For Pennsylvania’s young lawyers, here’s what’s... AT ISSUE

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Lawyers as Targets: How Attorneys Get Ensnared in FCPA Misconduct, Part II
By Lou Ramos, Esq. and Ben Klein, Esq.

Editor’s note: This article was originally published on Law360.com and has been reprinted with permission. The first part of this article highlighted notable prosecutions of in-house counsel, and this part will provide solutions to avoid those pitfalls.

Avoiding potential pitfalls and addressing compliance risks
There are several lessons to be drawn from the Foreign Corrupt Practices Act (FCPA) enforcement actions discussed in Part I about identifying and responding to corruption risks.

First, neither Chow nor Weisman were able to escape prosecution by pointing the finger at more senior leaders. Chow testified that he “act[ed] in agreement with [his] seniors” while Weisman claimed that he “relented” to the pressure of a former co-CEO. If individuals act “corruptly” (i.e., with an improper motive of accomplishing either an unlawful result, or a lawful result by unlawful means) and “willfully” (i.e., voluntarily and with a bad purpose), then they can be held criminally liable under the FCPA, whether they masterminded the bribery scheme or not.

Second, while legal and compliance personnel are expected to identify and address red flags, they often face the same business pressures as commercial personnel, and the prosecutions discussed above show they can engage in criminal conduct as a result of this pressure. Additionally, a failure to respond effectively—or respond at all—can be used against them by prosecutors. The FCPA requires prosecutors to prove that the accused acted with knowledge, which extends to circumstances in which the person “is aware of a high probability of the existence” of the prohibited activity. Willful blindness and conscious avoidance of the true facts and circumstances indicating a high probability of misconduct (such as the failure to adequately respond to red flags) can be used to satisfy this requirement. While both Chow and Weisman ultimately admitted that they knowingly participated in the bribery schemes, prosecutors might have used the red flags to build their cases and put pressure on the lawyers to enter guilty pleas.

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Third, federal regulators have consistently emphasized the importance of promoting and sustaining a culture of compliance—a culture that, at a minimum, must be embedded in the psyche of its legal and compliance professionals. The DOJ and SEC warn in their FCPA Resource Guide that “[a] well-designed compliance program that is not enforced in good faith, such as when corporate management explicitly or implicitly encourages employees [including company lawyers] to engage in misconduct to achieve business objectives, will be ineffective.” In addition, the DOJ’s “Evaluation of Corporate Compliance Programs” guidance advises prosecutors to consider whether legal or compliance personnel were involved in the decisions relevant to the misconduct or raised any concerns about it. Lawyers and compliance professionals are held to a higher standard due to their ethical obligations and oversight responsibilities, and their actions and inactions may be subject to greater scrutiny.

Finally, companies should ensure that they have adequate resources for their employees—including in-house counsel—to confidentially and anonymously report potential misconduct and protect them from retaliation. While a reporting hotline may not have prevented the corrupt payments in the Petro-Tiger matter due to the seniority of the offenders, it may have allowed Chow to sidestep his complicit “seniors” and escalate his concerns to more responsive personnel. Keppel’s deferred prosecution agreement requires the company to modify its compliance program to address “deficiencies in its internal controls, compliance code, policies and procedures regarding compliance with the [FCPA],” including issues with “Internal Reporting and Investigation.” Specifically, Keppel is required to maintain or establish (1) “an effective system for internal and, where possible, confidential reporting by, and protection of, directors, officers, employees . . . concerning violations of the anti-corruption laws or [Keppel’s] anti-corruption compliance code, policies, and procedures;” and (2) “an effective and reliable process with sufficient resources for responding to, investigating, and documenting allegations of [similar] violations.”

Conclusion

The prosecutions of Weisman and Chow offer a clear warning: in-house counsel and compliance professionals can get caught in the crosshairs of FCPA enforcement actions. As a result, such personnel must ensure not only that their companies are complying with the law but also that their individual conduct is irreproachable.

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It's rare to find a law student or recent law school graduate who will tell you Civil Procedure was his or her favorite class. In fact, you may hear the course material is anything but exciting. Instead, they are likely to say that it's dry, boring and written in "ye olde English." In order to give 1L students a flavor for what jurisdiction is, law professors frequently cite the case *Pennoyer v. Neff*, 95 U.S. 714 (1877), a 19th century opinion that “seamlessly” weaves due process, full faith and credit, notice to parties and insufficient service of process into the big, confusing basket that is jurisdiction.

Fortunately, this article isn't a dossier on our favorite civil procedure screeds that we could not decipher without help from our patient professors. Rather, it gives civil procedure the credit it deserves and shares with young lawyers and law students the real value behind the hard-to-read, seemingly pointless cases about the procedural aspects of the law. "Civil Procedure may be the most important course in the entire law school curriculum. Civil Procedure is the first course in which law students are presented with issues of dispute resolution, problem-solving, lawyering, ethics, professional responsibility, process, and the value of process that cut across the entire law school curriculum." Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. Cin. L. Rev. 1223 (1993).

Unfortunately, most, if not all, newly minted lawyers only realize after they are well into their first jobs just how valuable and practical their first year of Civil Procedure class really was. Picture this: it’s your first day as an associate at the big law firm of your dreams. You have your own office with a window, a legal assistant (your own assistant!) and business cards with “Esq.” behind your name. You’ve made it to the promised land of lawyer-topia ... until you realize that you have zero time to enjoy the window view, and your assistant has a better working knowledge of pleadings and litigation than you do.

Your daydream is further interrupted by a sharp-dressed partner who abruptly walks into your office without knocking, addresses you by the wrong name and scatters a bunch of files on your shiny new desk. By the end of the week you must now complete the following: a research project about the enforceability of a covenant not to compete; a memorandum determining whether or not a plaintiff filed suit against one of the firm’s biggest clients in the proper jurisdiction; prepare an amended complaint (today marks the 18th day from initial service); and determine the likelihood of success of a demurrer motion filed for the failure to join a party under Rule 19. And, by the way, the memo detailing the jurisdictional issue doesn’t count towards your billable hour requirement. Time to buckle up, counselor.

By now, you are haunted by your lackluster Civil Procedure performance, and you have more questions than answers. Demurrer? That sounds vaguely familiar. That’s probably opposing counsel’s name. Joinder issues actually occur in real-life litigation? Whoa, wait a second; what is joinder again and how does it work? Quasi *in rem* is a jurisdictional concept and not a Disney character? Why do I care that today is the 18th day since service of the original complaint? That shouldn’t matter, I have a week to get it done. Only one week? That sharp-dressed partner is so unreasonable.

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After avoiding eye contact with the legal assistant who knows you are in over your head, you kick yourself for not thinking any of the Civil Procedure course concepts would someday matter. Newsflash: they all matter, and they matter a lot.

After a mild panic attack—and maybe after a perfunctory review of Civil Procedure outlines on the internet—you prioritize the projects and refamiliarize yourself with the Federal Rules of Civil Procedure. You’re able to knock out the noncompete research project; you perfect your first memorandum about jurisdiction. Thanks to the Pennoyer discussion from your 1L days, the plaintiff’s suit should be dismissed because they didn’t properly serve the firm’s client in the forum state. The Amended Complaint gets timely filed as a matter of course on the 20th day—thanks for that one-time pass, Rule 15(a)(1). Whew! Lastly, you are able to determine opposing counsel’s Rule 12(b)(7) Motion to Dismiss for Failing to Join a Party will likely be dismissed since the omitted party—a joint tortfeasor—isn’t a necessary party. You’ve done well—this time—but don’t expect a “thank you” just yet. You can, however, expect more of the same.

Civil Procedure is the backbone of any litigation; it’s the beginning and end of every lawsuit, and governs the conduct of licensed attorneys. “The purpose of the Federal Rules of Civil Procedure ... is to cut through the maze of technicalities which have heretofore existed, and to enable the court to do a greater measure of moral justice under the law.” Mackerer v. New York Cent. R. Co., 1 F.R.D. 408, 410 (E.D.N.Y. 1940). Although unknown at the time of initial study, its importance permeates throughout one’s entire legal career.

In conclusion, fear not 1Ls, you will get through Twombly, Iqbal, and Erie. Although they may not have any meaning until you are in practice, you will soon see firsthand the way Twiqlbal reformulated pleading standards and how Erie paved the way for federal courts sitting in diversity jurisdiction to apply state substantive law. Most importantly though, you will recognize Civil Procedure as the nucleus of practicing law. Your initial ambivalence for the subject matter will slowly evolve into an appreciation for an organized system that governs the profession.

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I’m a Millennial, and Everything is Alright
By Grant P. Bloomdahl, Esq.

In December 2018, I turned 28 years old. I spent a vast majority of my twenties in school instead of working full-time. I like video games. I watch too many movies. I pay too much in rent. I spend too much on coffee and food. I am, for all intents and purposes, a typical millennial: a member of that broadly defined group of people born between 1981 and 2001. And, I have learned to be proud of that fact.

Unfortunately, I also watch the news. When my generation is discussed, it is almost always the subject of scorn. This scorn tends to fall into the same general categories: (1) millennials are bad with money; (2) they don’t get married or have kids; (3) they carry too much debt; (4) they prefer to rent instead of buy; and, of course, (5) avocado toast!

This derisive feeling is not isolated to the just the media. I have heard my generation talked poorly about in private conversation as well. The word “millennial” has nearly transgressed into a slur that older generations use to describe whatever those youngsters are up to. I concede that I am also guilty of bashing millennials on occasion to win points with older people. If there is a problem somewhere, millennials are surely to blame. I imagine when the next recession hits, all 80 million millennials will be blamed for that, too.

Some of the problems of our generation do have merit. Although millennials are the most diverse and most educated generation in American history, 40 percent of the nation’s unemployed are millennials. Americans between the ages 18 to 34 are earning less today than ever. Millennials are more depressed, drink more

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and have more student loan debt. Millennials frequently live with their parents and are financially unable to own a house. They raise fewer children, get married later in life and are generally poor at interpersonal relations. Millennials are far less likely to start a business or work for themselves than generations in the past, and they frequently quit their jobs, sometimes after only a few months.

And still, even if these problems are true, I think that millennials will have a positive effect on the legal community in Pennsylvania. Perhaps our perceived laziness will translate to efficiency and getting to the point in an argument. Already gone are the closing arguments that last over four hours. With time, our familiarity with technology and communication will make it easier to integrate technology in the courtroom and convey our message to jurors and judges. The result is less time spent talking, better communication and more time spent solving problems.

Perhaps our inability to own a home and our willingness to quit a job for greener pastures will mean that we will be more willing to leave a situation, or merely speak up, when we (or our clients) are treated unfairly or unjustly. Because we have little—if any—attachment to a specific area, we can approach problems in our local society without the tint of bias. And, if something is hopeless beyond repair, or just not worth the effort, we will be willing to get up and leave. Our unsustainable levels of college debt, furthermore, may help society, and therefore the law, examine what truly matters in life.

Perhaps our resistance to start families will result in the cost of raising children to tumble and the procedure in family courts to change. Further, it may result in some societal

Despite the negative talk, I think that millennials are more willing to talk things out, are more approachable, less greedy, and more efficient than prior generations.

I am proud to be a millennial.

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Diverse Gateways: The “Pool Problem” in Domestic Arbitration

By Alice Adu Gyamfi

The issue of diversity has become central to the discourse and function of arbitration. Both domestic and international largely remain a “white male game.” (F. Peter Philips, *It Remains A White Male Game*, International Institute for Conflict Prevention and Resolution, Nov. 28, 2006) As arbitration continues its rise as the premier alternative dispute resolution mechanism, the lack of racial and ethnic diversity in domestic arbitration presents a crisis of legitimacy and long-term sustainability for the entire system.

A textbook example of the issues presented by this lack of diversity can be found in a lawsuit between Shawn Carter, more commonly known as Jay-Z, and Iconix Brand Group Holdings (Iconix). On Oct. 1, 2018, Iconix commenced arbitration against Jay-Z. Jay-Z responded with a petition to stay the arbitration. In so doing, Jay-Z asserted that the arbitration should be stayed, as the arbitration agreement was void as against public policy because (1) the arbitration clause violated New York's public policy against racial discrimination as a result of the American Arbitration Association's (AAA) failure to provide African-American neutral decision makers, and (2) the arbitration clause violated public policy because the AAA's procedures for large and complex cases violate New York law. During the arbitrator selection process, the AAA reviewed a list of arbitrators with experience in large and complex cases and presented Jay-Z with a list of 200 potential arbitrators. A review of that list revealed that there were no African-American arbitrators with the required expertise. After raising a concern about the lack of diversity amongst the potential arbitrators, the AAA provided Jay-Z with a short list of three African-American arbitrators. This list also fell short, given that one of the three proposed arbitrators was a partner at the firm representing Iconix in the pending arbitration. Jay-Z asserted that AAA's actions deprived litigants of color of a meaningful opportunity to have their claims heard by a diverse panel of decision-makers.

As evidenced by Jay-Z's petition, the lack of neutral African-American arbitrators prevented him from making a meaningful and representative choice in the selection of an arbitrator. One of the fundamental principles of arbitration is party autonomy: a party's right to select an arbitrator which they believe understands their particular experience and has the expertise to adjudicate effectively. Such as in Jay-Z's case, when a tribunal is constituted without one neutral African-American arbitrator, it effectively denies parties the right to select their arbitrator because it narrows the scope of potential arbitrators in a manner that limits party choice in a substantial and material way. This has the effect of significantly curtailing party choice and minimizing party autonomy.

Further, the lack of diverse arbitrators impedes a party's ability to present their case in front of a panel of their peers. Jay-Z is an African-American rap icon, and the dispute is centered around one of his businesses, a housing project in Brooklyn, New York containing predominantly black residents, where Jay-Z himself grew up. As one of the most successful African-American entrepreneurs in history, the question of why Jay-Z wants to select an African-American arbitrator can hardly be considered unreasonable.

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This case raises the question: where are the diverse arbitrators? Moreover, are there enough diverse practitioners eligible to be appointed as arbitrators? This issue has best been described as the “pool problem.”

In order to dissect this issue, we first must look at how arbitrators are appointed. Arbitrators are appointed out of the eligible pool of arbitration practitioners that includes counsel, retired judges, professors and industry experts. These positions are referred to as “gateway positions.” It is through these positions that practitioners gain the experience and expertise required to be appointed as an arbitrator.

The lack of diverse practitioners in these gateway positions is representative of the pool problem. This problem, as outlined by David Wilkins, is characterized as what occurs when so few diverse attorneys exist in corporate law firms that the “pool” of practitioners who could be appointed as arbitrators is correspondingly restricted. (David B. Wilkins & G. Mitu Gulati, Why Are There So Few Black Lawyers in Corporate Law Firms—An Institutional Analysis, 84 Calif. L. Rev. 493 [1996], p. 498.) The lack of diverse arbitrators in domestic arbitration is a direct result of the lack of diverse attorneys in these critical gateway positions. It may be that diverse arbitrators are not occupying high enough positions—such as partner or senior counsel—to be regarded as having the requisite amount of experience to sit as an arbitrator. However, the diverse arbitrators who occupy those senior positions but are still unable to gain appointments, seem to be caught in a catch-22, wherein they need experience to be appointed but cannot gain experience without first being appointed.

As diversity in domestic arbitration is spotlighted by cases such as Jay-Z’s, the arbitration community can no longer afford to promote diversity through discourse alone. The arbitration community’s actions must rise to the level of its concern. As suggested by Gary Benton, one strategy would be to establish “defective panels.” (Gary Benton, Let’s Stop Talking About the Arbitrator Diversity Problem, Kluwer Arbitration Blog, 14 Jan. 2018.) Defective panels are characterized as those that do not contain any women or diverse arbitrators. If the arbitration community begins to recognize diverse panels as the norm, non-diverse panels will, in turn, signify to counsel, parties and institutions that such panels are unacceptable. Although small steps have been taken towards a more diverse arbitration-candidate pool, the arbitration community—and the legal community at large—must recognize the issues presented by this problem and take a more proactive approach in eradicating the issues presented therein.

Alice Adu Gyamfi is a 2L J.D. student at Penn State Law and the current director of diversity and outreach at Arbitrator Intelligence. Arbitrator Intelligence is a disruptive technology that is increasing accountability, transparency and diversity in arbitral appointments by supplying arbitration decision-makers with arbitrator intelligence reports on arbitrators.

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What does it mean to be intelligent? In her recent book *The Next IQ: The Next Level of Intelligence for 21st Century Leaders*, Arin Reeves suggests updating our traditional definition. Reeves argues the types of reasoning skills that traditionally defined intelligence are rapidly becoming outdated in the 21st century. (See Arin N. Reeves, *The Next IQ: The Next Level of Intelligence for 21st Century Leaders*, American Bar Association, 2012.) As the world becomes increasingly interconnected and diverse, new methods of problem solving are becoming essential elements for intelligent leadership.

Reeves argues 21st century leaders require a global mindset with a focus on deliberative intelligence. This often means seeking diverse and potentially contrasting points of view. To underscore this concept, she introduces the model of CORE intelligence (intellectual courage, intellectual openness, intellectual reflection and intellectual empathy).

Reeves argues traditional IQ tests (think LSATs) measure the “Retro IQ.” The Retro IQ developed in the pre-modern period. It measures an individual’s ability to focus narrowly on a particular problem. Often this intelligence involves logic and deductive reasoning. The Retro IQ focuses on individuals getting “the right answer” to a narrow problem.

Reeves suggests the “Next IQ” is more often focused on teams working together on innovative solutions. This collaboration may include redefining the nature of the problem itself. Sometimes reframing the question can be more intelligent than simply striving for “the right answer.”

In tying this concept to the legal profession, Reeves relates one story involving her consulting work with a large law firm. The partners were disappointed with the firm’s rankings on a survey of mid-level associate satisfaction. To that end, much ink has been spilt belaboring the perceived differences between millennials (born between approximately 1981 and 1999) and other generations in the workplace. Some millennials are now reaching the point in their legal careers where they can compete for roles as partners. Some commentators seem to worry young people will be too busy taking selfies and eating avocado toast to embrace this leadership and responsibility.

Condescending stereotypes about young people are neither new nor helpful. On the other hand, research indicates there are meaningful differences in the professional values of young attorneys compared to their more mature colleagues. For example, it is true that young attorneys are more likely to value work-life balance. Many young attorneys also report attaching a greater significance to diversity, inclusion and performing meaningful work. Also, because many millennials are “digital natives,” they may have different communication preferences.

Reeves documented this generational disconnect while consulting with the firm. She was asked to collaborate with a working group of partners to improve the satisfaction of their associates. During this process, the partners realized how seldom they sought the input of others, including the very associates they were seeking to retain. According to Reeves, these leaders were relying too heavily on the Retro IQ insofar as they only prioritized the perspectives of partners and outside consultants. It never occurred to them to seek input from within their organization.

Research suggests that employees report greater job satisfaction when they feel involved and integrated into their organization. The firm decided to begin including associates within the working group and seeking their input on a regular basis. Sometimes the intelligent decision involves asking others for their perspectives.

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Throughout the book, Reeves uses the example of Linus's Law, which states that “given enough eyeballs, all bugs are shallow,” which essentially means that if enough sets of eyes look at a larger problem, every smaller problem that led to the larger problem will be found. The idea is named after the founder of Linux open-source software operating system Linus Torvalds. Author and software developer Eric S. Raymond detailed this concept in his groundbreaking book The Cathedral and the Bazaar. (See Eric S. Raymond, The Cathedral and the Bazaar: Musings on Linux and Open Source by Accident, O’Reilly Media 2001.) According the Raymond, one of the fundamental principles behind open-source systems is, “[p]rovided the development coordinator has a communications medium at least as good as the Internet, and knows how to lead without coercion, many heads are inevitably better than one.” Id.

The story of open-source software might be an appropriate analogy for millennials. Coincidentally or not, Linux was released (or “born”) in 1991. (IBM introduced “object code only” in 1983 making problem solving in the context of software technology more centralized and inflexible. Prior to the 1970s, open source software was actually more common.) More importantly, open-source systems take inclusion and collaborative problem-solving as a basic operating principle. Success depends on programmers communicating solutions and through widespread voluntary collaboration.

Critics of the open-source approach remain skeptical. They point out that for all the compelling slogans, there is still no hard data to suggest open-source superiority. Open-source software has yet to develop any faster than closed-source alternatives.

Collaboration is almost always helpful, but “more eyeballs” can’t solve a problem if their collective vision is insufficient. Think about the resources available for performing legal research. Wikipedia might be a convenient and free source for random facts, but no competent lawyer would ever cite to it for any type of legal writing. On the other hand, in a few short years, Wikipedia has virtually eliminated the market for once-dominant reference collections like the Encyclopedia Britannica. Perhaps a balanced approach to problem solving can include both open and closed-sourced systems.

21st century leaders should understand diversity as an indispensable element of business intelligence.

Reeves also suggests that leaders in the 21st century deal with a volume of information so great it becomes impossible to process it completely and efficiently. She asserts that the magnitude of this information necessitates not only delegation and collaboration, but a growth mindset and flexible decision making.

Consider how we think about great leaders from the past. Generations of children learned that individuals like George Washington, Napoleon Bonaparte and Alexander the Great were the exemplars of effective leadership. Many of these “great leaders” tended to be autocratic and militaristic (not to mention male and European). An increasing number of historians today are considering the limitations of this “Great Man” method of understanding history.

Other historians, like Howard Zinn, took the opposite approach. They apply a critical theory to frame historical events in terms of the “common man” struggling against entrenched hierarchical systems. From this point of view, great leadership is more likely to come from the collective decisions of ordinary people.

It turns out that leadership is extremely difficult to define and even harder to reduce to a formula. There are very few traits shared by all great leaders. Research seems to suggest leadership is an emergent property between leaders, their team and the situation. Many successful CEOs fail miserably when they leave to work in a different organization. Effective leadership is much more complex than simply having the right answer.

In order to continually improve leadership, there must be constant evolution. Accordingly, the Next IQ involves a mindset shift. Reeves makes a thought-provoking distinction between “diversity” and “diversity and inclusion.” She traces the history of diversity in the modern workplace back to the original anti-discrimination laws. She suggests intelligent leaders should no longer conceptualize diversity merely in terms of “compliance” or “fairness.” Instead, 21st century leaders should understand diversity as an indispensable element of business intelligence. Effective organizations have diversity in their DNA because they inherently value inclusion, respect and collaboration. Diversity and inclusion aren’t just about doing the right thing, they’re also about the opportunity to make ourselves better.

This isn’t just rhetoric. Reeves points to studies of mock juries, which seem to lend empirical evidence to this view. Research suggests when jurors come from different backgrounds, the overall performance of the jury improves and

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the length of their deliberations increases. If this is correct, diversity and inclusion may help organizations conceptualize problems differently.

Unfortunately, recent data also suggests the legal profession continues to lag behind. Although the proportion of women and minorities associates seems to be (very) slowly increasing, alarmingly few of these attorneys have ascended to partnership positions.

In sum, The Next IQ makes a forceful argument. It’s not enough to simply make diversity “a priority” within an organization. Intelligent leaders understand why diversity and inclusion matters. Intelligent leaders are constantly searching for methods to improve themselves and their teams. The Next IQ suggests diversity, inclusion and collaboration are a great place to start.

Part 2 of this article will discuss the second half of The Next IQ, including cognitive biases, heuristics and “insightful intelligence.”

Patrick McKnight is a JD/MBA candidate at Rutgers University and a law clerk at Wilson Elser LLP in Philadelphia. He writes on topics, including insurance law, corporate law and American history.

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Trying Times & Tough Legal Headlines?
A 1L’s Perspective on Law School Lessons of Diversity and Responsibility

By Alexandra DeBonte

From Trump v. Hawaii – or, the “travel ban” case – to Justice Brett Kavanaugh’s confirmation hearing before the Senate Judiciary Committee, to the “zero tolerance” policy that separated migrant families at the border, first-year law students were met with some interesting legal headlines as we prepared to dive into the beginning of our legal education. Some of us weren’t even sure what a Senate Judiciary Committee was. It is possible that some of us didn’t even know why the Senate was involved with the appointment of a Supreme Court justice. But we were about to learn. We were about to learn by using those intense, torn-from-the-headlines legal issues to supplement the lessons of our first-year courses.

Yet, while some of 2018’s biggest legal headlines served as a practical example of how to tie course material into the “real world,” I think they served an even more important purpose: teaching our 1L class to engage with a new level of diversity and the responsibility that comes along with it. Welcome to law school.

I cannot speak for all 1Ls, but I know that my first semester of law school was a crash course in thinking about and understanding diversity on a new level. The course material was bound to its political underpinnings, the conversations were destined to spark debate, and students came prepared to challenge and provoke each other (all in good fun and spirits, of course). And, as I learned, with that came a higher degree of social responsibility - one that meant learning to accept diverse perspectives and opinions and use them to further meaningful and thought-provoking exchanges, rather than resulting in chaos and turmoil. We are preparing to be lawyers, after all, and haven’t we all been told that it’s a critical part of what lawyers do? Encourage fair and challenging debates? Strive to find a way to see things from different perspectives and anticipate the opposing sides to any conflict?

From the very first month of our law school careers, our

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community welcomed 1Ls with open arms and open minds, ready to accept the wide range of experiences and backgrounds each of us brought to the building. From the very first day, we were encouraged to recognize how the politically divided, enthralling legal headlines would spark intense but meaningful discourse. It was an experience that taught us how to practice acceptance, use our attentive listening skills and keep an open mind in response to those discussions to make the most of them.

One thing I love about my school and the young lawyers I have met is that they really take on and promote this idea of diversity and responsibility. I will endlessly praise my classmates and community for their commitment to respecting and encouraging diversity in this way. Diversity is not a new concept; most law firms sponsor diversity internships and law schools increasingly diversify each incoming class. Lawyers and law students alike have been continuously encouraged to promote diversity and incorporate it into their everyday lives. While it is obvious that accepting and promoting diversity has been a critical element of the legal field, it is time for young lawyers to represent that idea in every aspect of their new endeavors. My hope is that my 1L classmates and I, who will be starting legal internships and careers for the very first time this summer, take it one step further and continue to advocate for and enrich this level of diversity and understanding in the workplace. It is our turn, and our responsibility, to take this kind of appreciation for diverse viewpoints with us wherever our professional lives lead. We can bring our enthusiasm and commitment to diversity into the legal field and truly inspire others within the profession to do the same. It will soon be our turn to continue the momentum of the professionals who have already set a perfect example of what it means to accept, promote and commit ourselves to diversity.

It is an exciting time to be a law student, and it is one that students from law schools and young lawyers can really use to their advantage as they enter the workforce with some critically important views on diversity and the responsibility that comes along with promoting it in every possible way.

Alexandra DeBonte is a first-year student at Penn State Law and is expected to graduate in 2021. She is currently a member of the PBA YLD, serving as Penn State Law's representative. She received her bachelor's degree in philosophy from York College of Pennsylvania last May. She is originally from Pompton Lakes, New Jersey.

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**Economic Loss Doctrine After Dittman**

*By Erik S. Unger, Esq.*

Recently, in *Dittman v. UPMC*, 196 A.3d 1036 (Pa. 2018), the Supreme Court of Pennsylvania addressed two distinct issues of practical importance to younger lawyers. The first issue was whether an employee could bring a negligence claim based upon an employer’s failure to safeguard personal data of employees from third-party cyberattacks. The second issue was whether application of the economic loss doctrine barred tort-based claims seeking only economic damages. Although both issues warrant attention, the focus of this article relates to the second prong of the court’s holding relating to application of the economic loss doctrine. This article will explore the basis for the court’s holding and implications of the doctrine’s application.

Plaintiffs in *Dittman* were employees of defendants, University of Pittsburgh Medical Center (UPMC) and UPMC McKeensport (collectively referred to as “UPMC”). Employees alleged that a data breach had occurred, which resulted in their personal and financial information being accessed and stolen. It was further alleged that the stolen data consisted of information collected by UPMC as a condition of employment and that the stolen data was used to file fraudulent tax returns, which resulted in actual damages. Employees asserted claims of negligence and breach of implied contract against UPMC. Employees alleged that UPMC had a duty to exercise reasonable care to protect employees’ personal and financial information from being compromised, lost, stolen, misused and/or disclosed to any unauthorized third parties. Employees asserted that UPMC had a duty of care to ensure the security of employees’ information in light of the special relationship between employees and UPMC, whereby UPMC required employees to provide the information as a condition of employment, which included implementation of processes that would

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timely detect security breaches. Employees contended that UPMC breached its duty by not implementing adequate security measures and violated administrative guidelines by not encrypting confidential data properly.

UPMC filed preliminary objections to the complaint arguing, inter alia, “no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage.” Id. at 1039. The lower court sustained the preliminary objections and dismissed the employees’ negligence claim. Employees appealed and the Superior Court, in a split decision, affirmed the lower court’s order. The Supreme Court of Pennsylvania granted allocatur to address the issues of: (1) whether an employer has a legal duty to use reason-able care to safeguard personal information of its employees when the employer chooses to store such information on an internet-accessible computer system; and (2) whether the economic loss doctrine permits recovery for purely pecuniary damages resulting from breach of an independent legal duty arising under common law, as opposed to breach of a contractual duty. The Supreme Court answered in the affirmative on both issues and provided an in-depth analysis relating to the proper application of the economic loss doctrine.

In addressing whether employees’ claims were barred by the economic loss doctrine, the court observed that the issue was whether the economic loss doctrine precludes all negligence claims that seek to recover purely economic damages except for narrow exceptions, or whether such claims are generally permitted if a plaintiff can establish a breach of a legal duty independent of any contractual duties existing between the parties. The court noted that the primary dispute centered on seemingly contradictory decisions in Bilt-Rite Contractors Inc. v. The Architectural Studio, 866 A.2d 270 (Pa. 2005) and Excavation Technologies Inc. v. Columbia Gas Company of Pa., 985 A.2d 840 (Pa. 2009). In summarizing Bilt-Rite, the court observed that the most important aspect in relation to the application of the economic loss doctrine was that the court looked to the approach taken by the South Carolina Supreme Court in Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding Inc., 463 S.E.2d 85 (S.C. 1995). In that case, the South Carolina Supreme Court observed that a plaintiff may maintain an action in tort for purely economic loss where a breach of a duty arises independently from any contractual duty between the parties, such as claims involving libel and defamation, accountant malpractice, legal malpractice and architect liability. Tommy L. Griffin Plumbing, 463 S.E.2d at 88.

The court contrasted its holding in Bilt-Rite with that of Excavation Technologies and opined that Excavation Technologies did not compel a different conclusion. It noted that the issue in Excavation Technologies was whether a utility is liable to a contractor for economic losses sustained when the utility does not mark or improperly marks the location of gas lines around work sites for the purposes of a negligent misrepresentation claim. In deciding that issue in the negative, the court held that the contractor did not state a negligent misrepresentation claim and declined to impose liability.

The court acknowledged that the Excavation Technologies court concluded there was no statutory basis to impose liability on utility companies for economic losses under the governing law and included a broad definition and brief discussion of the economic loss doctrine, which was ancillary to its holding regarding negligent misrepresentation. It was observed that the Excavation Technologies court did not discuss Bilt-Rite’s approach to the doctrine and to the extent that Excavation Technologies could be interpreted as having any impact on the court’s expression of the rule under Bilt-Rite, that interpretation was rejected.

Ultimately, the court rejected the proposition that the economic loss doctrine precludes all negligence claims seeking solely economic damages. It was observed that “Pennsylvania has long recognized that purely economic losses are recoverable in a variety of tort actions” and that “a plaintiff is not barred from recovering economic losses simply because the action sounds in tort rather than contract law.” Dittman, 196 A.3d at 1052 (quoting Bilt-Rite, 866 A.2d at 288). In so doing, the court set forth a “reasoned approach"
Economic Loss Doctrine After Dittman
Continued from page 12

to applying the economic loss doctrine that "turns on the
determination of the source of the duty plaintiff claims the
defendant owed." Id. (quoting Tommy L. Griffin Plumbing,
463 S.E.2d at 88). Specifically, if the duty arises under a
contract, a tort action will not lie from a breach of that duty.
However, if the duty arises independently of any contractual
duties, then a breach of that duty may support a tort action.

Prior to Dittman, it was an open question as to whether
tort-based claims asserting economic damages could
withstand application of the economic loss doctrine absent
personal injury or property damage where the claim did not
fit into the Bilt-Rite exception. By answering this question,
the Dittman court clarified that it was the source of the duty
that implicated the economic loss doctrine, not the type
of damages alleged. That is, the function of the economic

loss doctrine was merely to maintain the legal distinction
between contract and tort-based claims, not preclude tort
claims asserting only economic loss. The Dittman court’s
clarification not only assists in maintaining the conceptual
distinction between contract and tort based claims, but also
prevents misapplication of the doctrine to valid negligence
claims that only assert economic loss. The court’s explana-
tion provides an excellent roadmap for the doctrine’s appli-
cation and provides substantial assistance for young lawyers
seeking to bring or defend against claims that assert solely
economic loss.

Erik S. Unger is a partner at March, Hurwitz & DeMarco
PC, where he specializes in complex litigation. He is a YLD
member and YLD liaison to the Senior Lawyers Committee. He
is a graduate of Hofstra University School of Law (J.D.) and
Franklin and Marshall College (B.A.).

Your Time Is Valuable, But Be Sure To Donate It

By Christopher M. Brown, Esq.

I smiled to myself as I left the parking lot of Aronimink
Country Club on Friday, Jan. 11, 2019. I had just
attended the Delaware County Bar Association
(DCBA) Annual President’s Dinner. This event was held at
Aronimink this year, and it was a great
and special evening.

The DCBA is the county bar asso-
ciation, where my firm’s main office is
located. As a Chester County resident,
I always have a long commute to all of
these “Delco” events. The commutes
give me time to reflect on my way
home as I make my way either north
on Route 322 or west on Route 30,
depending on whether I come from
the office or elsewhere.

This year’s President’s Dinner was
special to me because a member of my
firm, Craig B. Huffman, was hon-
ored as the incoming president of the
DCBA. Craig somehow manages to be incredibly active
in the DCBA while also maintaining a thriving family law
practice and being the type of husband and father who
never misses one of his five children’s events. He is someone

I admire on both a personal
and professional level. If an
overabundance of activities and
obligations stresses him out, I
never see it
show. Rest
assured, the
DCBA is in
good hands
for 2019.

As a law student, I entered under the
belief that I was seeking a career in the
profession in which I was best suited
to help the most people in the most
significant way I could for the longest
amount of time possible. I focus on
estate planning, do not consider myself
confrontational, and am an enthusiastic
but anxious public speaker. I profession-
ally worry about people. Specifically, I
worry about what would happen to the rest of their family if
and when something befalls them, be it death or some degree
of incapacity. I have a knack for overwhelming myself with

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such worries, despite attempting to seal all exits, anticipate and have an answer, the answer, for every possible issue for every single person. Then I listened to Craig beam with pride about his family during part of his brief remarks at the President’s Dinner. I realize that if someone like him, with all that he does, can stand in front of a room of his peers and appear cool as a cucumber, I do not have to feel overwhelmed.

When you shoot for the proverbial moon, you may not give much thought to what it will actually be like when you have arrived on the moon’s surface. The DCBA has been a cornerstone of my personal self-confidence in my own practice. Having colleagues in the local area where the majority of my clients—whom I consider my friends—has allowed me to feel like I made the correct career choice—something I never thought would happen when I was going through law school.

I recently read that work tends to expand or contract to fit the time given to complete it, and that has never felt truer. Having completed my year-term as editor of the Delaware County Legal Journal, I have filled the time (that I never believed I had in the first place) previously reserved for my editor duties with volunteering as a district coordinator for the PBA 2019 Mock Trial Competition. I admire the students who compete, just as I admire Craig, not just for their regular efforts but for their extraordinary efforts—with emphasis on the “extra.” I always tell my clients that your own time is extremely valuable because you never have enough, cannot get more and, for each of us at an unknown future date, will run out. Therefore, the most valuable thing you can give to another is your time. I urge you to do the same. Get involved in your local bar associations and build your network. Volunteer your time and pay it forward to those looking to someday become part of our profession. And, as you become more experienced, always try to set an example for those attempting to follow in your footsteps.

Belonging to my firm, Eckell, Sparks, Levy, Auerbach, Monte, Sloane, Matthews & Auslander PC (affectionately “Eckell Sparks”), the PBA and the DCBA, and surrounding myself with the brilliant and inspiring people in these organizations, everyone from Craig down to the student-competitors, has by osmosis made me a stronger and more confident person and a better estate planner. I offer my sincerest congratulations to Craig and all the students who participated the mock trial competitions throughout the commonwealth.

You are all why I choose to overload my schedule, overextend myself and ultimately (hopefully) infinitely overachieve. If you bet on me, bet the over.

Christopher M. Brown is a lifelong resident of the Philadelphia area. Chris concentrates his practice in the areas of estate planning, administration and litigation, with additional focuses in business formation and development, real estate and zoning and land use. Chris was selected as a 2017 and 2018 Main Line Today Top Lawyer, a Delaware County Daily Times Best Lawyer by Reader’s Choice in 2018 and is a member of the Pennsylvania Bar Association and Delaware County Bar Association, where he is active in the Young Lawyers Section. Chris lives in Downingtown with his wife, Meghan, and their sons, Jack (4) and Brady (1).
Holy Cross High School Wins PBA Statewide Mock Trial Competition

Germantown Friends School and Holy Cross High School Edged Out Wyoming Seminary College Preparatory School in Final Round of Competition

Holy Cross High School in Lackawanna County won the 36th Annual PBA Statewide High School Mock Trial Competition held on March 29 and 30 at the Dauphin County Courthouse in Harrisburg. The Holy Cross High School team competed against Germantown Friends School in Philadelphia County. The competition is sponsored by the PBA Young Lawyers Division.

With its first state finals win, Holy Cross High School will represent Pennsylvania in the national mock trial finals May 16 – 18 in Athens, Ga.

Both teams edged out Wyoming Seminary College Preparatory School in Luzerne County to advance to the final round. In a first for the state finals competition, all three of these teams won all three of their trials, but only the two highest-ranking teams could advance to the fourth and final round. Wyoming Seminary College Preparatory School won the 2011 and 2018 PBA Statewide High School Mock Trial Competitions.

Eleven additional teams participated in the state championships: Eden Christian Academy (Allegheny County); Butler Area Senior High School (Butler County); Northwestern High School (Erie County); Central High School (Blair County); State College Area High School (Centre County); Cumberland Valley High School (Cumberland County); Pennsylvania Leadership Charter School (Chester County); Penn Wood High School (Delaware County); Roman Catholic High School (Philadelphia County); Lower Merion High School (Montgomery County); and Lower Moreland High School (Montgomery County).

Judge Karoline Mehalchick, U.S. District Court for the Middle District of Pennsylvania, presided over the final round of competition.

This year, 287 teams from 242 high schools competed in district and regional levels of Pennsylvania’s mock trial competition in hopes of gaining one of the 14 spots at the statewide competition. Pennsylvania’s competition is one of

“These finalists have demonstrated the highest levels of effective communication, critical thinking and teamwork skills necessary to compete in the state level of championship.”

Alaina C. Koltash, PBA Young Lawyers Division chair
Mock Trial Competition
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the largest in the nation.

Throughout the competition, eight-member student teams are given the opportunity to argue both sides of the case in an actual courtroom before a judge. The students, who play the roles of lawyers, witnesses, plaintiffs and defendants, are assisted by teacher coaches and attorney advisors in preparing for competition. Volunteer lawyers and community leaders serve as jurors in the trials. The jurors determine the winners in each trial based on the teams’ abilities to prepare their cases, present arguments and follow court rules.

This year’s hypothetical case was a criminal jury trial in which the defendant, a local pain management doctor, is accused of prescribing opiate painkillers outside the realm of normal medical practice, resulting in the overdose death of his patient.

The case was written by Jonathan A. Grode of Philadelphia, Paul W. Kaufman of Philadelphia, PBA Young Lawyers Division Immediate Past Chair Jonathan D. Koltash of Harrisburg and Talia Charme-Zane, an alumna of the Pennsylvania mock trial program and former captain of the Central High School team in Philadelphia.

Co-chairs of the Mock Trial Executive Committee are Jonathan Koltash and Young Lawyers Division Chair-elect Jennifer Menichini of Pittston.

The Pennsylvania Cable Network aired the final round of the competition on April 6, April 7 and April 11. The Pennsylvania Bar Foundation, the charitable affiliate of the PBA, is providing funding support for the broadcast.

More information about the PBA Statewide High School Mock Trial Competition can be found at https://www.pabar.org/site/For-the-Public/Mock-Trial-Competition.

Pennsylvania Bar Association Young Lawyers Division
Nominating Committee Report

The PBA Young Lawyers Division (PBA/YLD) Nominating Committee respectfully submits this report for the PBA YLD elections being held at the 2019 PBA Annual Meeting during the YLD Business Meeting at 4:15 p.m. on May 16, 2019, at the Lancaster Marriott at Penn Square, Lancaster, Pa. This report is of all eligible members (those who met the requirements of office and timely expressed an interest in the listed position) and the position they have requested they be considered for by the YLD membership. If a nomination for more than one individual has been made for one position, the individuals have been listed alphabetically by last name.

All young lawyers are encouraged to attend and vote on the 2019-2020 YLD officers. To register for the meeting please view our PBA Annual Meeting brochure.

For the office of Chair-elect:
The Nominating Committee nominates the following candidates to the office of Chair-elect:

Paul Edger, Esq.

Paul is the managing attorney for MidPenn Legal Services out of Carlisle, Pa. In this position, he oversees all of the administrative functions of services provided by MidPenn Legal Services, sits on numerous task forces and community organizations concerning legal services to the public and protection from domestic and sexual violence, serves as liaison between the organization and the bench/bar, and represents clients in matters concerning protection from abuse, landlord tenant, unemployment compensation, child custody, public benefits and criminal expungements. Additionally, Paul is an adjunct professor at Widener Commonwealth School of Law.

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Paul has been active in the PBA, currently serving as the treasurer of the YLD. He is a member of the Pennsylvania Bar and admitted to practice before the U.S. Supreme Court. Paul is a 2011 graduate of the Widener University Commonwealth School of Law. He graduated in 2008 from the Elizabethtown College.

Additional materials are available upon request of the Nominating Committee.

Colin J. O’Boyle, Esq.

Colin’s practice includes trial and appellate litigation in state and federal courts, focusing primarily on commercial litigation, health law and employment discrimination with the firm Elliott Greenleaf PC, in its Blue Bell office. Colin has been involved in litigation across the country, including claims involving healthcare provider disputes, ERISA, civil rights, employment discrimination and contract and other complex commercial disputes. Colin has also litigated several private arbitrations. Colin has been named to Pennsylvania’s “Rising Stars” list from 2010 through 2017.

Colin is a member of the Pennsylvania and New Jersey Bars and is admitted to practice in the U.S. Supreme Court, the Third Circuit Court of Appeals and the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania.

He is an active member of the PBA. He is currently serving as the YLD division delegate and previously served as a member of the House of Delegates from Zone 9. He is also active in the Montgomery County Bar Association. Colin is a 2007 cum laude graduate of Villanova University School of Law. Colin graduated magna cum laude from the University of Scranton’s Special Jesuit Liberal Arts honors program with a dual degree in history and philosophy.

Additional materials are available upon request of the Nominating Committee.

For the office of Treasurer:

The Nominating Committee nominates the following candidate for the office of treasurer.

Christopher T. Michelone, Esq.

Chris is a shareholder at McQuaide Blasko in Hollidaysburg, Pa. His practice includes assisting clients with business and tax law matters, real estate, providing banks with representation in commercial and residential collection matters, and preparing wills, trusts and powers of attorney to meet their planning needs.

He is active in the PBA, serving as the YLD Zone 8 chair since 2015. He is the president of the Blair County Bar Association YLD, was part of Leadership Blair County Program in 2014, and serves as a board member for the Ronald McDonald House Charities Mid-Penn Region, Blair County Chamber Foundation and Blair County Sports Hall of Fame. Chris is also a past president of the Altoona Rotary Club.

Chris earned his juris doctor from the University of Pittsburgh School of Law in 2010. He graduated from George Washington University in 2007 with a degree in political science and a minor in biology.

Additional materials are available upon request of the Nominating Committee.

For the office of Secretary:

The Nominating Committee nominates the following candidates for the office of Secretary:

Garnet Lee Crossland, Esq.

Garnet is currently the solicitor for the Court of Common Pleas for the 14th Judicial District. In this position, she serves as a legal advisor to the court. Prior to that, she was a judicial law clerk to the president judge in the Fayette County Courthouse.

Garnet is barred to practice in the Commonwealth of Pennsylvania and in the Commonwealth of Virginia. She is active in the Pennsylvania Bar Association. She is currently the secretary of the YLD and a member of the House of Delegates. She also currently serves as the executive director of the Fayette County Bar Association and a past president of the Fayette County Bar Association YLD.

Additional materials are available upon request of the Nominating Committee.

For the office of Division Delegate:

The Nominating Committee nominates the following candidates to the office of Division Delegate:

Paul Edger, Esq.

Paul is the managing attorney for MidPenn Legal Services in Carlisle, Pa. In this position, he oversees all of the administrative functions of services provided by MidPenn Legal Services, sits on numerous task forces and community organizations concerning legal services to the public and pro-

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NOMINATING COMMITTEE REPORT

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Protection from domestic and sexual violence, serves as liaison between the organization and the bench/bar, and represents clients in matters concerning protection from abuse, landlord tenant, unemployment compensation, child custody, public benefits and criminal expungements. Additionally, Paul is an adjunct professor at Widener Commonwealth School of Law.

Paul has been active in the PBA, currently serving as the treasurer of the YLD. He is a member of the Pennsylvania Bar and admitted to practice before the U.S. Supreme Court. Paul is a 2011 graduate of the Widener University Commonwealth School of Law. He graduated in 2008 from the Elizabethtown College.

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Colin is a member of the Pennsylvania and New Jersey Bars and is admitted to practice in the U.S. Supreme Court, the Third Circuit Court of Appeals and the U.S. District Courts for the Eastern, Middle and Western Districts of Pennsylvania.

He is an active member of the PBA. He is currently serving as the YLD division delegate and previously served as a member of the House of Delegates from Zone 9. He is also active in the Montgomery County Bar Association. Colin is a 2007 cum laude graduate of Villanova University School of Law. Colin graduated magna cum laude from the University of Scranton’s Special Jesuit Liberal Arts honors program with a dual degree in history and philosophy.

Additional materials are available upon request of the Nominating Committee.

ELECTION PROCEDURES:

Pursuant to Article IV, Section 7 of the PBA YLD bylaws, the election of officers shall be at the Annual Meeting of the YLD. The YLD meeting at the PBA Annual Meeting will take place on May 16, 2019, at the Lancaster Marriott at Penn Square, Lancaster, beginning at 4:15 p.m. Fifteen members of the PBA YLD who are eligible to vote must be present at the meeting to constitute a quorum. PBA YLD Bylaws Article VIII(4). Under Section 6 of Article VIII, a candidate must receive a majority vote from the present members to be elected to office.

Voting procedures will be as follows:

• Any member of the PBA YLD is eligible to vote.
• Voting will be permitted by email or in person at the May 16, 2019 YLD meeting. A member is eligible to vote if: 1) he or she is a member of the PBA YLD; 2) properly registers for the Annual Meeting meeting in advance of the meeting; 3) follows the procedures outlined in this report; and 4) is present for the entire YLD meeting.

• Any member who properly registers and appears in person at the PBA YLD May 16, 2019 meeting will cast a paper ballot. The paper ballot will be collected by Jonathan D. Koltash, chair of the Nominating Committee, and verified by Maria Engles, YLD coordinator.

• Any member who wishes to vote by telephone and cast an electronic ballot must inform Maria Engles at Maria.Engles@pabar.org and Jonathan D. Koltash, Chair, Nominating Committee, at jonathan.koltash@gmail.com of his or her intent to vote electronically no later than 5:00 p.m. on May 9, 2019.

• Any member wishing to vote electronically will be required to be present when the YLD chair convenes the May 16, 2019 meeting and remain on the telephone for the duration of the meeting until the election of officers occurs. A roll call of those members who stated their intent to vote electronically will be called at the beginning of the meeting and before the election of the officers. Those members will then email their vote, at the appropriate time, to an email account specified at a later time.

Any exceptions sought to this process should be submitted to the Nominating Committee Chair at jonathan.koltash@gmail.com and Maria Engles at Maria.Engles@pabar.org no later than 5:00 p.m. on May 10, 2019.
2018-2019 YLD Executive Council

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Chair
Pennsylvania House Education Committee
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akoltash@gmail.com

Jennifer Menichini
Chair-elect
Joyce, Carmody & Moran PC
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Jonathan D. Koltash
Immediate Past Chair
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Garnet Crossland
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