YLD
Allegheny County Bar Association

Point of Law

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

Summer 2017

What I Learned Preparing for My First Oral Argument

by McKean J. Evans

Oral argument is a skill young lawyers learn through practice. Like many young civil litigators, I was several years out of law school before I was assigned my first oral argument. I suggest young lawyers consider the following practical tips when preparing for and presenting oral argument.

First, become comfortable being in a courtroom and speaking in public. My clerkship experience with a Common Pleas Court judge helped me immensely with my first argument because I had seen other lawyers do it a hundred times. I was nervous about my argument, but the courtroom itself added no special apprehension because I already spent so much time there. Become comfortable by asking experienced attorneys for their oral argument tips and war stories, arranging to speak at a CLE or other public presentation, and sitting in on hearings at the courthouse. Being at ease in a courtroom and speaking in public will allow you to focus on your argument, and not on the fact you are before a judge for the first time.

Second, map your argument. Identify the two or three key points you need to make. Tell the judge your main points at the beginning: "Your Honor should grant my client's request for a preliminary injunction for three reasons, [reason one, reason two, reason three]." This helps you in three ways. First, if your judge asks questions, the flow of your argument may be moved off course. Having a roadmap helps you bring every tangent back to your key points. Second, beginning the argument with your roadmap invites the judge to say "counsel, I'm most interested in the second point." This helps you home in on the issues that are most important to the judge, and thus, the issues where

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Each year, the Young Lawyers Division (YLD) of the Allegheny County Bar Association (ACBA) selects a group of lawyers to be admitted to the Bar Leadership Initiative (BLI). Through membership in the BLI, young lawyers are educated about the YLD and ACBA as a whole, with the overall goal of the initiative being to prepare young lawyers for future leadership within the bar association.

Under the BLI curriculum, class members are required to participate in various ACBA committees and programs, such as the YLD's annual Children in Shelter Holiday Party and other philanthropic efforts in Allegheny County.

Perhaps the most significant and rewarding aspect of participation in BLI is planning and executing a class project, of the class's choosing, to give back to the local community. The 2017 BLI class initiated a *Threads for Vets* clothing drive. Inspired by a class member whose spouse served in the military, this year's BLI class partnered with the Veterans Leadership Program of Western PA (VLP), an organization that offers housing, employment, and other services to veterans, to collect small winter items to donate to local area veterans in need.

Throughout the winter months, the BLI class solicited the aid of several local law firms and companies. With the help of the local legal community, they were able to donate over twenty-eight boxes of hats, scarves, gloves, socks, and other small winter accessories to VLP. The donations were an immense help to VLP's clients and, according to VLP's Director of Programs and Operations, Christine

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Criminal Law on Spring Break

by Amanda Hausman

Whether you are a criminal law attorney, or merely answering your cousin's questions over spring break, it is important to stay abreast of developments in criminal law, particularly because changes in the law may alter your answers from year to year.

This year your cousin greets you with, "I got pulled over yesterday and the cop told me I had to do a blood draw or else. What gives?" Last year, your answer might be, "First, don't drive drunk. Second, Pennsylvania has an implied-consent law which imposes penalties on drivers who refuse testing when there is sufficient reason to believe that you're drunk. That means if you are arrested for a DUI and refuse testing, your license will be suspended, and if you're convicted of that DUI, you'll face higher criminal penalties. Third, hello." 75 Pa.C.S. § 1547(b); 75 Pa. C.S. § 3804(c). This year, your answer will be more nuanced.

In *Birchfield v. North Dakota,* 136 S.Ct. 2160 (2016), the Supreme Court of the United States reviewed three cases involving state laws that made it a crime for a motorist to refuse to submit to blood or breath tests, to determine whether these warrantless searches violate the Fourth Amendment.

One might think that because alcohol inevitably dissipates from the bloodstream that exigent circumstances will justify warrantless blood or breath tests. However, this inherent "exigency" is not enough to create a *per se* rule that police may conduct blood or breath tests every time they have probable cause to believe a motorist is driving drunk. Rather, SCOTUS re-emphasized that exigency will be

determined on a case-by-case basis, taking into account all of the facts and circumstances of the particular case.

All three defendants in *Birchfield* were searched (or refused to be searched) after a DUI arrest, and thus the searches could potentially be justified as searches incident to arrest. The state and federal government have a significant interest in preserving the safety of motorists on public roadways; alcohol consumption is the leading cause of traffic fatalities and injuries. However, the state's need to obtain BAC readings for suspected drunk drivers must be balanced against the impact of these tests on an individual's privacy interests. SCOTUS held that breath tests constitute reasonable searches incident to arrest for DUI arrests. Breath tests involve a minimum inconvenience, and do not significantly impact an individual's privacy concerns. Blood tests, on the other hand, do implicate significant privacy concerns. To-wit, a person's skin is pierced in order to extract a part of her body, namely blood, and allows for the possibility of law enforcement to preserve the blood sample and extract additional information beyond just a BAC reading. For these reasons, blood tests do not constitute reasonable searches incident to arrest.

Remember those implied-consent laws? SCOTUS finally analyzed whether those laws permit a warrantless blood test search. The court reiterated its approval of implied-consent laws that impose civil penalties and evidentiary consequences for individuals who refuse to comply, but felt that laws imposing enhanced criminal penalties for refusals (like in Pennsylvania) have gone too far. Finding that there must be a limit to the consequences which a motorist will be deemed to have consented to by deciding to drive on public roadways, SCOTUS held that a "motorist cannot be deemed to have consented to a blood test on pain of committing a criminal offense." *Birchfield,* 136 S. Ct. at 2186. So, this year, your cousin might have a viable issue for suppression if their blood was drawn without consent and without a search warrant.

You might next be hoping for a light-hearted discussion on the merits of sprinkles on your ice cream sundae, or your favorite Broadway musical. Unfortunately, your cousin is still catching up on Breaking Bad: "If a chemistry teacher/drug dealer sells a metric ton of meth, does that affect his sentence?"

Several years ago, you'd discuss Pennsylvania's individualized sentencing scheme, as well as mandatory minimum sentencing

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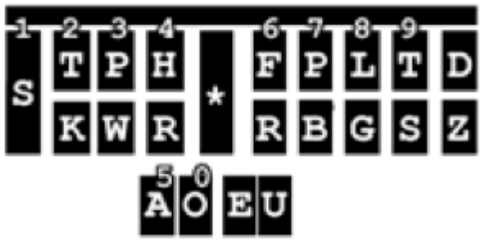
The Impact of Court Reporters on Young Lawyers' Legal Practice

by Brian L. Shepard

How many of us really take the time to think about the court reporter and the extent to which what they do, and the skill with which they do it, contributes to our end product?

We all know the goal of a deposition is to create a record of what a witness has to say, pin down their testimony, and gain admissions and concessions for trial. But all of the preparation by the deposition taker and the artfulness of the questions and objections is for nothing if it doesn't come across clearly in the record. We, the lawyers, certainly bear the responsibility for ensuring our questioning comes across clearly. However, at the end of the day, the "record" we receive is made by the court reporter. We can walk out of a deposition thinking it went exceedingly well, that we really nailed it, that the witness gave us everything we wanted. But what do we actually walk out of a deposition with? Nothing!

We rely on the court reporter to take what was said and give us a nice, clean transcript that we can offer for use at trial. Fortunately, today's court reporters are skilled professionals who typically attend school for three years or more learning how to a take a keyboard that looks like this:



-Thanks to Kilobytezero at en.wikipedia

and turn several hours of complicated back and forth dialogue into 100-plus pages of actual written English-language words. They are a valuable part of the deposition and court process. Lisa King*, an experienced court reporter, gave me a few tips to help young attorneys effectively communicate with court reporters and receive the best possible record for his or her case. First, when you or someone in your office is booking a court reporter for a deposition, it is important to let the service know what type of witness is being deposed. Ms. King reports that while all reporters are skilled, like in any job, there is a large disparity in the level of proficiency among different court reporters. A reporter who is taking down the deposition of a complicated expert witness, on a contested topic with multiple lawyers involved, may be more likely to find themselves in a situation where people are talking over one another. Additionally, technical, medical, or unusually scientific subject matter may further complicate matters. When these things occur, it may be necessary to ensure you have a court reporter with appropriate skills in terms of content ability, speed, and proficiency. On the other hand, the deposition of a relatively simple lay fact witness with not a lot of controversy involved may allow for the use of a less-experienced reporter.

Additionally, it is important to let the service you are hiring know what kind of time frame in which you will need a completed transcript. We are all guilty of wanting things done more quickly than may be practical. Fortunately, a little bit of forward planning can save both the lawyer and the court reporter loads of grief. This

would be easier accomplished with a little understanding of how the court reporting and transcription process actually works.

Despite the apparent real-time nature of the court reporter's work, much more goes into it. In order to accommodate the speed at which we speak, court reporters take the words that are spoken and turn them into a roughly phonetic "steno" output. This steno is, for the uninitiated, frankly unreadable by English speakers. Historically, this would require the paper steno output to be manually transcribed by the reporter or sent off to others to be converted and transcribed.

This means that, once the deposition is over the work is far from done. Fortunately, today's court reporting machines ("stenotype") are more computer than typewriter. Each has the ability to store thousands of pages of steno text and roughly convert that text to English on a screen. This is based on a dictionary of the individual reporter's specific phonetic translations of words. Despite the technological advantages of today's stenotypes, after the deposition

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What I Learned Preparing for My First Oral Argument

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you are most likely to persuade the judge to rule for your client. Third, beginning with a roadmap helps stave off nervousness, especially when arguing for the first time.

Third, master your argument. It goes without saying you should memorize your argument itself. Beyond that, know both parties' cases, the factual record, the procedural history, and every other potentially relevant point by heart. This helps you respond to unexpected questions from the judge and also demonstrates your credibility. Citing a case by page number or a deposition transcript by line number shows you know what you are talking about. Conversely, referring to notes disrupts the flow of your argument and makes you seem less confident. Recall your law school exams: which classmates did you think would do better: the ones you saw writing confidently or the ones you saw desperately flipping through their outlines?

Fourth, clearly articulate your point. Two criticisms judges often make of lawyers' oral arguments are that we fail to clearly and directly say what we want the judge to do, and that we fail to get right to the point. Have your point clearly prepared and on the tip of your tongue so the first thing you say is "Good morning Your Honor, my name is McKean Evans and I represent the plaintiff Ms. Jones. We're here on Defendant BigCo's Motion to Dismiss the First Amended Complaint. Your Honor should deny the Motion to Dismiss because [reason]." The basic issues involved in your case may seem obvious to you because you have spent the past several days preparing. But the judge before whom you are arguing may have spent the past several days trying a murder case, or may have read your motion weeks before. Make it easy for her by getting right to the point.

Fifth, prepare exhaustively, right up until the moment before you enter the courtroom. Re-read the briefs, cases and file. The biggest surprise in preparing for my first argument was how significantly my perception was sharpened by knowing I would argue the case the next morning. You may find that the case you thought was a winner is less impressive, while the case you cited for an ancillary point actually carries the day.

Sixth, rehearse, rehearse, rehearse. Make your argument to yourself in the mirror. Ask a colleague to hear your argument and give you feedback. I found exhaustive rehearsal made me more confident, made arguing my main points second-nature, allowed me to focus on the judge's questions, and effectively counter opposing counsel's points.

My first argument was intimidating, but the tips outlined in this article helped me succeed. While everyone has their own argument style and best practices, I hope what worked for me is helpful to other young lawyers. ■

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BLI secures "Threads for Vets"

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Pietryga, the items that the BLI class donated "flew off the shelves."

The *Threads for Vets* project culminated in February with a "Socks for Hops" event, at which additional clothing donations were collected. In addition, nearly $300 in cash donations were raised and donated to VLP. Through the *Threads for Vets* project, this year's class was able to not only provide a valuable service to the those who have proudly served our country, but also build a relationship with VLP that will allow for future collaborative projects to benefit the community and the bar association.

The YLD's Bar Leadership Initiative is a fantastic way to learn more about the ACBA and to have an impact in both the legal and non-legal communities. To learn more about the BLI visit *www.acba.org/BarLeadership.* ■

We Want to Hear From You!

Interested in writing an article for the next issue of *Point of Law?* Please submit article ideas to *yldcommunications@gmail.com.* If you have any questions or comments about *Point of Law,* please contact YLD Communications Committee Co-Chairs Zach Gordon (*gordon@fgbmp.com*) or Lou Kroeck (*lkroeck@gmail.com*).

Observations on Transitioning from a Law Clerk to a Practicing Attorney

by Nick Krakoff

Like many other law school graduates who work as judicial law clerks in the year following law school, after my graduation, I had the opportunity to work for Judge Renée Cohn Jubelirer of the Pennsylvania Commonwealth Court. And, like many other young judicial clerks, after a little more than a year working for the Commonwealth Court, I was hired as an associate attorney at a law firm. Having recently completed my first year as an associate in employment law, I offer the following tips on transitioning from a judicial law clerk to an associate attorney.

Writing Style

A judicial clerk's writing style is much different than that of a practicing attorney.

A clerk seeks to summarize the relevant law and objectively apply that law to the facts of each case. In contrast, a practicing attorney is concerned less about objectivity and, instead, tries to persuade the judge deciding the case why the judge should apply the law in their client's favor.

It can be difficult for recent law clerks to adapt their writing styles once they begin working as associate attorneys. However, one way to ease the transition is for former clerks to pay close attention to the writing style used by the attorneys appearing before the court. Toward the end of their clerkships, I recommend that clerks consider keeping copies of the briefs submitted to the court which they found to be particularly effective.

Having these examples for reference will be helpful when beginning the transition to more persuasive writing.

Who's the Boss?

Another significant difference between working as a judicial law clerk and as an associate in a law firm involves balancing your working relationships. As a law clerk, your sole "client" is the judge. Although a law clerk may work for or with other law clerks and court staff, it is the judge who will set the expectations for the clerk, assign work, and decide how the clerk writes judicial opinions. While a judge may be demanding to work for, generally the law clerk only has to worry about meeting the expectations of this one person.

However, as an associate attorney, your working relationships multiply. An associate attorney works for one or more managing partners, who may have different working styles and expectations. Other more seasoned associate attorneys might also assign work to the new associate. While challenging, learning to manage relationships with partners, other associates, as well as paralegals and staff will be necessary to an associate's successful transition.

An associate attorney must also navigate working relationships with opposing counsel, which can lead to a host of issues. For example, opposing counsel may be unpleasant to deal with, uncooperative, or might just take actions that require the associate's response.

Yet, the key difference that a former clerk will encounter when transitioning to an associate attorney is forming client relationships. Clients are looking for guidance in making major decisions and will at times be more demanding than the managing partner. Learning to accommodate clients' needs and manage their expectations is one of the most challenging aspects of transitioning to an associate in a law firm.

For example, I recently dealt with a client who acted unreasonably regarding settlement negotiations. The opposing party offered what I considered to be a favorable settlement amount based on what the client and I had discussed previously. However, the client was suddenly reluctant to accept the offer. Even after explaining to the client the risk of losing at trial and the likelihood a jury would not award him a higher

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Law Firms by the Slice

by Robert Stasa

The Disciplinary Board of the Supreme Court of Pennsylvania recognized recently that Rule of Professional Conduct 1.17 (governing sale of a law practice) was overly strict, and softened the Rule to allow the sale of an entire area of practice.

First, an attorney selling an area of practice can no longer practice in that area of law. Comment 4 to Rule 1.17 explains that, "If a practice area is sold and the lawyer remains in the active practice of law, the lawyer must cease accepting any matters in the area of practice that has been sold, either as counsel or co-counsel or by assuming joint responsibility for a matter…." It is easy to understand that a firm could sell its criminal defense area of practice while continuing to practice family law, but many areas of law are not so easily compartmentalized. The Comment provides a hypothetical wherein a lawyer would be considered to be compliant with the Rules if she sold the estate planning portion of her practice, but continued to practice law focused on probate administration. So at a minimum, we know the division of estates and probate work is acceptable under Rule 1.17. It remains to be seen where other lines of practice areas can be drawn, but the issue may realistically be handled within the contractual terms between buyer and seller. After all, an attorney paying for a particular area of a law practice will likely define that area and ensure that the selling attorney does not cross that line.

In addition, Rule 1.17 makes clear that you must buy the *entire* area of practice. Comment 5 explains that, "The prohibition against sale of less than an entire practice area protects those clients whose matters are less lucrative and who might find it difficult to secure other counsel if a sale could be limited to substantial fee generating matters." Buyers who were planning to only buy the high value clients are out of luck. There is, of course, an exception if one of the acquired clients creates a conflict of interest for the buyer.

There is some good news. The part (a) of the Rule states that "the seller is not prohibited from assisting the buyer or buyers in the orderly transition of active client matters for a reasonable period after the closing without a fee." The meaning of "without a fee" may mean that the selling attorney is prohibited from receiving any portion of the fee from a practice area that was sold. Relatedly, the Rule states that "fees charged clients shall not be increased by reason of the sale." Pa.R.P.C. 1.17(d). It remains unclear whether it would be ethically permissible for the buyer and seller, in the terms of the sale, to agree that fees charged to clients will remain the same but a portion of those fees will be paid to the seller as part of the terms of the purchase.

Much of the uncertainty surrounding the selling of one practice area will be resolved when attorneys attempt to complete such a transaction. While there is perhaps room to get creative in the terms of the sale, the underlying rationale of the Rule, to protect client interests, should always come first. One final aside – there are many rules when purchasing or selling a law practice. One who is considering buying or selling a practice area should read Rule 1.17 in its entirety. The foregoing focuses on the rule changes and complications that have arisen from the changes in the Rule allowing the sale of an *area* of practice. ■

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Criminal Law on Spring Break

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statutes that permitted evidence, such as the specific weight of drugs, to be submitted to at the time of sentencing and only had to be proven by a preponderance of the evidence to invoke a mandatory minimum sentence. 18 Pa. C.S. § 7508. However, in 2013, SCOTUS changed that; in *Alleyne v. United States*, 133 S.Ct. 2151 (2013), SCOTUS held that any fact which increases the mandatory minimum sentence for a crime is an element of the crime, and must be submitted to a jury and proven beyond a reasonable doubt. This decision rendered several sentencing statutes unconstitutional, and left state courts to tackle questions left open by the decision. The Pennsylvania Supreme Court recently answered one such question in *Commonwealth v. Washington,* 142 A.3d 810 (Pa. 2016): *Alleyne* created a procedural rule, not a watershed rule, and thus does not apply retroactively to collateral attacks. That meth-dealing chemistry teacher might catch a break in his mandatory sentence, depending upon when his appeal was taken.

Finally, as you pack up your beach blanket, your cousin asks, "My co-worker is a registered sex offender. He was about to finish his tenth year of registration, but now he has to register for life. Is that allowed?" You can tell her to hold onto that question, because in April, 2016, the Pennsylvania Supreme Court granted three petitions for allowance of appeal to determine whether SORNA (Sex Offender Registration Notification Act, 42 Pa. C.S. § 9799.10 *et seq*) violates the *Ex Post Facto* clauses of the constitutions of the Commonwealth of Pennsylvania and the United States, based on the argument that "its purpose or effect is so punitive that it constitutes a retroactive increase in punishment when applied to [petitioner]?" *Com. v. Gilbert,* 135 A.3d 178, 179 (Pa. 2016); *see also Com. v. Reed,* 135 A.3d 177 (Pa. 2016); *Com. v. Muniz,* 135 A.3d 178 (Pa. 2016). Oral arguments were held on March 7, 2017.

Next year you can look forward to discussing SORNA, Pennsylvania's application of *Birchfield,* and the rule of law in the latest season of Westworld. But that's why they keep us around, right? ■

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The Impact of Court Reporters on Young Lawyers' Legal Practice

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the reporter must then run this steno output through specialized computer software and do a number of edits in order to get the transcript into the completed product.

All of this takes time. For example, Ms. King can edit about twenty pages of deposition an hour to get to a rough draft. After that, there is further editing and proofing to be done to ensure that the final product is as good at it can be. Ms. King reports that while many court reporters do this work themselves, it is also not uncommon to recruit the work of people trained in steno language ("scopists") to help them. Each service will have a standard turnaround time for deposition transcripts but it is important to communicate with the service and your individual court reporter when that usual turnaround time may be inadequate. It is important to be realistic with expectations, and it is even more important to communicate your expectations at the time of booking.

Hopefully this provides some insight into this critical and often overlooked component of the legal system, and will assist young attorneys as they approach their next deposition. ■

**Special thanks to Lisa King for her assistance with this article. Lisa is a Certified Court Reporter, a Certified Shorthand Reporter, and a Registered Professional Reporter, licensed by the National Court Reporters Association. She currently works as a freelance court reporter in the southwest Missouri area and has been working in the field for over 20 years.*

Mr. Shepard is an attorney with Pion, Nerone, Girman, Winslow & Smith, P.C. He is a recent Pennsylvania transplant having relocated here in 2015. This article was originally published in the Missouri Bar publication, The Young Lawyer.

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amount, the client remained stubborn. Eventually, the client did agree to settle the case before trial, but only after significant time spent trying to manage his new expectations for the settlement. Trying to advise the client and accommodate his needs even when he acts unreasonably is something I certainly was not prepared for after working as a law clerk.

Deadlines

Finally, it can be difficult to adapt to the deadlines that one will encounter as an associate attorney. Although a judicial law clerk will face many internal deadlines set by the judge, they will not face the same external pressures as an associate attorney. Associate attorneys not only have to deal with the internal deadlines set by the managing partner or other associate attorneys, but they will also have many "hard" external deadlines. These include deadlines set by the court regarding briefs, motions, discovery, and trial; statute of limitations or appeal deadlines; tax deadlines; administrative deadlines; other filing deadlines; as well as deadlines set by the clients themselves. Managing these various deadlines and time constraints represents one of the most difficult aspects of transitioning from a law clerk to an attorney.

Recently, the judge in a case I was handling ruled that my client's brief in opposition to a protective order needed to be filed less than 24 hours after opposing counsel filed his protective order. In order to finish the brief on time, I had to drop all my other work and rearrange my after work plans. Facing such a tight deadline was something that I was unfamiliar with and could not anticipate from my experience as a law clerk.

Developing a system of reminders and calendaring takes time and everyone has their own way of keeping track of deadlines. A former clerk should prioritize finding a system that works for them from the moment they start practicing. Doing so will set a former clerk up for a more organized and less stressful practice.

Conclusion

There are even more issues to consider as a clerk transitions into a law firm that are not mentioned here, including timekeeping, billing, client development, and mentorship. However, keeping the issues I have described in mind will assist any former law clerk in making a smooth transition into practicing as an associate attorney. ■

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Lunch with the Judges

The Young Lawyers Division hosted Lunch with the Judges in the Koppers Building on April 7. Pictured, from left, are YLD Education Committee Chair Nick Bell, Judge Nora Barry Fischer, Judge Joy Flowers Conti, Judge Arthur Schwab and Judge Thomas Hardiman.

Meetings at a Glance:

All meetings held at the ACBA Headquarters

- YLD Council Meeting – 1st Thursday of every month at noon
- YLD Communications Committee Meeting – 1st Wednesday of every month at noon
- YLD Education Committee Meeting – 2nd Wednesday of every month at noon
- YLD Public Service Committee Meeting – 3rd Tuesday of every month at noon
- YLD Membership Outreach Committee Meeting – 2nd Tuesday of every month at noon
- YLD Member Services Committee Meeting – 3rd Wednesday of every month at noon
- YLD Diversity Committee Meeting – 3rd Thursday of every month at noon

Military and Veterans Project

This year, through communications with the 316th Expeditionary Sustainment Command in Coraopolis, PA, we shipped 100 care packages to deployed military in active combat zones. The care packages were packed and shipped on May 6, 2017. Thanks to the kindness of several area businesses and law firms, the care packages included everything from playing cards to toiletries to an impressive selection of snack foods.