ACBA
Young Lawyers Division

Point of Law

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

Fall 2022

Mandatory Mediation Comes to Allegheny County: What You Need to Know

By Serena Tamburrino

Autumn brings falling leaves, cooler temperatures, and this year, mandatory mediation to the Allegheny County Court of Common Pleas. Effective September 13, 2022, Allegheny County Court of Common Pleas Local Rule 212.7 requires all parties to participate in a formal mediation process no later than 45 days prior to commencement of the assigned trial term. This new rule affects all civil cases filed in Allegheny County except for arbitration appeals, asbestos cases, and landlord-tenant cases. The first trial term affected by Local Rule 212.7 is the May 2023 trial term, which was published in the *Pittsburgh Legal Journal* on October 31, 2022.

Although the Rule is titled "Mandatory Mediation," there are two exceptions to the rule that excuse parties from mediation. First, on a party's motion with good cause shown, the Calendar Control Judge may excuse the case from mediation. A note to the Rule states that "[a]t the discretion of the Calendar Control Judge, 'good cause' may include, but is not limited to, the expense of mediation relative to a party's perceived valuation of the case, as well as a party's inability to afford the expense of mediation." This note takes into account the potential expense of mediation as related to the parties' ability to pay and the value of the case, recognizing that in low dollar amount cases, the expense of mediation may not be worthwhile. Second, all parties may agree to waive mediation. This allows parties who do not believe that their case can be resolved through mediation to stipulate that they will not mediate.

Whether or not the parties mediate their case, all parties are required to file a certification stating that (1) the case was mediated and all claims were resolved, (2) the case was mediated but all or some issues remain for trial, or (3) the parties agreed in writing to waive mediation. If the Calendar Control Judge excuses the parties from mediation, the moving party must serve a copy of the order to the Calendar Control section of the Civil Division.

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The YLD Carries on ABA Award-Winning Tradition

By Asra Hashmi

The YLD continued its tradition of excellence by earning two awards at the American Bar Association Conference in August for projects completed during the 2021-2022 bar year. Represented by current YLD Chair Taylor Gillan and YLD Chair-Elect Tara Sease, the ACBA was recognized among bar association leaders from across the country during the annual meeting in Chicago.

The competition for these coveted awards seems to be fiercer each year. As a testament to the YLD's continued creativity and enthusiastic engagement, despite the numerous challenges faced during the ongoing COVID-19 pandemic, we earned ABA awards in two categories during my Chair year – diversity and newsletter.

This year's diversity project recognition went to the "Green Card Renewals: Helping Low-Income Immigrants Apply" and included both a CLE and a day of service assisting low-income applicants navigate the green card process in partnership with the Jewish Family and Community Service Center. This program was a joint effort by the Anti-Racism and Education committees in conjunction with numerous volunteers from the legal community – making it a huge success.

And, while no stranger to recognition, the YLD's quarterly publication *Point of Law* again received an ABA Award in the newsletter category. The efforts of the Communications Committee and the many member-writers who submitted articles throughout the year are proof of what makes this publication so unique.

Congratulations to all who helped the YLD achieve these awards. I am so proud to have led the division through a particularly challenging year that culminated in proof that our Young Lawyers Division remains, purely objectively, the best around. ■

Asra Hashmi was Chair of the YLD during the 2021-2022 bar year. She practices employment law at Ogletree Deakins and can be reached at asra.hashmi@ogletree.com.

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Pennsylvania is Poised to Shape Legal Ethics Nationwide – For Better or For Worse

By Alison Gutierrez

It is no secret that lawyers are often perceived negatively by the public. According to an April 2002 American Bar Association report, many presume lawyers to be cunning, distrustful, and even unethical. While such perceptions may be undeserving, legal professionals nonetheless have an interest in maintaining public confidence in the profession and in the legal system in general.

The integrity of the profession is now at the forefront of an ongoing legal battle over Pennsylvania's adoption of Rule of Professional Conduct 8.4(g), which prohibits attorneys from "knowingly engag[ing] in conduct constituting harassment or discrimination" in the practice of law. The Third Circuit is set to decide the fate of Rule 8.4(g), potentially paving the way to a Supreme Court fight that could affect similar rules across the nation.

The Pennsylvania Disciplinary Board of the Supreme Court had discussed the adoption of Rule 8.4(g) in various forms since the American Bar Association (ABA) first added its version of Rule 8.4(g) to the Model Rules in 2016. The current version of Rule 8.4(g) came to fruition in Pennsylvania in June of 2020, in the midst of protests over George Floyd's death. The Disciplinary Board reasoned that adopting Rule 8.4(g) was "in the best interests of the profession and the public" and ensured that "no lawyer is immune from the reach of law and ethics." 49 Pa. Bull. 4941 (Aug. 31, 2019).

The original form of Rule 8.4(g) made it misconduct to "by words or conduct, knowingly manifest bias or prejudice, or engage in harassment or discrimination." Soon after it was adopted, the Disciplinary Board was hit with a lawsuit from Zachary Greenberg, an attorney for the Philadelphia-based Foundation for Individual Rights in Education. Greenberg claimed that the Rule would chill lawyers' speech on controversial topics. Specifically, Greenberg thought his own work, which includes giving speeches and CLE presentations on topics such as the constitutionality of hate speech and due process rights for individuals accused of sexual assault at universities, might give rise to discipline for potentially manifesting bias. Judge Chad F. Kenney for the Eastern District of Pennsylvania agreed with Greenberg, enjoining enforcement of Rule 8.4(g).

In July of 2021, the Disciplinary Board narrowed the rule to its current form and defined the terms "in the practice of law," "harassment," and "discrimination" for purposes of the Rule. Greenberg then filed an amended complaint, again arguing that if Rule 8.4(g) were enforceable, his speech would be chilled through self-censorship for fear of investigation and potential discipline for his work in public speaking and teaching CLE presentations on controversial topics. As evidence that his fears were sufficient to chill speech, Greenberg cited examples of public outcry against attorneys for controversial public statements – such as the 2013 judicial ethics investigation into Judge Edith Jones for remarks that certain racial groups were prone to commit a disproportionate percentage of crimes and efforts by Duke University law students to disinvite George Mason Law Professor Helen Alvare from speaking at Duke due to her involvement in advocating for gay conversion therapy and referring to same-sex marriage as a "horrid natural experiment."

Ultimately, Judge Kenney agreed with Greenberg, issuing a 78-page opinion in March of 2022 granting summary judgment and permanently enjoining enforcement of Rule 8.4(g). Judge Kenney noted that the interest in discouraging attorneys from knowingly engaging in harassment or discrimination

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YLD Esquire Open Returns with Success after COVID Hiatus

By Carly Koza

Game, set, match!

On Thursday September 29, 2022, the Allegheny County Bar Association YLD hosted its 5th annual Esquire Open event at Mount Lebanon Tennis Center. After taking an event hiatus due to COVID-19, it was exciting to once again host an in-person tournament for local practicing attorneys. Former President of the YLD and past Esquire Open co-chair Asra Hashmi shared, "Ever since its inception, the Esquire Open has been the Young Lawyers Division's most popular event amongst Bar Association members outside of the Young Lawyers Division, considering both participants and observers."

Although the final tournament round was captured under court lighting, it turned out to be a beautiful day for tennis play.

Overall, there were 35 attendees. Those who wished to participate in the tournament were randomly paired by head tennis pro Hank Hughes for doubles-style play. The first side to win six games by a margin of at least two games won the set and thereafter advanced in the tournament. After multiple rounds, the team of Dorothy Dohanics from Harry S. Cohen & Associates, P.C. and Jeffrey Pollock from the Law and Mediation Office of Jeffrey L. Pollock, Esq. came out victorious. First through third place winners went home with both bragging rights and tennis ball-shaped trophies. Other participants and attendees took home treat bags filled with snacks, a tennis ball keychain and an Esquire Open customized visor and tennis ball.

For those who did not wish to participate in tournament-style play, there was plenty of delicious food provided by Big Burrito Restaurant Group along with a prize court where attendees could serve a ball over the net and choose a prize that was located in the area on the court where the tennis ball landed.

Event co-chairs Carly Koza and Kelly McGovern managed the sponsorship and raffle prize donation outreach to local offices and businesses. The event raised $2,000 in sponsorships this year thanks to Compass Rose Financial, Bit-x-bit, John McGinley Jr. and the Honorable Mary McGinley, and Babst Calland. Attendees also got to participate in a raffle where prize packages included shopping sprees, beauty and spa days, and days/evenings out on the town in downtown Pittsburgh.

Event co-chair Carly Koza decided to oversee this particular event because she played both Junior Varsity and Varsity tennis at her local high school, Beaver Area High School, even advancing to the state level with her doubles partner during her junior year. While Carly has enjoyed keeping up with the sport over the years, the Esquire Open was the first time since high school that she had the chance to compete in tournament-style play. "I enjoyed meeting fellow lawyers both on and off the court at the event in a competitive but fun setting," Carly shared.

The YLD cannot wait to serve up another successful Esquire Open event next year! ■

See more photos of the YLD Esquire Open event on page 8.

Carly Koza is an Associate with Buchanan Ingersoll & Rooney, P.C., in its H ealthcare practice group. Her practice focuses on healthcare transactions and corporate ompliance. She can be contacted at carly.koza@bipc.com.

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Three Bills Introduced: The Future of Privacy in Pennsylvania?

By Anokhy Desai

The passing of the California Consumer Privacy Act (CCPA) in 2018 inspired a wave of privacy bills across the country in the following years, a few of which have passed in Colorado, Connecticut, Virginia, and Utah. In this legislative session, three privacy bills were introduced in the Pennsylvania General Assembly between December 2021 and April 2022. H.B. 2202, 2021 Biennium, 2021-22 Reg. Sess. (Pa. 2021); H.B. 2257, 2021 Biennium, 2021-22 Reg. Sess. (Pa. 2022); H.B. 1126, 2021 Biennium, 2021-22 Reg. Sess. (Pa. 2022). Given that there are only a few more months remaining in this session, it is highly unlikely that any of the three bills that were referred to the Consumer Affairs committee will make it much further in the legislative process. However, the fact that the first year that Pennsylvania has joined the privacy race is also the year not one, but three consumer privacy bills are introduced is a clear indicator of the direction that the future of privacy legislation will take in this state.

Although the bills are supported down party lines, it is notable that in terms of the fundamentals of privacy rights, there is bipartisan agreement. All three bills protect similar consumer rights and use language similar to that in California's and Connecticut's privacy acts.

H.B. 2202, or the Consumer Data Privacy Act, provides consumers with the rights of access, rectification, deletion, restriction, portability, sales opt-out, and rejection of automated decision making. In other words, this bill would allow a consumer to request access to the data collected about them from an organization, to correct incorrect data stored about them, to request the deletion of their data, to restrict the processing of their personal data by the data controller for profiling or targeted advertisements, to be able to move their stored data between providers, to opt out of the sale of their personal data, and to opt out of certain automated decision-making about their data, like decisions and inferences made by algorithms. According to this bill, covered entities must provide the option to opt-in to data collection by default for consumers 16 and under, must provide notice to and be transparent with consumers about the purposes for which their data is being collected, cannot use the data collected for discriminatory purposes, and must limit the processing of data collected from consumers to the original, specified purpose.

H.B. 2257, or the Consumer Data Protection Act, is identical to H.B. 2202 in the privacy rights it provides to consumers, but it differs in two aspects of its business obligations. First, the opt-in requirement protects not all information of those 16 and under, but rather, sensitive information of those 18 and under. This slight change in wording and age makes it so that more teens are protected, but only the collection of specific information requires consent, potentially leaving businesses who do not already comply with similar requirements in other states with less of a cost burden than H.B. 2202. The bill also requires covered entities to perform risk assessments to ensure their cybersecurity and data protection capabilities are sufficient to protect the data they collect, process, use, and store and to minimize chances of unauthorized exfiltration.

H.B. 1126, also titled the Consumer Data Privacy Act, leaves consumers with far fewer rights than the other two proposed bills, active bills in all of the other states with proposed privacy legislation, and passed privacy laws.

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Mandatory Mediation Comes to Allegheny County

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Parties may also consider the best time to mediate given the flexibility of Local Rule 212.7. Because parties have until 45 days prior to the commencement of the trial term to which their case is a ssigned to mediate, parties can choose to mediate after the pleadings are closed, after discovery has closed, or even before an answer is filed. The timing requirements of Local Rule 212.7 are "intended to provide the parties with maximum flexibility in determining when mediation would be most effective."

With the promulgation of Local Rule 212.7, the Allegheny County Court of Common Pleas joins other courts that either require some form of mandatory alternative dispute resolution or allow judges to recommend cases for mediation. In the Washington County Court of Common Pleas, under that court's Local Rule 212.7, judges have discretion to submit civil cases to the Washington County Civil Litigation Mediation Program or order the parties to participate in private mediation. In federal courts, the United States District Court for the Western District of Pennsylvania has required most civil litigants to participate in some form of alternative dispute resolution (mediation, arbitration, or early neutral evaluation) since 2005.

In considering whether to move to waive mediation, practitioners should consider the benefits that mediation offers. Mediation can benefit litigants in three key ways. First, mediation allows parties to work with a neutral third party to try and find common ground on issues, even if all of the issues in the case are not ultimately resolved at mediation. Mediation allows parties who may wish to preserve a business relationship with the opportunity to find a resolution through a less adversarial process than fully litigating claims to conclusion in the courts. It also allows parties to craft an individualized settlement that may better reflect the parties' wishes than a jury or bench verdict.

Second, mediation requires parties to critically examine the strengths and weaknesses of their case, and identify which facts fall in their favor and which facts may become problematic in a trial. Parties may exchange crucial documents before mediation to better facilitate settlement. The confidential aspect of mediation allows parties to address potentially problematic facts with the mediator and gain the benefit of hearing a neutral party's reaction to their case.

Third, mediation can result in cost and time savings for both parties. The traditional litigation process can be expensive and lengthy, with some cases dragging on for years before concluding. Mediation, on the other hand, can be done in a day. If the value of a claim is low, parties can conserve resources by participating in mediation.

However, not all cases are appropriate for mediation. In cases where the value of the claim does not justify the added expense of mediation, it may be more economical to move to be excused from mediation under Local Rule 212.7. Cases where the parties have already tried and failed to work out their dispute privately without the assistance of the courts may also not be appropriate for the added expense of mediation and in these cases the parties may want to agree to waive mediation under Local Rule 212.7.

Attorneys practicing in Allegheny County should familiarize themselves with the new requirements under Local Rule 212.7 to ensure that they are complying with the rules and to avoid sanctions. ■

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The Young Lawyers Division (YLD) of the Allegheny County Bar Association is comprised of all lawyers who have been admitted to the practice of law for 10 years or less. Lawyers who join the ACBA and meet the criteria automatically become members of the Young Lawyers Division without paying any additional dues. The Young Lawyers Division provides young lawyers with a means of gaining broader participation in bar activities, a forum for continuing legal education, and a vehicle for social exchange with their contemporaries at the bar.

The YLD is actively involved in helping young lawyers participate in activities of the ACBA and directs activities toward improving the administration of justice and prompting public welfare. The YLD helps young l awyers deal with problems and obligations specific to its members, and advises the ACBA of the needs and opinions of its newer members.

If you're interested in getting more involved in the division, find out more at *www.acbayld.org.*

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is not compelling enough to limit attorneys' speech and stated that the court would not "blindly accept anti-harassment and anti-discrimination policy as an overwhelming good that is justified in and of itself." Greenberg v. Goodrich et.al, No.20-03822, slip op. at 60 (E.D. Pa. Mar. 24, 2022).

The case is now pending before the Third Circuit, with some commentators expecting it to make its way to the Supreme Court. Briefing is expected to be completed by the end of October. Bar associations, law professors, prominent legal ethicists, and civil organizations from across the nation have filed amicus briefs on the matter, underscoring the high stakes of the case. As the Disciplinary Board pointed out in its opening brief, the outcome of this case could cause similar rules in 39 other states and U.S. territories – none of which have been deemed unconstitutional – to be struck down. Brief of Appellants at 1, Greenberg v. Lehocky et. al, No. 22-1733 (3d Cir. Sept. 6, 2022).

The Disciplinary Board offered numerous arguments for why Rule 8.4(g) does serve a compelling interest. For one, it cited well-settled case law explaining that allowing attorneys to engage in harassment and discrimination reflects poorly on the legal profession and undermines the very system tasked with providing justice for all. Id. at 50. Further, the Board cited numerous examples of other states' enforcement of equivalents of Rule 8.4(g), all of which involved disciplining attorneys' use of overt racial epithets or crude sexual comments towards clients or witnesses. Id. at 51. The Disciplinary Board also certified that Greenberg's regular presentations and CLE's would not fall under the purview of Rule 8.4(g) by its plain terms. Id. at 12. Rather, Rule 8.4(g) regulates the conduct of attorneys which otherwise could go unchecked unless a victim is willing and able to pursue civil or criminal action.

Regulating attorneys' speech is not a novel concept under the Rules of Professional Conduct. Attorneys routinely limit their speech – or else risk discipline – for the purposes of ethics rules regarding advertising, civility and candor towards the courts, and communications with unrepresented persons, to name a few. So why is there resistance to restricting lawyers' rights to knowingly engage in harassment and discrimination in the practice of law?

On one hand, such resistance may be unsurprising given the lack of diversity in the legal profession. As of 2022, only 19% of all lawyers are non-white and only 38% identify as women. See American Bar Association, 2022 Profile of the Legal Profession. The number of Black lawyers has actually decreased over the past decade, and only 2.2% of all U.S. law firm partners are Black. Id. Pennsylvania fares particularly poorly for legal diversity, with Pittsburgh having the lowest nationwide percentage of law firm partners who are lawyers of color and Philadelphia having the lowest percentage of law firm partners who are lawyers of color for cities of comparable size. Id. Such statistics can be discouraging for aspiring lawyers, and for the diverse pool of clients, witnesses, and other participants in the justice system. Ensuring that the legal profession "functions for all participants" was one of the Disciplinary Board's chief goals in implementing Rule 8.4(g). 49 Pa. Bull. 4941 (Aug. 31, 2019).

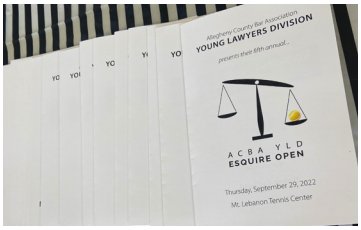
But, it is particularly noteworthy that at least 39 other states have adopted rules similar to Pennsylvania's Rule 8.4(g). This underscores a mounting nationwide consensus that harassment and discrimination by lawyers reflects poorly on the profession and on the justice system at large. Nonetheless, the pending outcome of Greenberg v. Lehocky at the Third Circuit and beyond may undermine this consensus. Regardless of the outcome of the case, seeing lawyers attempting to evade discipline for knowing instances of harassment and discrimination may add fuel to the public's negative perceptions of lawyers. And in the words of the late U.S. Supreme Court Justice Brandeis, "If we desire respect for the law, we must first make the law respectable." ■

Alison Gutierrez is an associate in the litigation department at Schnader, Harrison, Segal, & Lewis. She litigates a broad range of cases including employment litigation, commercial contract disputes, toxic tort cases, and professional liability matters. She can be contacted at agutierrez@schnader.com.

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 Esquire Open



Three Bills Introduced: The Future of Privacy in Pennsylvania?

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This bill provides consumers the right of access, right of deletion, and right to opt out of the sale of their personal data. Despite this, the bill does provide consumers with a limited private right of action if their data was not encrypted or redacted and was subject to a breach because of the business's violation of the duty to maintain reasonable security practices. The bill holds the same age requirement as H.B. 2202, requires covered entities to provide notice of data collection and transparency about the data collected, and prohibits discriminatory uses of collected data. It notably does not include purpose limitation as a business obligation, which means business following the letter of this law would be able to process data for purposes other than those specified to the consumer upon collection.

Many states that failed to pass proposed privacy bills on their first try have often returned in consecutive years with updates to the new bills based on industry, academic, and advocate participation. Considering the industry voices in the state, it is commendable that Washington has continued negotiations into its third year of attempting to pass privacy legislation in both its House and Senate in what seems to be an effort to avoid signing a law containing vague or missing definitions and policy loopholes in one year, then passing an update to that law the next. See Cal. Civ. Code § 1798.100 et. seq. All of the proposed Pennsylvania bills support certain baseline rights for consumers, and bills from either side of the aisle, H.B. 1126 and 2202, relieve businesses of the burden of conducting annual risk assessments, which can become a costly process depending on the size and allocated cybersecurity budget of the organization.

As this year and legislative session come to an end, the common trend indicates that the next iterations of state privacy bills in Pennsylvania will include the rights of access, deletion, sales opt-outs, and opt-in defaults for teenage users. It remains to be seen whether the next session will find more success, but with this amount of bipartisan support, one thing is for certain: Pennsylvanians should expect to see enacted data privacy rights in the coming years. ■

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