conundrum, such as how one simply wipes information out of his or her mind, especially information that is helpful to the client? Nevertheless, this approach is clearly the more lenient one here, emphasizing that the client should not

be penalized for an error of the attorney or his or her staff. Lastly, the case-by-case approach means precisely what the title implies: Each disclosure situation is evaluated and ruled upon separately depending on the facts and circumstances surrounding the



**Clark** disclosure itself as well as the overall administration of justice. In *Sampson Fire Sales, Inc.*, the court employed the case-by-case approach, evaluating the inadvertent disclosure in light of several factors, including (1) the reasonableness of the precautions taken to prevent inadvertent disclosure as it relates to the extent of document production, (2) the number of inadvertent disclosures, (3) the extent of the disclosure, (4) any delay in rectifying the disclosure and the remedial measures taken, and (5) whether the overriding interests of justice would be served by relieving a party of its error. Applying these factors in *Sampson Fire Sales, Inc.*, the court concluded that the inadvertent disclosure did not waive the attorney-client privilege, giving much greater weight to the final factor, the interests of justice. Ultimately, the court determined that the inadvertent disclosure did not waive the privilege and precluded its use in the proceedings. Further, in light of the uncertainty in the law and various ethics rules on this point, the court did not sanction counsel for utilizing the privileged letter in his submission to the court.

So what is the uncertainty in the law and ethics rules? The court in *Sampson Fire Sales, Inc.* identifies the varying applicable law and ethics rules in Pennsylvania. While not having had formally adopted rules to that effect in 2001 at the time of the *Sampson Fire Sales, Inc.* decision, the upshot of the current rules of both the ABA and PBA requires that evidence not be obtained improperly (such as through deception or other surreptitious acts) and that opposing counsel be notified as soon as counsel discov-

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ers that he received a privileged communication. More specifically, ABA Model Rule of Professional Conduct 4.4(a) (2002 edition) provides that “[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.” This portion of the rule addresses those cases in which a party obtains privileged materials in an improper manner, including the case in which a client “liberates” evidence from the opposing party. Subsection (b) of that rule states simply that “[a] lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.” The comments to that rule instruct that electronic mail and facsimiles are included in the definition of “document.” In short, the ABA rule simply requires that the recipient of privileged communication notify the sender of the disclosure, inadvertent or otherwise.

Pennsylvania Rule of Professional Conduct 4.4 (204 Pa. Code §81) is modeled after its ABA Model Rule counterpart. However, proposed changes to that rule as it currently exists are in the works, albeit subtle changes. Notably,

there are a number of new comments to the rule specifically addressing the scope and intent of the rule. You can review these proposed changes on the Pennsylvania Disciplinary Board Web site ([www.padisiplinaryboard.org/ethics\\_2000.htm](http://www.padisiplinaryboard.org/ethics_2000.htm)). As the comments detail, the rules do not address the waiver/non-waiver issue with any certainty, since that is clearly an issue of law and falls outside the scope of the rules. Additionally, there are a number of ABA ethics opinions and informal PBA Committee on Legal Ethics and Professional Responsibility opinions addressing this issue, several of which are discussed in the *Sampson Fire Sales, Inc.* opinion.

On appeal, the 3rd U.S. Circuit made several telling comments in addressing the conduct of the attorneys in the *Sampson Fire Sales, Inc.* case. 55 Fed. Appx.87 (January 2003). Broadly, the 3rd U.S. Circuit found no error in the magistrate judge’s application of the case-by-case approach, concluding that the magistrate judge properly and “thoughtfully” refused to impose the “draconian” sanction of dismissing defendant’s answer on the basis that defendant violated the plaintiff’s attorney-client privilege. However, the appellate court also found the actions of defense counsel to be “questionable”

regarding use of the misdirected fax and stated that the court was in no way condoning such actions by not imposing sanctions upon the defense.

Although dicta, these statements are a clear view into the likely results this issue may yield on appeal to the 3rd U.S. Circuit absent any further developments in Pennsylvania or federal law to the contrary. So, give much thought to the actions you take after receiving any materials you believe to be privileged during the course of litigation (after you immediately contact opposing counsel, of course). Keeping in mind that this issue truly warrants a much more thorough and detailed comment or even a case note, use this case as a starting point for research should you ever find yourself faced with an inadvertent disclosure of privileged materials. This is a very delicate issue that may affect your client drastically. Acknowledging that sometimes mistakes can occur, you should nonetheless stack the deck in your favor and take all possible precautions to prevent the cat from slipping out of the bag.

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## YLD SEEKS NOMINATIONS FOR CHAIR-ELECT, SECRETARY AND TREASURER

The YLD Nominating Committee, chaired by Steven R. Serfass, is accepting applications from YLD members interested in seeking nomination to run as candidates for division chairperson-elect, secretary and treasurer at the 2004 Annual Meeting (May 12-14 at the Hershey Lodge & Convention Center, Hershey).

If you are interested in being nominated by the Nominating Committee under Article IV, Section 2, of the bylaws, please submit your qualifications and a brief biographical sketch by Feb. 15, 2004, to Steven R. Serfass, 232 Delaware Avenue, Palmerton, Pa. 18071. Fax: (610) 826-8082.

If you wish to be nominated by petition under Article IV, Section 4, of the bylaws, please send your materials with a petition signed by at least 15 members of the YLD by April 12, 2004, to the above address or fax number. Send a copy of all materials to Jayanne Hogate, YLD coordinator, Pennsylvania Bar Association, 100 South Street, Box 186, Harrisburg, Pa. 17108-0186.

The YLD bylaws can be found on the PBA Web site at [www.pabar.org](http://www.pabar.org). Serfass can be reached at (610) 826-8080 to answer any questions you may have regarding the election process.