ACBA
Young Lawyers Division

Point of Law

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Spring 2023

To Rank or Not to Rank? That is the Question

By Alison Gutierrez and Taylor R. Mosley

The U.S. News and World Report (U.S. News) first published law school rankings in 1987 and has published rankings annually since 1990. A category of the "Top Fourteen" (T14) schools has emerged, and these schools have occupied the top spots in the rankings since the rankings' inception. The rankings are regularly referenced by law schools, current and prospective students, professors, and legal employers. There is even a direct correlation between connection to a T14 school and employment at the nation's largest law firms.

Yet, in November of 2022, Yale Law School – the longstanding number 1 ranked law school – announced that it would be declining to provide U.S. News the statistics requested for the rankings. Yale's exit from the rankings quickly spawned an exodus, with 12 of the top 14 schools announcing their departure from the rankings within the following weeks. Yale Law School Dean Heather K. Gerken called the rankings "profoundly flawed" for disincentivizing programs supporting financial aid and welcoming diverse students, as well as discouraging law schools from admitting students of "modest means."

The following are several issues cited by the schools withdrawing from the rankings:

• U.S. News bases 20% of a law school's ranking on median LSAT and GRE scores, as well as grade-point averages. This incentivizes schools to use financial aid to recruit high-scoring students, rather than to base aid on financial need.

• U.S. News does not consider school loan forgiveness programs when calculating student-debt loads, discouraging schools that offer them. Publicizing student debt also incentivizes schools to admit students who do not need loans.

• U.S. News does not classify graduates on school-funded public-interest fellowships as employed, harming employment numbers for schools that offer them.

The U.S. News Rankings site itself indicates that its data should not be the only thing a prospective student considers when choosing a graduate program and admits that many factors cannot be measured in the way they determine rankings. One hundred and ninety-six (196) law schools were surveyed as of March 28, 2022 and U.S. News publishes the top 75% of schools eligible to be ranked for each discipline. They indicate that they do

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The State of Domestic Data Privacy in 2023

By Derrick Maultsby Jr.

Privacy in the United States is nothing new, dating back to the passage of the Fourth Amendment to ensure the right to be secure against unreasonable searches and seizures by the government. Data privacy and, more specifically, consumer data privacy is something that the U.S. has grappled with since the 1970s as demonstrated by the 1974 U.S. Privacy Act, the 1996 Health Insurance Portability and Accountability Act (HIPAA), and the 2000 Children's Online Privacy Protection Act. However, it was the European Union's General Data Protection Regulation (GDPR), made effective in 2018, that really changed consumer data privacy in the U.S. The impact of the GDPR on domestic legislation was first exhibited with the passing of the 2018 California Consumer Privacy Act (CCPA), but in 2023 the GDPR's influence over our consumer privacy landscape is undeniable.

The GDPR created a wide-reaching and comprehensive consumer privacy framework that was rooted in transparency and the concept that an individual owns all of the data they create. The GDPR provides EU citizens with specific rights (i.e., rights to deletion, portability, to be forgotten), while also placing strict requirements on companies in the way they interact with the consumer data of EU citizens (i.e., breach notification protocols, proper consent for data collection). This framework is effectively the master design for U.S. consumer data privacy laws, as we see the spirit of the GDPR in such laws going into effect in 2023, and those that will potentially be passed into law this year.

The latest hot topic in the data privacy world is the California Privacy Rights Act (CPRA). The CPRA is an amendment to the CCPA which seeks to strengthen the previous measure. While it went into effect on January 1, 2023, most companies are just now turning their focus to compliance ahead of the July 1, 2023 enforcement date. The CPRA amends the CCPA in many ways, but a few key focuses are: (i) a change to the definition of a Covered Entity under the law; (ii) the addition of a new tier of data with heightened scrutiny called Sensitive Personal Information; and (iii) a further expansion of the rights of California residents. While the CPRA is causing the latest compliance frenzy, there are several other US jurisdictions with consumer privacy laws going into effect in 2023.

Virginia's Consumer Data Protection Act (VCDPA) also went into effect on January 1, 2023. This law applies to persons that conduct business in Virginia that either: (i) control or process personal data of at least 100,000 consumers or (ii) derive over 50 percent of gross revenue from the sale of personal data and control or process personal data of at least 25,000 consumers. Similar

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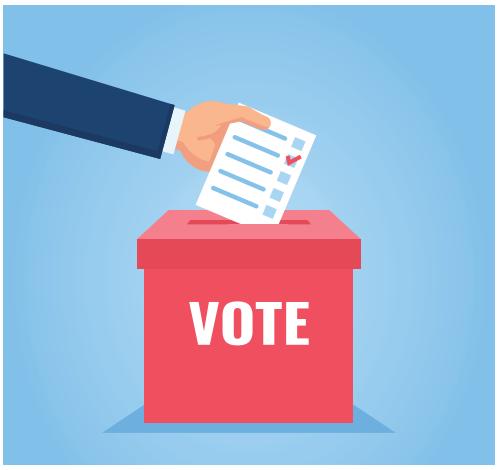
Pennsylvania Senate's Proposed Voter ID Law – The Fight for Fair Elections?

By Taylor R. Mosley

On January 11, 2023, by a 28-20 vote, the Pennsylvania Senate passed Senate Bill 1 (S.B.1) which contains a number of proposed amendments to the PA constitution, including one amendment that would require all Pennsylvania voters to verify their identity before voting. This would require in-person voters to present a valid state-issued ID in order to receive their ballot, and mail-in voters would need to send in a photocopy of their ID with their mail-in ballots. Currently, in-person voters are not required to show ID, but mail-in voters do have to provide either a Pennsylvania ID number or a Social Security number when submitting an application for their ballot.

The measure was approved during the last congressional session by the Pennsylvania House and Senate, and if S.B.1 is passed by the House again this session, it will be on the ballot for the next state election. S.B.1. was introduced by Senator Daniel Laughlin who sought to "enhance election integrity and increase voter confidence." Senator Laughlin lists Missouri, Wyoming, Montana, and Arkansas as examples of states who have recently enacted voter ID requirements. As of March 13, 2023, S.B.1. was sent back to the Judiciary Committee.

Pennsylvania Senator Judy Ward stands behind the proposal, indicating that voter ID laws are not a new concept. She represents that she has a responsibility to ensure voters can trust the election process. She reiterated that President Joe Biden, as a Delaware resident, has to provide identification or sign an affidavit in order to vote. However, it should be noted that the



proposed Pennsylvania measure does not contain the option to sign an affidavit as an alternative to providing state-issued ID.

Voter ID laws are controversial. While they do serve to ensure a qualified individual is voting, they have a tendency to isolate the elderly, low-income individuals, and those with physical disabilities who do not drive (and non-drivers for any other reason), as they have no need to carry a driver's license or other state-issued ID. According to a recent study by the Brennan Center for Justice at NYU School of Law, approximately 11% of adult U.S. citizens do not possess a valid, government-issued photo ID. That means that more than 21 million eligible voters nationwide may be presently unable to vote if the trend of passing voter ID laws continues.

The AARP organization notes that the older Americans get, the less likely they are to have an ID. In fact, nearly 1 in 5 citizens over the age of 65 does not have a current government-issued ID. Some states have IDs for non-driving elderly citizens, but many do not. A related issue is whether or not those elderly voters have their birth certificates, which are required to seek government ID. The issuing and recording of birth certificates was not always standard procedure in some localities, so some senior citizens simply do not have one on record. Daniel B. Kohrman, an attorney for the AARP Foundation has said, "An older person whose passport has expired, who has to go to the trouble of digging out a birth certificate may just say to heck with it." He fears that we may see a significant decrease in elderly voters as the result of passing voter ID laws.

Some feel that voter ID laws requiring current photo ID will not affect those over the age of 65 at all. Hans A. von Spakovsky, a senior legal fellow at the Heritage Foundation and former commissioner of the Federal Election Commission, indicated that he believes that all states requiring photo IDs for voting are making them available for free, which allegedly would remove the barriers that the Brennan Center is warning against.

However, evidence shows that voter ID laws come with significant cost, both for the state and the citizens. Even if the state provides free IDs, voters still have to pay for copies of their birth certificates and travel to ID-issuing stations. It is estimated that it costs between $75 to $175 for a person without a driver's license to acquire the required documents and pay for travel in order to obtain state-issued ID. A working individual also must hold a job that would allow them to apply for ID during regular business hours when government ID offices are open. Those who are disadvantaged by these processes are low-income individuals and those in rural communities, as public transportation

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not publish the bottom 25% of ranked schools because their data is incomplete. This may limit students' abilities to make a proper comparison between schools in the top 75% and bottom 25%.

U.S. News has announced that it will revisit its methodology for rankings in response to certain criticisms of the methodology. Particularly, it has agreed to place higher emphasis on bar passage and job placement, which previously paled in comparison to GPA and LSAT scores, and professors' academic footprints. U.S. News also stated that it would take more time to address all of the diversity and socioeconomic concerns of the departing institutions. However, the promised changes do not yet seem to be making a difference.

To date, at least 42 institutions have now decided to leave the U.S. News rankings, with the University of Pittsburgh School of Law being one of the most recent departures. Interim Dean Haider Ala Hamoudi stated that "the U.S. News ranking system is systematically flawed and harmful to both legal education and the legal profession." Interim Dean Hamoudi put significant emphasis on the effect he feels any rankings system has on students from disadvantaged backgrounds. He indicated that the U.S. News rankings in particular "decide for a student what is more important, GPA or the services provided." Hamoudi had previously expressed that "…the rankings overvalue the amount spent on legal education without regard to how those resources are used, and they place a heavy emphasis on admissions criteria, including standardized tests, in a manner that is not welcoming to students from disadvantaged communities who have been systematically and historically marginalized in our legal system."

When asked to expand on this opinion in an interview for this article, Hamoudi stated that because the rankings currently weigh undergraduate GPA and LSAT scores so heavily along with annual tuition, and seemingly ignore how funding is used to benefit students, it leaves those who rely on the rankings to make decisions to essentially accept GPA and LSAT scores as the most important factors in determining whether is school is highly ranked or not. If students instead had a centralized location where all factors were available to them, such as what resources are available, and how many students are employed after graduation, bar passage rate, then students could decide for themselves what factors weigh more heavily in their personal decisions on where to attend.

When asked if he would be amenable to participating in a rankings system with other schools who have withdrawn from the U.S. News rankings that is specifically tailored to address concerns about which factors were in consideration, Hamoudi indicated that he did not feel that such participation would be worthwhile. He stated, "I don't think that rankings are a particularly helpful way to measure much of anything. I do think that we should be held accountable. I would love for different organizations to say, 'You say you are committed to social justice, how much money is spent per student on public service or community service?'" Hamoudi went on to say that while some rankings systems are better than others, he would prefer schools to identify what they are really committed to, and then students can look at the criteria they are most concerned about and make a decision accordingly. He felt that by leaving students with simple numerical figures to define an entirety of a school's program, "you are implicitly deciding for the student what is more important." Hamoudi's call is for schools to be transparent and students to decide for themselves what factors weigh most heavily when comparing higher education institutions.

As an alternative to participating in a rankings system, Pitt Law seeks to offer additional employment data publicly on its website. Hamoudi referenced Pitt Law's employment rate at graduation and ten months following graduation as more applicable statistics which may facilitate prospective students' decision to attend a particular institution. He also mentioned that any statistics for which the ABA already has reporting requirements are more relevant to students seeking to make a decision on which graduate program to attend.

Meanwhile, Duquesne's Thomas R. Kline School of Law remains in the rankings for the time being. While Dean April Mara Barton could not be reached for an interview, she has said publicly that Duquesne will continue to monitor the situation "with an eye on how these rankings influence students, future lawyers and the legal profession."

Schools who are hesitant to withdraw from the rankings cite the fact that the list provides valuable information to prospective students so that they may compare institutions in one easy-to-access location. Ken Randall, Dean of

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No Reason to Cheer – Case Dismissed Due to Severe Discovery Violations

By Jessica Barnes

Interpretations of the extent of a responding party's obligations to certain discovery requests likely vary by lawyer. One thing that most if not all lawyers would agree with, however, is that a party producing more than 99 percent of its documents *after* the close of fact discovery is improper, which is what occurred last month in a case out of the U.S. District Court for the Western District of Tennessee.

In *American Spirit and Cheer Essentials Inc, et al. v. Varsity Brands, LLC,* et al., No. 2:20-cv-02782-SHL-tmp (W.D. Tenn. Mar. 21, 2023), there were numerous discovery disputes among the parties. Between seeking documents excluded from discovery via protective order, producing documents in a form that was in violation of the mutually agreed upon electronically stored information (ESI) protocol, outright lack of production and responses, failing to maintain and provide lists of search terms used in collecting documents, attempts to serve hundreds of subpoenas, and producing documents either immediately before or after the deposition of a relevant witness, the court described the history of discovery in this matter as "long, complex, and tortured[.]"

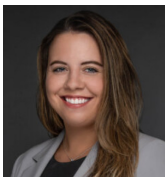
The court faced a first round of motions to dismiss in this case, which were granted in part and denied in part. The most critical aspect in the court's actions here is that it specifically warned the plaintiffs that "willful failure to cooperate in discovery could lead to dismissal of plaintiffs' case under Rules 37(b) and 41(b)."

Then later came another round of motions to dismiss. The plaintiffs responded, not contesting the defendants'

factual allegations of discovery violations, but arguing that the alleged discovery failures did not meet the legal standard to justify dismissing the case. In evaluating the arguments, the court highlighted that under Federal Rule of Civil Procedure 37, the court may impose sanctions on a party who fails to obey a court order to provide discovery, and such sanctions may include dismissal of the action. In addition, Federal Rule of Civil Procedure 41 permits involuntary dismissal of a case if the plaintiff fails to comply with the federal rules or a court order.

Accordingly, the court went through the four factors to consider when a party moves to dismiss a case under these two rules. First, the court found that while the defendants did not show an intent to thwart judicial proceedings from the plaintiffs, they did show that the plaintiffs' conduct did amount to reckless disregard. Second, the court found that the plaintiffs' actions prejudiced the defendants, who expended significant time, money, and effort to obtain plaintiffs' documents. Furthermore, the defendants conducted depositions that were largely unusable because they were unable to inquire into important topic sources from the documents. Third, the court found that its previous explicit warning, that their behavior in discovery could lead to dismissal of the plaintiffs' case, weighed in favor of dismissal. Lastly, the court found that lesser sanctions were insufficient to protect the integrity of the judicial process. Thus, the court dismissed the plaintiffs' claims with prejudice.

Overall, this case is an example of how discovery misconduct, if severe enough, can cost the client its entire case. While disputes over the burden and proportionality of specific discovery requests will continue across the board, let this case be a lesson that neglecting discovery obligations can result in a plaintiff's worst-case scenario: dismissal. ■



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The YLD's ABA award-winning newsletter

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to the GDPR and CPRA, this law also grants consumers rights around their data (i.e., rights to access, correct, delete, opt-out).

The next wave of consumer privacy laws that go into effect in 2023 all have effective dates on or after July 1:

• Colorado Privacy Act (effective July 1, 2023): Applies to "controllers" that conduct business in Colorado or produce or deliver commercial products or services that are intentionally targeted to Colorado residents and that either (i) control or process the personal data of 100,000 or more consumers during a calendar year or (ii) derive revenue or receive a discount on the price of goods or services from the sale of personal data and process or control the personal data of 25,000 or more consumers.

• Connecticut 2022 S.B. 6 (effective July 1, 2023): Applies to all individuals and organizations in Connecticut, as well as those from outside the state who interact with Connecticut residents for business purposes who: (i) have controlled or processed the personal data of at least 100,000 Connecticut residents in the preceding year, with the exception of completing payment transactions or (ii) derive more than 25% of their annual gross revenue from selling the personal data of over 25,000 Connecticut residents.

• Utah Consumer Privacy Act (effective December 31, 2023): Applies to any entity that (i) conducts business in Utah, or produces products or services that are targeted to Utah residents; (ii) has annual revenue of $25 million or more; and (iii) annually controls or processes the personal data of at least 100,000 Utah residents, or controls or processes the personal data of at least 25,000 Utah residents and derives over 50% of its gross revenue from the sale of personal data.

All three of the above consumer privacy laws also give consumers rights to their data similar to the GDPR, CPRA, and VCDPA. Additionally, they also place requirements on the companies such as security standards, specific collection processes, and breach protocols.

While it is important to be prepared for the laws that will go into effect in 2023, it is equally important to follow the draft legislation which may be passed into law this year. Most recently, on March 15, 2023 the Iowa state legislature passed SF 262, a comprehensive state privacy legislation providing rights to Iowa residents. On the horizon, over a dozen different privacy laws could be passed into law this year, including but not limited to, the Massachusetts Information Privacy Act, the Ohio Personal Privacy Act, the Kentucky Consumer Protection Act, the Tennessee Information Privacy Act, the Pennsylvania Consumer Data Privacy Act, and the New York Privacy Act. All of these proposed pieces of legislation follow similar frameworks to the numerous data privacy laws going into effect in 2023, but the variations of each are important and require detailed analysis on how they will impact your business. ■

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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 lawyers 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 far less available in these localities. As of 2020, 75% of Pennsylvania's land area is rural and makes up about 26% (nearly 3.4 million people) of the state's residents.

Additionally, Pennsylvania would incur costs relating to educating the public, training poll workers, and actually providing ID cards to voters. Even if voter ID cards were free, in order to address the potentially discriminatory practices on the basis of income, the state would incur significant costs in doing so. In Indiana, the state spent over $10 million between 2007 and 2010 to provide free ID cards to their constituents.

It will be interesting to see how the Pennsylvania House handles S.B.1 and the concerns many have raised about the efficacy of voter ID laws in cracking down on voter fraud as intended. Will the goal of preventing fraud be achieved? Will it be at the expense of the elderly and other marginalized populations? It is only a matter of time before we see whether this question appears on the ballot and what the implications will be on Pennsylvania citizens. We must ask ourselves, what really makes an election "fair"? ■

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the George Mason University Antonin Scalia Law School (ranked #30 in 2022) was quoted as saying, "Most students don't go to the top 10, and there are about 200 law schools." His point being that students considering lower-ranking schools get more value out of the list, turning to it for guidance when deciding between schools with higher acceptance rates. It is true that the top schools do not seem to benefit from the rankings in the same way lower-ranked schools might. Truthfully, a candidate with a Yale Law degree is likely going to have greater access to the top employers, whether or not Yale Law remains on the U.S. News rankings list.

When schools began withdrawing in November 2022, the rankings for 2023 had seemingly already occurred. The year 2024 will be the first year the 42 schools who withdrew will either be missing from the rankings, or their rankings will be based solely on publicly-available data and not supplemented by information provided by the schools themselves.

It remains to be seen what will come of the law schools exiting the U.S. News rankings. While it makes a strong political statement in highlighting the ways in which rankings based on admission criteria may leave out certain marginalized demographics, withdrawing from the rankings does not actually change the dynamic of how these law schools choose who to admit or on what basis. The act of quitting the rankings, at least for top schools, may be no more than performative activism. Or, it could be the first step in making law school and the legal profession more accessible to all. Time will tell. ■

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