YLD
Allegheny County Bar Association

Point of Law

The E-Newsletter of the Young Lawyers Division of the Allegheny County Bar Association

Fall 2020

Young Lawyers Division – Year in Review

By Andrew Rothey

In 2019-2020, the Young Lawyers Division (YLD) was in the midst of yet another great year when the world as we knew it came to a screeching halt in March of 2020. Unless you have been living in an Appalachian cave for the past eight or nine months, you know the world has been dramatically changed by the COVID-19 pandemic. The activities of the YLD are no exception, as many YLD events that were planned had to be shifted to Zoom or, unfortunately, canceled entirely. Nevertheless, the YLD accomplished a great deal in 2019 and early 2020, and remains committed to providing high-quality programming for its membership during these difficult times.

Before the onset of the pandemic, the YLD had continued its long history of great programming aimed at enriching our members both professionally and socially. Events such as the Esquire Open, a tennis event, and the always well-received Boo-ery Tour, a spooky brewery tour where costumes are highly encouraged, were a hit. The Holiday Party was held at the Renaissance Hotel, which provided for a festive atmosphere for socializing and networking. Also brought back for another successful run was the YLD Family Feud event, which pairs young lawyers with judges for a trivia style event. It is safe to say that Amanda Thomas, our current YLD Chair, has the master-of-ceremonies job for this event locked down for years to come.

The Children's Gift Drive, the YLD's biggest public service event of the year, provided thousands of wrapped presents to under-privileged children around the city of Pittsburgh,

On Oct. 22, ACBA members mingled with diverse law students – on Zoom this year – at the annual Diverse Law Student Reception. Nearly 100 were in attendance and were entered into a drawing for the chance to win an original painting by popular local artist and former Pittsburgh Steeler Baron Batch.

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Special thanks to Jessica Wysocki Valesky & ACBA Communications and Publications staff

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personally delivered by Santa. Every year, I am amazed at the scale that the Gift Drive has reached. When I show up to start wrapping presents, I am always struck by how profoundly the Gift Drive reminds me of what the holiday season is truly about – giving to those in need. This enormous undertaking requires many hours of organization and dedication, and the YLD Public Service Committee and countless volunteers were more than up to the task.

The YLD remains steadfastly committed to diversity and inclusion not only within the YLD itself, but the broader Pittsburgh legal community. One of the challenges in increasing diversity is keeping diverse law students in Pittsburgh after they graduate. This year, the YLD hosted the Diverse Law Student Reception to bring together law students from diverse backgrounds and attorneys and judges from Allegheny County. The Reception is designed to foster new relationships and networking opportunities.

The YLD has made a tradition of receiving national acclaim for its programming and 2019-2020 carried on that tradition in spades. The YLD's creativity in crafting new legal education programming stole the show. Two new educational programs won awards from the American Bar Association. The YLD won the "Service to the Public" award for designing a new CLE – aiming at educating young lawyers outside of their own practice area – called "True Crime Event: Criminal Procedure for the Non-Practicing Attorney." In a truly innovative move, the YLD combined legal education with a winter ski trip in its SkiLE. Four presenters taught an Ethics CLE on the bus ride up to Seven Springs, before the entire group enjoyed a great day on the slopes. Not only was the event a blast, but I challenge you to come up with a better title! The YLD won the American Bar Association "Service to the Bar" award for the SkiLE event.

Once the pandemic hit, the YLD (with great thanks to the unflappable ACBA staff) kept its operation afloat through Zoom meetings. While we could not be physically together, the YLD adapted quickly and shifted as much programming as it could to the digital space. A virtual "Passing the Gavel" ceremony, traditionally held during the Bench-Bar Conference, was held in June. CLEs continue to be regularly available via streaming Internet.

While this year has presented unprecedented challenges for the YLD, I cannot understate how impressed I have been with our membership's resilience and dedication. I have no doubt that, even in the face of this daunting challenge, the YLD will push forward and continue to be a vital resource for its members. ■

Andrew Rothey is an attorney with Rosen & Perry, P.C. He practices in the areas of personal injury, motor vehicle accidents and medical malpractice.

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Why Aren't Corporations Adopting a Stakeholder Approach to Decision Making?

By Eryn Correa

A myth exists in the corporate world, that maximizing shareholder returns requires laser focus on maximizing shareholder returns. Thinking beyond the shareholders' bottom line, the myth continues, not only risks financial performance, but shareholder derivative suits as well.

However, emerging data shows that a *stakeholder* approach to corporate decision-making – where corporations consider the impact of their decisions on consumers, employees, the environment, the community, and greater society, in addition to the shareholders – generates significantly better financial returns. In fact, during the coronavirus pandemic alone, the Imperative 21 coalition reports that companies that "lead in meeting the needs of their stakeholders" have outperformed others by double-digits. *Imperative21.co.*

If that is true, why aren't more corporations adopting this stakeholder model of decision making?

Milton Friedman and the Rise of Shareholder Primacy

Fifty years ago, Milton Friedman published an article in the *New York Times Magazine* declaring that the social responsibility of business is to increase its profits. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits, N.Y. Times Mag.,* (Sept. 13, 1970). Ever since, shareholder primacy, the idea that corporations exist primarily to maximize the wealth of their shareholders, has ruled corporate decision-making. Lynn Stout, *The Shareholder Value Myth* (2012). The concept is based on a

principal-agent model. Shareholders are generally considered to be the owners/principals of a corporation because they have bought shares of the company. However, when the shareholders purchase shares, they give up control of their investment and cede it to the managers/agents running the corporation. To ensure the shareholders' financial interests are protected, despite their lack of control, corporate law requires corporate managers to make decisions the same way the shareholders would if the shareholders themselves were running the company: with an eye towards maximizing the return on his/her investment.

While there are plenty of mistaken assumptions underlying this approach, regardless, we now live in the world that shareholder primacy has wrought. Think of Boeing or Volkswagen or Amazon, companies that (rightfully) are on the end of significant public ire and frustration. We deserve to be frustrated with their actions. But they are not required to act in the public's best interest – only in the interest of their shareholders.

Conversely, companies like Unilever, Ben & Jerry's, and Warby Parker, who utilize a stakeholder model, are lauded for their commitment to their employees and wider causes. We seem to understand that we *want* companies to behave this way – but again, it is not required.

Changing Tide: Stakeholder Decision-Making

Despite the intransigence of shareholder primacy, public opinion is growing more insistent that corporations be held accountable to all stakeholder interests. On September 13, 2020, the 50th anniversary of Milton Friedman's article, the Imperative 21 coalition launched its RESET initiative that calls for the creation of "a more just and equitable form of capitalism" that would account for all stakeholders. JUST Capital, *Introducing the Imperative 21 Campaign to Reset Capitalism, JustCapital.com* (Sept. 14, 2020). In 2019, CEOs at the Business Roundtable sought to redefine the purpose of the corporation and proclaimed their commitment to serving all stakeholders. David Gelles and David Yaffe-Bellany, *Shareholder Value is No Longer Everything, Top C.E.O.s Say, N.Y. Times,* (Aug. 19, 2019). In 2018, Senator Elizabeth Warren introduced the Accountable Capitalism Act, which would require corporations with revenue over $1 billion to obtain a federal charter and be obligated by law to consider the interests of all relevant stakeholders. Mathew Yglesias, *Elizabeth Warren has a plan to save capitalism, Vox.com,* (Aug. 18, 2018). For the last several years,

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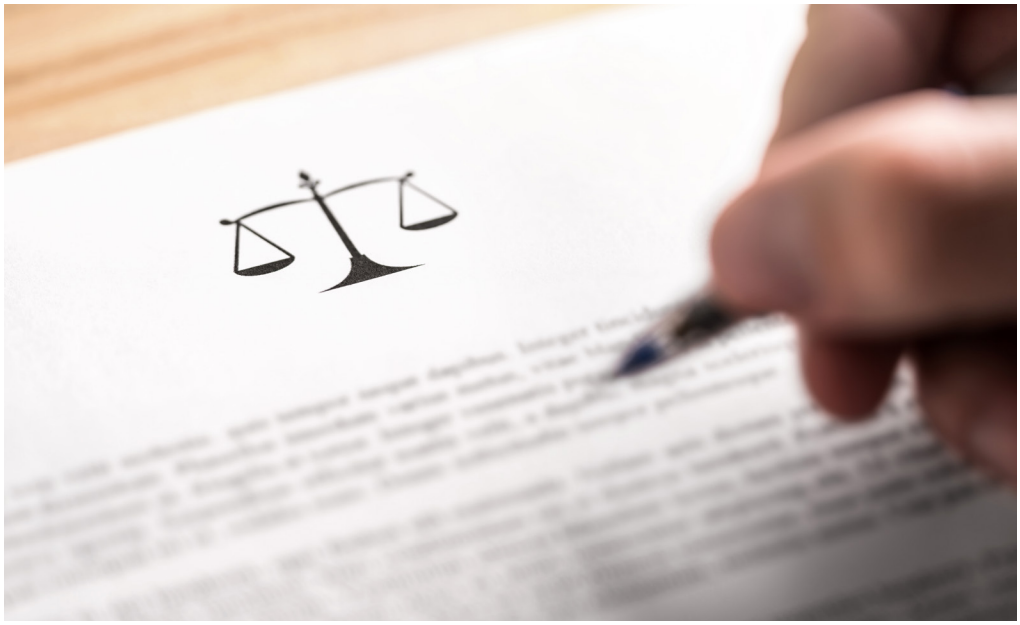
A Brief Guide to Better Briefs

By Shane Miller

Billionaire investor Charlie Munger, known as Warren Buffett's right-hand man, once gave a famous commencement address on an unusual topic: "prescriptions for guaranteed misery in life." Alec Hogg, *Simply great: Charlie Munger's speech to the Harvard School, June 1986 – "Invert, always invert., BizNews* (June 13, 1986). Munger surely knew that the graduates sought happiness and success; none desired "guaranteed misery." But he realized that it is often easier to solve hard problems in *reverse.* Discovering the secrets of success and happiness is hard, but finding sources of assured misery is easy. Munger suggested that the graduates could achieve happiness and success not by uncovering profound universal secrets, but simply by avoiding guaranteed sources of misery like substance abuse, resentment, and self-pity.

A similar logic applies to brief writing. It is hard to define a "good brief." Different people like different things, and popular advice varies. So, reverse the question like Munger: what is a *bad* brief?

That's easy. Don't identify the key issues. Make your argument difficult to follow. Provide no clear outline. Throw every argument against the wall. Don't clearly explain why you should win, or your requested relief. Misstate the law. Misstate the facts. Add irrelevant facts. Misspell words. Personally attack the other side. Ignore the rules. Drone on and on until the reader begs for mercy. Include fancy words that nobody knows. Use abbreviations and acronyms that nobody can remember.



Simply reversing these errors reveals hallmarks of a good brief:

- Identify the key issues.
- Make your argument easy to follow.
- Provide an outline.
- Raise only strong arguments.
- Explain clearly why you should win.
- State your requested relief.
- Accurately state the law and facts.
- Include only relevant facts.
- Make no misspellings or typographical errors.
- Avoid personal attacks.
- Follow the rules.
- Keep the brief as short as possible.
- Use plain language.
- Insert abbreviations and acronyms sparingly.

These ideas are simple, but achieving them is hard. Following a reliable writing process helps. I follow the four-step process created by Professor Betty Flowers. She calls it "madman-architect-carpenter-judge." Betty S. Flowers, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process,* Intellectual Entrepreneurship. Bring each step to life and call it "Einstein-Wright-Angelou-Ginsburg."

Here's how it works:

Phase I: Einstein

Picture Albert Einstein. The wild hair. The messy desk. The piles of books. He embodies innovation and creativity. Before putting fingers-to-keyboard, let your inner Einstein run wild. Generate lots of ideas. Tap into your creativity. Chat with colleagues about the brief. Learn about the judge. Review the rules. Research the issues. Take copious notes. Select your arguments. Just sit and *think.* Get the ideas flowing.

Phase II: Wright

Now that you are teeming with ideas, you must organize them. Summon your inner architect, Frank Lloyd Wright of Fallingwater fame. Create a blueprint for your brief. I usually list each relevant heading and

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Disclosure of Insurance Coverage in Discovery

By Zachary N. Gordon

How much is a medical malpractice lawsuit or a personal injury lawsuit worth? These cases are normally valued based upon considerations such as lost wages, the severity of the injuries, and the extent to which liability is disputed. While these and many other considerations related to the merits of a case are important, the value of the case also depends on how much insurance coverage the defendant has. Sometimes the only funds to pay a settlement or judgment is the defendant's insurance coverage. Since insurance coverage is crucial information, this article examines how the Pennsylvania and Federal Rules of Civil Procedure provide access to this crucial information.

In most personal injury and medical malpractice cases, the defendant may have multiple types of insurance. "Primary insurance first pays toward the loss." *Planet Ins. Co. v. Ertz,* 920 S.W.2d 591, 593 (Mo. Ct. App. 1996). There is often little dispute in turning over the primary insurance coverage. Plaintiffs also want to know if there is additional insurance commonly known as excess insurance. "Designed to cover catastrophic losses, excess insurance policies begin coverage when the underlying coverage ends." *Id.* There are many types of excess insurance. *Kropa v. Gateway Ford,* 974 A.2d 502, 506, n.2 (Pa. Super. Ct. 2009) (quoting *Planet Ins. Co.,* 920 S.W.2d at 593). "A true excess policy provides coverage above a primary policy for specific risks. An umbrella policy provides coverage over more than one policy, and may cover risks not covered by the primary policy." *Id.* Disputes arise over when a defendant

must disclose its excess or umbrella coverage.

In Federal Court, Rule 26 of the Federal Rules requires the parties to provide: "for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment." Fed. R. Civ. P. 26 (a)(1)(A)(iv). This is part of the initial disclosures mandated by Rule 26 and this disclosure is typically due within 14 days of the Rule 26(f) conference. Fed. R. Civ. P. 26 (a)(1)(C). Thus, in Federal Court this insurance information is disclosed very early into the case.

One District Court in New Jersey clarified that "Rule 26 disclosures are mandatory" and further explained that Rule 26 requires the production of any insurance agreement, including umbrella or excess policies. *Garcia v. Techtronic Indus. N. Am., Inc.,* No. 2:13-CV-05884 MCA, 2015 WL 1880544, at *3 (D.N.J. Apr. 22, 2015). In *Garcia,* the Defendants also argued that they should only have to provide the declaration page instead of the complete insurance agreement. The District Court disagreed; "The Rule is clear on its face regarding insurance agreements as a whole: their disclosure is automatic." *Garcia,* 2015 WL 1880544, at *4. The 'dec' or 'declaration page' refers to the page(s) "of a policy that specifies the named insured, address, policy period, location of premises, policy limits, and other key information that varies from insured to insured." *Schmidt v. Shifflett,* No. 1:18-CV-00663-KBM-LF, 2019 WL 3573507, at *2 (D.N.M. Aug. 6, 2019) (quoting *Bhasker v. Kemper Cas. Ins. Co.,* 361 F. Supp. 3d 1045, 1078 n.7 (D.N.M. 2019)). Some courts have granted motions to compel and awarded counsel fees to the plaintiff when the defendant only provided the declaration page and failed to provide the entire policy with its Rule 26 initial disclosures. *Schmidt,* No. 1:18-CV-00663-KBM-LF, 2019 WL 3573507, at *2. Thus, in most federal court cases, the parties must disclosure all insurance policies and must provide a complete copy of the every policy with the Rule 26 initial disclosures.

The Pennsylvania Rules of Civil Procedure also require production of insurance policies. Rule 4003.2 provides that, "A party may obtain discovery of the existence and terms of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment." Pa.R.C.P. No. 4003.2. As with the Federal Rules, Pennsylvania requires "any insurance agreement," so parties need to disclose excess policies.

The Pennsylvania Rule differs with Fed. R. Civ. P. 26, because unlike Rule

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Why Aren't Corporations Adopting a Stakeholder Approach to Decision Making?

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BlackRock, Inc., the world's largest asset manager with more than $7.4 *trillion* under management, has encouraged companies to contribute positively to society. Andrew Ross Sorkin, *BlackRock's Message: Contribute to Society or Risk Losing our Support, N.Y. Times,* (Jan. 15, 2018). And all of this is taking place against the backdrop of the benefit corporation movement, a push for all states to adopt benefit corporation statutes, which incorporate stakeholder decision-making into a corporation's governing documents and directives.

Financial Benefits of Stakeholder Decision-Making

For years, it seemed that adopting stakeholder-centric decision-making would mean sacrificing returns. But this is not just a feel-good initiative – it is proving to provide *significantly* better returns. For example, research conducted by McKinsey & Company revealed that companies that engage with their consumers and communities enjoy a 2% per annum superior stock market performance. *How companies succeed through radical engagement* (February 2016). *Firms of Endearment: How World-Class Companies Profit from Passion and Purpose,* found that companies that bring the interests of all stakeholders into strategic alignment, enjoyed cumulative returns of 1,681.11% over a 15-year period; by comparison, the S&P 500 had cumulative returns of only 117.64% over the same period. Raj Sisodia, Jag Sheth, and David Wolfe, *Firms of Endearment: How World-Class Companies Profit from Passion and Purpose* (2d ed. 2015). And in 2019, the Torrey Project showed that these firms of endearment enjoyed stock growth 100% higher than the S&P 500 over the last 20 years, between 1999 and 2019. David C. Ferran, *Torrey Project's Evaluation of the Financial Performance of Highly Ethical Companies and Stakeholder-Focused Companies* (2019).

Conclusion

And so, the question remains – why aren't more corporations adopting a stakeholder approach to decision making? Or maybe the better question is, why don't the shareholders require it? If this paradigm continues to provide better financial returns, it could be that shareholders would be within their rights to demand corporate adherence to it – for the strength of their own bottom line and to the benefit of the rest of us who are impacted by corporate decision-making. ■

Eryn Correa is a partner at Crivella Correa. She focuses her practice on business, governance, and transactional matters for emerging companies and benefit corporations. She serves on the boards of Sustainable Pittsburgh and Oikocredit US, and is a fellow in the Royal Society for the Encouragement of Arts, Manufacturers and Commerce. Eryn can be contacted at ecorrea@crivellafirm.com.

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Submit an article for Point of Law

The YLD's ABA award-winning newsletter

YLD members are encouraged to write about the practice of law or any substantive legal issue of interest.

Additionally, writers are encouraged to write responses to any article appearing in this issue.

Featured authors will have their article – up to 1,000 words long – published along with a brief bio.

Articles and inquiries may be submitted to *YLDCommunications@gmail.com.*

YLD Outstanding Young Lawyer Award

The YLD Outstanding Young Lawyer Award was presented to Julie Brennan this year. Pictured from right to left - Asra Hashmi, Andrew Rothey, Julie Brennan and Amanda Thomas.

A Brief Guide to Better Briefs

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subheading, then write each key point in a full sentence. Discover what works for you. Critically, do not *write* the brief now. Just design its contours, like an architect.

Phase III: Angelou

With your outline in hand, turn to writing. Emulate the late author and poet, Maya Angelou. To write, she often rented a simple hotel room near her home, removed everything from the walls, and spent hours in the barren room. *Maya Angelou with George Plimpton/92Y/The Paris Review Interview Series, YouTube* (Nov. 20, 2014). Find your own space to concentrate. Shut your door. Hold your calls. Close your email. Produce a full draft in one sitting, if possible. Do not *edit* yourself now. Just follow your outline and *write, write, write.*

Keep a few things in mind as you go. First, the judge will not be browsing your brief on the beach. She lacks time for a leisurely read. Convey your points with *urgency.* Do this in four ways. First, explain on the first page what the dispute is all about and why you should win. Second, keep the brief as short as possible. Third, lead with your best argument. Finally, do not include any weak arguments, unless you must. Weak arguments divert attention from strong arguments, waste the reader's time, and reduce your credibility. Write the facts after the argument. Your brief should contain only relevant facts, and a fact is irrelevant unless it supports an argument. By writing the argument first, you know which facts to include.

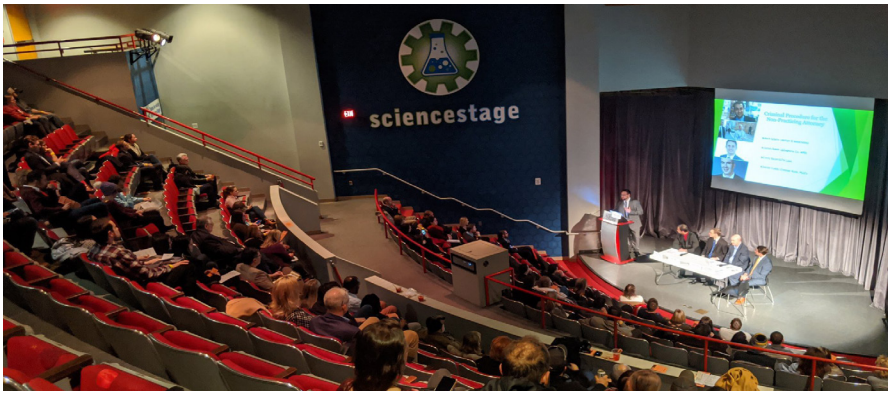
Phase IV: Ginsburg

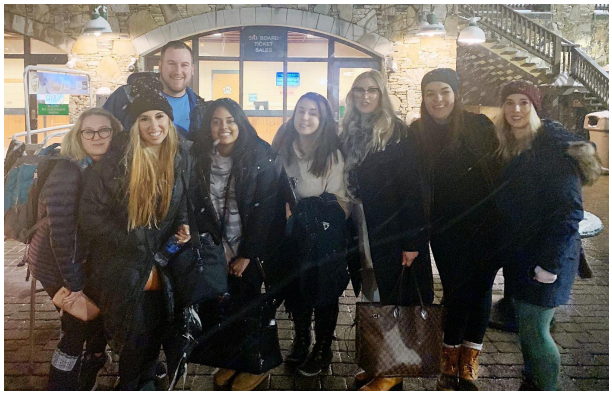
With a draft complete, it is time to revise. Call upon the late Justice Ruth Bader Ginsburg, who meticulously reviewed her clerk's work late into the night to weed out the smallest errors. Justice Goodwin Liu, *Clerking for Justice Ginsburg was a gift beyond measure, SCOTUSblog* (Sept. 22, 2020). We will do the same here. Delete superfluous paragraphs. Slash unnecessary sentences. Purge extraneous words. Remove unnecessary dates. Correct misspellings and grammatical errors. Soften hyperbolic or emotional language. Replace obscure acronyms and abbreviations with full words. Revise overstatements or misstatements. Swap complex words for simple ones. Exchange dense text for charts, graphs, or pictures. Tighten your brief in every possible way, always remembering that "rewriting is the essence of writing well." William Zinsser, *On Writing Well,* p. 283 (2006).

Keep polishing your brief until it shines like a diamond, then file it with confidence. ■

Shane Miller is an Associate with Tucker Arensberg, PC in its litigation practice group. His practice focuses on commercial litigation. He can be contacted at smiller@tuckerlaw.com.

YLD ABA Awards





Congratulations to the YLD for winning the ABA's Service to the Public Award of Achievement for its program "True Crime Event: Criminal Procedure for the Non-Practicing Attorney" held in conjunction with the Carnegie Science Center. A special thanks to Tom Cocchi, the chair of the event and to James Baker, Maria Coladonato and Corey Bauer for helping coordinate the event.

The YLD was also recognized by the American Bar Association for its Ski-LE CLE program in the category of Service to the Bar. A special thanks to Maria Coladonato, Genevieve Grace, and Alexandra Farone for co-chairing this event and to Andrew Rothey, Sarah Steers, Conn Thieman and Amanda Thomas for their contributions as CLE panelists.

Disclosure of Insurance Coverage in Discovery

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26, disclosure of insurance is not automatic; it must be affirmatively requested. A document request mirroring the language of Rule 4003.2 is usually the best way to do seek the defendant's insurance coverage. The Pennsylvania courts sometimes disagree if "terms" of insurance require production of the entire insurance agreement. In a Lycoming County case, the Court of Common Pleas required production of the entire insurance policy after reviewing other trial court opinions on both sides of the issue. *Baer v. Redka,* No. 04-00573, 2004 WL 5868027 (Pa.Com.Pl. Dec. 10, 2004). The *Baer* decision relied upon a ruling by Judge Wettick of the Allegheny County Court of Common Pleas. *Weiner v. Charny,* 23 Pa. D. & C.3d 367, 370 (Pa. Com. Pl. 1982), which also required production of the entire insurance policy. Other decisions have also required production of the entire policy. *Marion v. Lukaitis,* No. 2011 CV 7451, 2013 WL 10607627, at *2 (Pa. Com. Pl. Nov. 12, 2013). If the plaintiff is willing to file a motion in Pennsylvania courts, the plaintiff can likely obtain full copies of all insurance policies.

Courts continue to resolve disputes over disclosure of insurance coverage. While some still resist disclosing insurance information, most arguments against full disclosure were soundly rejected by the Pennsylvania Supreme Court almost 50 years ago. In the landmark decision of *Szarmack v. Welch,* 318 A.2d 707 (Pa. 1974), the Pennsylvania Supreme Court found that the prior practice of delaying production of insurance coverage hindered settlement discussions. The Court also found that knowledge of insurance coverage was "crucial information" and that disclosure of that insurance coverage would foster settlements, "based more upon a fair evaluation of plaintiff's claim and less upon ignorant conjecture concerning the depth of defendant's pocket." *Id.* at 710. The Supreme Court rejected the assertion that disclosure of insurance coverage far above what the case might be worth would cause plaintiffs to refuse to settle finding that even in those cases the parties' settlement discussions would focus on how a jury would view the defendant's liability, the extent and duration of the injuries, and the credibility of witnesses among other factors. *Id.* Thus, the Pennsylvania and Federal Rules require disclosure of insurance. ■

Zachary N. Gordon, Esq. is an associate attorney at Del Sole Cavanaugh Stroyd LLC. His practice is focused on litigation, including commercial, personal injury, and appellate litigation. He also regularly counsels clients on the Right-to-Know Law, FOIA, and First Amendment rights. His email is zgordon@dscslaw.com.