YLD
Allegheny County Bar Association

Point of Law

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

Winter 2019

YLD Wins Big at the ABA Annual Meeting

By Lacee C. Ecker, YLD Chair

The American Bar Association (ABA) Young Lawyers' Division hosted its 2018 Annual Meeting in Chicago, Illinois during the first week of August. Young lawyers representing their local and state bar associations from across the country convened for the YLD Assembly to hear updates for the ABA YLD leaders, platforms for candidates running for office, and to recognize local and state divisions for their successes throughout the year. Laura Bunting and Lacee Ecker attended the meeting on behalf of the ACBA YLD.

This year, the ACBA YLD was honored with four ABA Awards of Achievement in the Service to the Bar, Service to the Public, and Comprehensive categories. The YLD Membership Outreach Committee was recognized for Service to the Bar. In response to the declining and aging membership of the ACBA, the YLD established the Membership Outreach Committee as a means of recruiting, retaining, and supporting membership in the YLD and the ACBA at large. The Membership Outreach Committee hosts the annual "Passing the Bar Bash" for newly admitted attorneys and organizes events that connect ACBA YLD members with young professionals from other companies and organizations throughout Pittsburgh.

The Fitting Fido into Public Places program was recognized by the ABA for Service to the Public. This program consisted of a CLE covering the intersection of animals and the law in housing, employment, and public accommodation as well as a "Barks and Brews" Happy Hour that raised funds for the Humane Animal Rescue's Prison Pups program. The Prison Pups program provides an alternative environment for pets that do not thrive in a shelter while also providing a pet for incarcerated individuals. The Prison Pups program has seen great success with every dog from its inaugural class being adopted (mostly by prison staff members). The "Barks and Brews" Happy Hour raised $2,000 for the Humane Animal Rescue. Fitting Fido into Public Places was also recognized as the Outstanding Service to the Public project across all categories and received an Affiliate Star from the ABA YLD.

In the Comprehensive category, the "Medical Marijuana - A Budding Field of Law" Lunch and Learn, Military Veterans Project, Bar to Board program, Practicing Green Initiative, and Beverly's Birthdays projects were all recognized. The "Medical Marijuana - A Budding Field of Law" Lunch and Learn educated attendees on the recent developments in marijuana-related issues in Pennsylvania. It took place, fittingly, on April 20th and featured a brownie tasting. The Military Veterans Project packed and shipped 125 care packages to deployed military personnel from Western Pennsylvania who are currently serving in active combat zones. Service members from

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Fake News:
Local Mom Posts "Cute" Facebook Video of Five Year Old Son That Will Derail His 2065 Supreme Court Confirmation

By James Thornburg

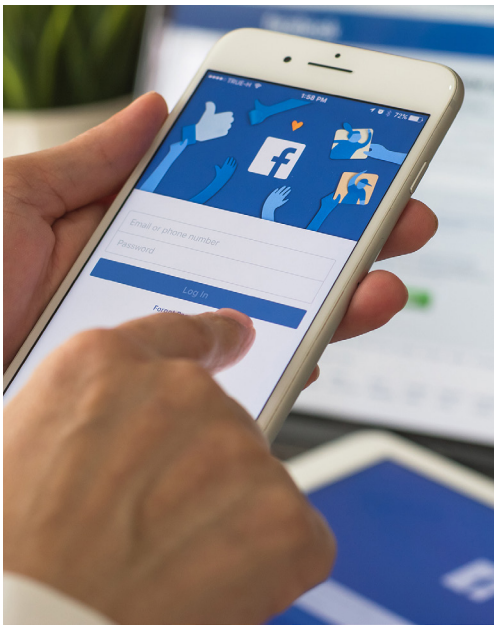
Local mom Ashley Sanders posted a video of her five year old son Aiden to her Facebook page yesterday, unaware that it will resurface in 2065 and sink his nomination to serve on our nation's highest court.

"Aiden is soooooooo cute lol," wrote Ashley when she posted the video, which depicts her son, his face red with tears, frantically begging his mother to put a booger back into his nose, then shrieking with furious indignation when she patiently informs him that she cannot.

Ashley's patience will not be shared by the Senate Judiciary Committee, which in forty seven years will consider the video to be a troubling indication that Aiden lacks the proper temperament to be a Supreme Court Justice.

The video, dubbed "Boogergate" by the press, will mar the otherwise spotless record of would-be Justice Aiden, which will include decades of dedicated public service and lead to a nearly unanimous appointment to the U.S. Court of Appeals for the Third Circuit.

Widely viewed as a shoo-in candidate for the Supreme Court, Aiden will receive the highest possible rating from the American Bar Association, only to have that rating reevaluated and rescinded in the wake of Boogergate. "This problematic outburst of rage does not comport with the dispassionate impartiality expected of a Supreme Court Justice," the ABA will say.



After the embattled president withdraws the nomination under pressure from both parties, Aiden will retreat in disgrace, knowing that his once-sterling reputation, like that booger, can never be put back again.

It will be no consolation to him that the candidate nominated in his stead will also be withdrawn, this time following the revelation of a forty year old comment on a friend's Instagram selfie which used language that, according to the third most upvoted definition on Urban Dictionary, has racial undertones.

At press time, Ashley's Facebook post had garnered over fifty likes. ■

James Thornburg is an attorney at Quinn Logue LLC, where he focuses his practice on personal injury and commercial litigation. He can be contacted at james@quinnlogue.com.

The Law's Blind Eye Toward Injustice: When Criminal Defense Lawyers Have a Duty to Allow Wrongful Convictions

By Corey A. Bauer

What should an attorney do if their client provides inculpatory information which would help free an innocent man or woman convicted of a crime? Further, what if that innocent man or woman is sitting on death row in Texas, awaiting their impending demise? For those of us who have never attended law school and sipped from the proverbial "Think Like a Lawyer" Kool-Aid, the answer is likely self-evident; how could anyone let an innocent person be executed?

However, the intricacies and complexities of the American judicial system deny such an easy conclusion. In fact, in almost all states the ethical rules require attorneys to keep such information confidential even as innocent men and women remain locked away. This is due to the competing interests in such a scenario; interests regarding trust, liberty and the rights given to each and every citizen by the United States Constitution not to incriminate oneself.

The legal profession is, and always has been, guided by rules that recognize a lawyer's duty as a "zealous advocate for the client, putting that person's interest ahead of all others." Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients,* 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 210 (2006). Aside from the few exceptions currently allowed, strict attorney loyalty is required of all lawyers. But, should there be a wrongful conviction exception to attorney client confidentiality?

WHATEVER HAPPENED TO "A SEARCH FOR THE TRUTH?"

A trial, the Supreme Court has asserted, is a "search for truth." *Nix v. Whiteside,* 475 U.S. 157, 171 (1986). But, although truth may be the goal of every trial, the defense lawyers playing their parts serve a different end – advocacy on behalf of their respective clients – that may very well be at odds with this search for truth. This is because the Model Rules require the lawyer to maintain the secrets of their client, and devote themselves to the client despite the consequences of maintaining those secrets. ABA Mod. R. Prof. C. R. 1.4, 1.6 (2016).

Although certain ethical rules require that lawyers not introduce false evidence, mislead a third person, or act deceptively or fraudulently, nowhere do they instruct a lawyer to ensure that the result of the legal representation reflects what *actually happened* in the occurrence that is the substance of the dispute. The search for truth pales in comparison to the dedication a lawyer must give to his client.

WOULD IT ERODE THE ATTORNEY-CLIENT RELATIONSHIP?

One of the most concerning issues with adopting a new exception is that it will undermine the very purpose behind the confidentiality doctrine. Longstanding wisdom in the legal profession sees confidentiality as essential to ensuring full and candid disclosure of potentially incriminating truths from clients, but this consensus is difficult to prove empirically. How would one determine how many clients in fact gave sensitive information to their lawyers which they would not have given but for assurance of confidentiality? There's no way of knowing.

Certainly, on some level a disclosure of this nature would erode the sanctity of attorney-client confidentiality. Especially with the individual whose

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Service Animal Rights

By Ryan Daniel Very

Ordinarily, Pennsylvania law views pets merely as property, so that your legal rights are limited to property rights. But you can get additional rights at home, at work, in places of business, and when traveling if you designate your pet a therapy or disability service animal, which usually only requires a note from a therapist or doctor, and sometimes training. If someone interferes with these special animal rights, they can be subject to more sophisticated civil and criminal claims. In this article, I'll explain how to help your pet become more than property in the eyes of the law.

Most housing providers, like landlords, condominium associations, and the government, may not interfere with your service animal, which includes emotional support animals such as dogs who alleviate depression and anxiety. *See* the Fair Housing Act at 42 U.S.C.A. § 3604(f); HUD Notice, *Pet Ownership for the Elderly and People With Disabilities* 73 FR 63834-01 (October 27, 2008); Pennsylvania Human Relations Act at 43 Pa. Stat. Ann. § 952. Landlords may not charge a pet fee for service animals, no matter what it says in your lease. *See* 24 C.F.R. § 100.60(4). With respect to employment, employers must reasonably accommodate service animals, which may include allowing them at work. *See* Title I of the Americans With Disabilities Act ('ADA') at 42 U.S.C.A. §§ 12112; 43 Pa. Stat. Ann. § 952. On pain of a summary criminal offense, public accommodations, such as restaurants, movie theaters, and hotels, be accessible to service animals, and they may not charge an additional fee. *See* ADA Title III at 42 U.S.C.A. § 12182. You have the right to travel with your service

animal, including on airplanes. *See, e.g.* the Air Carrier Access Act ('ACAA') at 49 U.S.C.A. § 41705. Uber recently settled a lawsuit in which a blind person was refused transportation because of a service dog. *N.F.B.C. et al. v. Uber Technologies, Inc.,* 103 F.Supp.3d 1073 (N.D. Cal. 2015). As part of the settlement, Uber updated its service animal policy, and requires drivers to acknowledge their legal obligations related to accepting service animals on trips. *See* Settlement with the National Federation of the Blind. Uber.com, 9 Nov. 2017, www.uber.com/newsroom/nfb-settlement/.

Service animals are not limited to dogs. *But see* 28 C.F.R. § 36.104. For example, mini-horses, which live about twice as long as dogs and therefore require less frequent training, can also be service animals. 28 C.F.R. § 35.136. The steps required to certify your pet as a service animal depend on the laws under which you seek protection. The most stringent laws impose species limitations, require particularized training, a note from a doctor, and exclude emotional support or comfort animals. *See e.g.* 28 C.F.R. § 36.104 The least stringent laws merely require evidence of a disability-related need for the animal and do not impose species restrictions. *See e.g.* HUD Notice, *Pet Ownership for the Elderly and People With Disabilities* 73 FR 63834-01 (October 27, 2008). ■

Ryan D. Very is the Proprietor of Very Law PLLC. His practice currently focuses on civil disputes, criminal defense, and consumer rights.

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the Navy, Army, and Air Force all received care packages from the ACBA YLD. The Bar to Board program consisted of a CLE covering the roles and responsibilities of nonprofit board members and a board matching event. Thirteen local nonprofit organizations and 25 young lawyers participated in the event. Each young lawyer met with 5 different organizations during the event. The Practicing Green Initiative included 3 separate events: (1) a CLE on converting to a paperless legal practice; (2) an Earth Day volunteer event; and (3) an electronics recycling drive. The Beverly's Birthdays project raised over $2,000 for Beverly's Birthdays, a local nonprofit that provides birthday celebrations for homeless children in the Pittsburgh area. The project also included a gift drive that collected more than 800 gifts for the program.

A special thank you to all of the ACBA YLD members who helped to organize and those that attended these award winning programs, projects, and events. We appreciate your continued support of the ACBA YLD and look forward to seeing you at future events! ■

Lacee C. Ecker is an Assistant General Counsel at American Eagle Outfitters practicing in corporate and commercial law.

Visit the YLD on the ACBA's website for more information on YLD events, programs and more: *www.acba.org/Young-Lawyers-Division.*

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information is disclosed by the lawyer. Yet, these incidents are few and far between, and they are likely to garner more positive attention than negative in the eyes of the public as a whole.

WHAT ABOUT MODEL RULE 1.6(B)(1)?

Perhaps one of the most prevalent arguments regarding a wrongful incarceration exception is that Model Rule 1.6(b)(1)'s exception to prevent "reasonably certain death or substantial bodily harm" already encapsulates such a right. ABA Mod. R. Prof. C. R. 1.6(b)(1) (2016).

It is true that inmates face an increased risk of physical violence based upon factors such as the concentration of violent individuals, overcrowding, prison culture, the inability of prisoners to physically separate themselves, the prevalence of drug use, and prison guard brutality. The inmates even experience heightened risks of communicable diseases compared to the general population because of prison overcrowding and poor medical screening. And lastly, 98% of inmates surveyed were aware of at least one sexual assault occurring in the previous year. *See* Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality,* 102 NW. U. L. REV. COLLOQUY 391, 393 (2008).

However, this is a "heightened risk" argument. The comments following each Model Rule provide that an interpretation of substantial bodily harm must include two things; 1) It must be "reasonably certain to occur"; and 2) that it is to be suffered imminently OR that there is a present and substantial threat that it will occur at a later date if a lawyer does not take action. "Heightened risk" doesn't quite cut it.

IF AN EXCEPTION IS MADE. WHEN THE HECK DO WE DISCLOSE?

Creating a mandatory disclosure rule starting at any stage could hurt the client's case irreparably. For example, in the middle of a trial in which the attorney's client is being tried, any immediate mandatory disclosure rule would effectively destroy the client's case. In contrast, the option of a discretionary rule allows an attorney to wait and see how the judicial process plays out for the innocent. If the innocent is acquitted, the attorney need not jeopardize their client's interests or undermine attorney-client confidentiality. Then again, once an innocent defendant has been sentenced it can be very difficult to appeal his conviction.

Furthermore, in enacting the proposed exception for the wrongfully convicted, one of the many practical issues presented is whether it should only apply when innocents have been sentenced to a certain number of years. If one is convicted to life in prison or death, many would argue there is a moral mandate to come forward due to the extreme and unjust loss of civil liberties.

But, what if an innocent man is sentenced to a month of incarceration, or even just a day? Is the moral incentive diminished by the lessened time? And if so, at what time should lawyers come forward with their information? These are questions that are perhaps best answered subjectively. Creating an arbitrary cut-off would impose an unfair discrimination upon those sentenced to less time in jail but still just as innocent as another who is sentenced to longer.

THIS CALLS FOR A DISCRETIONARY RULE

Allowing an attorney the right to come forward through a discretionary rule would be best in combating this dilemma. This would allow the attorney the opportunity to weigh the harm done to both parties given the sentencing and render a decision. Any rule setting forth a predetermined sentence length requirement risks exposing innocent people to the hazards presented by incarceration, even if briefly. And setting an arbitrary classification cut-off (for example, allowing disclosures only in the case of felony convictions) similarly imposes unjust distinctions upon innocent people serving time.

A discretionary rule would allow the attorney to make an informed decision by balancing the possible financial, emotional and physical harm imposed on the innocent throughout the course of a proceeding and the harm caused to his client by disclosure.

IN SUMMARY

Wrongful convictions are one of the most tragic byproducts of the American judicial system, and anything that can be done to counteract their occurrence should be done. The American judicial system is an objective structure that is predetermined and uniform for all. However, it is ruled by subjective motives and biases held by those who operate within it; and so no system or rule which helps govern it will be perfect in every situation. But why not try to make it better? ■

Corey A. Bauer, Esq. is a criminal defense attorney with a focus on state and federal violent and narcotics crimes at the firm of Dodaro, Matta & Cambest, P.C.

The Americans with Disabilities Act and Public Accommodations: Website Accessibility

By Sarah Steers

Title III of the Americans with Disabilities Act ("ADA") bars discrimination against individuals with disabilities in places of "public accommodation." 28 CFR § 36.102 (2017). A public accommodation is typically a private entity that owns, leases, or operates a business. 28 CFR §36.104 (2017). Initially, Title III applied to a business's physical location, but the ubiquity of the Internet is changing the game. Regulations require public accommodations to ". . . furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities." 28 CFR §36.303(c)(1) (2017). Insofar as many companies rely on a web presence to conduct or supplement their business operations, or to communicate with customers and clients, many current ADA Title III lawsuits allege that a business' website fails to accommodate individuals with visual, auditory, or other disabilities.

The federal government had informally relied on Web Content Accessibility Guidelines ("WCAG") 2.0 standards to ensure that individuals with disabilities could access its web content. WCAG 2.0 standards are the best available metrics for determining whether web content is accessible by those with a wide variety of disabilities (including ". . . blindness and low vision, deafness and hearing loss, learning disabilities, cognitive limitations, limited movement, speech disabilities, photosensitivity and combinations of these"). *Web Content Accessibility Guidelines (WCAG) 2.0,*

W3C (May 31, 2018), https://www.w3.org/TR/WCAG20/. WCAG 2.0's four main principles require web content to be:

1. Perceivable;
2. Operable;
3. Understandable; and
4. Robust.

Twelve guidelines (including "make all functionality available from a keyboard," "make text content readable and understandable," and "maximize compatibility with current and future user agents, including assistive technologies") fall under these four principles, and can be achieved with varying levels of specificity – A (lowest), AA, and AAA (highest).

In January 2017, the U.S. Architectural and Transportation Barriers Compliance Board (the agency tasked with promoting "equality for people with disabilities through leadership in accessible design and the development of accessibility guidelines and standards") issued a Final Rule *requiring* all federal agency websites and web content conform to WCAG 2.0 standards (specifically, WCAG 2.0 "AA"). Information and Communication Technology (ICT) Standards and Guidelines, 82 Fed. Reg. 5790 (Jan. 18, 2017). Under the Obama Administration, the Department of Justice indicated it would issue a proposed rule for public accommodations and websites in 2018; however, in President Trump's first Unified Regulatory Agenda (issued July 20, 2017), the DOJ labeled this an "Inactive Action." Inactive RINs 2017 Agenda Update (May 31, 2018) https://www.reginfo.gov/public/jsp/eAgenda/InactiveRINs_2017_Agenda_Update.pdf.

Regardless of whether the DOJ takes up this cause, litigation will likely lead to new law in the private sector. Recent opinions have decided in favor of requiring public accommodations to update their websites in order to be accessible to individuals with disabilities. On June 12, 2017, Judge Robert Scola of the U.S. District Court for the Southern District of Florida held, in *Gil v. Winn-Dixie Stores, Inc.*, that the Winn-Dixie grocery store chain's website was "heavily integrated" with its physical locations and operated as a "gateway" to the stores, thus subjecting it to ADA Title III requirements. 257 F.Supp.3d 1340 (S.D. Fla. 2017). Scola did not determine whether the website was a public accommodation in and of itself. This was the first trial in a website accessibility lawsuit. On July 21, 2017, Judge Katherine B. Forrest of the U.S. District Court for the Southern District of New York denied a restaurant chain's Motion to Dismiss in an ADA Title III lawsuit, holding that websites are subject to the ADA

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Why Victims of Childhood Sexual Abuse Need a Window to Justice

By Katie M. Shipp

In the wake of the recent grand jury report, Pennsylvania residents are confronted with the Attorney General's disturbing finding that 300 priests abused over 1,000 children throughout the Commonwealth. People have justifiably reacted with shock, disbelief, and disgust. As an attorney who exclusively represents victims and survivors of sexual abuse, the recent revelations are sadly all too familiar. Neither the sexual abuse of children nor the coverup is unique to the Catholic Church. The willful ignorance of child sexual abuse by those in positions of power is evident over and over again: at Penn State University and most recently by Rockefeller University, U.S.A. gymnastics, and the Boy Scouts. Unfortunately, without a substantial change in the law and culture, including statute of limitations reform with a civil look back window, it is a tragic reality that is unlikely to disappear any time soon.

The Catholic Church has spent millions of dollars over decades covering up and minimizing the abuse of children by priests and others affiliated with the Church. Instead of taking steps to protect children from known sexual predators, the Church hierarchy shuffled around pedophile priests, hid documentation in secret archives, and quieted victims. When the Pennsylvania grand jury report was released, an outpouring of survivors finally found the courage to come forward. The Attorney General received thousands of calls in the weeks following the report's widespread public release. Many of these callers were abused decades ago and are just now revealing this abuse for the first time. Research has confirmed that, on average, victims of childhood sexual abuse do not report what happened to them until age 52 and one third of victims never report. *See Statistics on Statutes of Limitations (SOL) for Child Sex Abuse,* Child USA (last visited December 13, 2018), https://www.childusa.org/sol/. Survivors struggle with fear, embarrassment, and shame. When the abuse occurs in institutions like the Catholic Church, survivors risk being ostracized from their communities and families.

Unfortunately, many survivors have only now discovered that their access to the courthouse is barred. The current Pennsylvania civil statute of limitations is age 30 and the criminal statute of limitations is age 50. 42 Pa.C.S.A. § 5552 and § 5533. These laws protect predators and the institutions which enable their abuse. In fact, the Catholic Church has spent millions of dollars lobbying state legislators to ensure that the Pennsylvania statute of limitations and similar laws in other states remain limited.

Survivors and their supporters have attempted to pass statute of limitations reform in Pennsylvania for years. Pennsylvania Senate Bill 261 is currently under consideration and would eliminate the criminal statute of limitations completely, raise the civil statute of limitations to age 50, and provide a two year look back window to allow lapsed claims to be filed. Each of these reforms are critical to achieving justice for survivors.

Extending the civil statute of limitations will help ensure child safety by putting institutions and individuals on notice that they cannot simply duck and cover until the statute of limitations has run. Instead, they need to take proactive and ongoing steps to make sure children participating in their programs are supervised and that potential offenders are effectively screened and monitored. An extension of the current statute of limitations is not enough. In order for the statute of limitations reform to truly serve survivors, it must include access to justice for lapsed claims. A window will allow victims and survivors who only now are capable of confronting their past abuse to gain access to justice and a small measure of compensation for the crimes and suffering they have endured, many for decades. Access to the courts is essential to giving victims a voice. Civil litigation not only benefits victims and survivors, it also results in the disclosure of currently hidden child predators and the policies and practices which allowed childhood sexual abuse to continue for decades. Survivors deserve the right to be heard and the public deserves the right to know what transpired in the institutions which perpetrated and permitted childhood sexual abuse for decades.

While the Catholic Church is currently at the forefront of this scandal, it is not alone. Statute of limitations reform will allow all victims of childhood sexual abuse to pursue justice. In fact, in Michigan the statute of limitations was recently extended to allow those athletes abused by Dr. Larry Nassar to seek compensation.

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The Americans with Disabilities Act and Public Accommodations

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and that courts can determine whether a public accommodation violated the ADA even if formal agency regulations are unavailable. *Markett v. Five Guys Enterprises LLC,* No. 1:17-cv-00788-KBF (S.D.N.Y. July 21, 2017). Then, on August 1, 2017, Senior Judge Jack B. Weinstein of the U.S. District Court for the Eastern District of New York held the same. *Andrews v. Blick Art Materials, LLC.* No. 1:17-cv-00767-JBW-RLM (E.D.N.Y. Aug. 1, 2017).

Winn-Dixie appealed the decision to the U.S. Court of Appeals for the Eleventh Circuit, but a decision has not been made at the time of this writing. Plaintiffs with disabilities have not been deterred. Research conservatively estimates that 7,663 ADA Title III lawsuits were filed in 2017 – a 16% increase over 2016. *ADA Title III Lawsuits Increase by 16% in 2017 Due Largely to Website Access Lawsuits; Physical Accessibility Legislative Reform Efforts Continue,* ADA TITLE III NEWS AND INSIGHTS (May 31, 2018), https://www.adatitleiii.com/2018/02/ada-title-iii-lawsuits-increase-by-14-percent-in-2017-due-largely-to-website-access-lawsuits-physical-accessibility-legislative-reform-efforts-continue/. Court filings show that 182 of those suits were filed in Pennsylvania.

The stereotype of ADA Title III lawsuits filed to spur dated websites into the 21st century imploded on May 10, 2018, when plaintiff Kathleen Sypert filed suit against trendy makeup brand Glossier. Her claims allege she encountered "access barriers" when using the website (i.e., images were not coded with "alt-text" allowing it to be read or described by a screen reader), preventing her from shopping. *Sypert v. Glossier, Inc.,* No. 1:18-cv-04215 (S.D.N.Y. May 10, 2018). Fashion, makeup, and tech blogs wrote extensively on the subject, drawing attention to the difficulties Internet users with disabilities encounter when trying to navigate many modern companies' websites. Cheryl Wischover, *Glossier Hit with a Lawsuit Alleging It Violates the Americans With Disabilities Act,* RACKED (May 16, 2018) https://www.racked.com/beauty/2018/5/16/17359998/glossier-lawsuit-ada-website-accessibility. Perhaps because of social media attention, or cognizant of judicial precedent regarding ADA Title III lawsuits, Glossier settled with the plaintiff on May 25, 2018.

Given the increasing prevalence of websites associated with public accommodations, and the need for judicial interpretation in the absence of federal regulations, the number of ADA Title III lawsuits seems poised to climb over the next few years. Readers with public accommodation clients should learn about WCAG 2.0 standards and initiate conversations with their clients to assess whether their websites are accessible to individuals with disabilities. ■

Sarah Steers is a 2015 graduate of the University of Pittsburgh School of Law and is licensed to practice in Pennsylvania and New Jersey. She is currently working as a research assistant to a professor at the University of Pittsburgh's Katz Graduate School of Business. In good weather, you can spot her obsessively tending to her vegetable and wildflower gardens.

Why Victims of Childhood Sexual Abuse Need a Window to Justice

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Reform is essential to ensuring that no child sex offender can escape criminal and civil penalties based on an arbitrary statute of limitations. Reforming these laws will put institutions on high alert that they can no longer conceal the pedophiles in their ranks without serious financial and criminal consequences.

Those opposed to reform in Pennsylvania continue to argue that reviving currently lapsed causes of action is somehow unconstitutional. As legal experts have repeatedly proven, a statute of limitations window to justice does not violate due process in Pennsylvania or federal constitutional principles. *See* Marci Hamilton, *Testimony of Prof. Marci Hamilton,* Pennsylvania Senate Judiciary Committee (June 13, 2016), available at http://pasenategop.com/judiciary/wp-content/uploads/2016/06/hamilton.pdf. In fact, the same retroactive window legislation currently pending in Pennsylvania has been upheld in the highest courts in states throughout the country.

The Pennsylvania Attorney General's grand jury report has brought the issue of childhood sexual abuse into sharp focus. Only by reforming the law and providing a crucial window to justice can future generations of children be protected, and past generations of victims restored. Child sexual abuse costs everyone. Statute of limitations reform will protect everyone. ■

Katie Shipp is a Senior Associate at Marsh Law Firm. Her work includes representation of survivors of campus sexual abuse, pregnancy discrimination, childhood sexual abuse, and child pornography.

Applying Common Sense to Technology Risks of Confidentiality Violations

By Mark Nolfi

Law school discouraged us from ignoring the nuances of the foundational professional duties like confidentiality. We were taught the basics and exceptions: keep everything secret, unless special circumstances in the rules permit it. But the way technology increasingly intrudes in our professional lives creates ways of running afoul of the rule and suffering disciplinary action that may seem unclear. *See generally,* Pa. R. Prof. Cond. 1.6(a)-(c). Today, digital competence is presumed and even required; but occasionally, rapid electronic correspondence between colleagues and opposing counsel creating lengthy and confusing email chains can lead to mistakes like clicking "reply-all" or "autofill", leading to an inadvertent disclosure. At the same time, cyber security dangers to law firms have grown. The danger from hacking and other cyber threats is so great that experts regard those risks as an inevitable cost of doing business. Julie Sobowale, *Managing Cyberrisk: Large or Small, Law Firms are Learning They Must Deal with Cybersecurity,* 103 ABA J. 34, 36 (Mar. 1, 2017). This article will broadly outline these risks, the extent to which they affect confidentiality, and suggest remedial steps. It will describe typical circumstances when inadvertent and unauthorized disclosures might occur, and the most efficient and low-cost methods for mitigating those risks to comply with the rules.

At the outset, Rule of Professional Conduct 1.6(a) mandates that a lawyer cannot "reveal" information concerning the client's representation absent consent, unless implicitly necessary. Using the word "reveal" suggests the rule broadly intends to cover any confidential disclosure flowing from the lawyer, whether intentional, inadvertent, unauthorized, or illicitly procured, regardless of the action taken to decrease or prevent that risk. *See* ABA Formal Ethics Op. 11-460, 3 (finding when employer-client obtains employee email copies, 1.6(a) requires maintaining confidentiality and withholding notice from employee as emails are "information relat[ed] to representation"); *but see* ABA Standing Comm. On Ethics & Prof. Resp., Formal Ethics Op. 99-413 (stating obligation in 1.6(a) to use reasonable steps to prevent confidential revelation not require absolute confidence in communication medium). Accordingly, Rule 1.6(d) provides a limitation on that liability by requiring a lawyer to make only "reasonable efforts to prevent" inadvertent or unauthorized disclosures. While this attempts to provide guidance while shrinking the lawyer's burden, the phrase "reasonable efforts to prevent" fails to address the specific measures that should be taken.

In response to this issue, the drafters for Comment 25 of Rule of Professional Conduct 1.6 use a factor test to determine what constitutes "reasonable efforts": 1) the information's sensitivity; 2) the likelihood of disclosure without additional "safeguards"; 3) the cost of those "safeguards"; 4) the difficulty of installation, and; 5) the degree to which the "safeguards" "adversely affect the lawyer's ability to represent clients" by, for instance, making a particular device or software "exceedingly difficult to use." The comment concludes by reiterating the client's freedom to demand or waive additional security measures, as state and federal law might require additional measures.

First, reasonable efforts dictate a lawyer should adopt conscientious

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email habits, like carefully checking the "To" and "CC/BCC" fields, hiding the "reply-all" button from the email toolbar, and disabling "autofill". Adopting such practices best comports with the factor test: cautious behavior costs nothing, is not hard to implement, and does not affect representation negatively, or at all. Furthermore, modifying the toolbar in this way is the most appropriate option for matters of low-grade sensitivity; it significantly reduces the risks of disclosure, and the burden on either the lawyer or the client is de minimis. Hiding "reply-all" is the most sensible option in typical situations, especially when major platforms like Microsoft Outlook, Apple Mail, and Gmail support this function; some mainstream platforms include additional features to prevent disclosures, but they are not consistently offered. For example, Outlook and Gmail support installing an add-on that creates desktop notifications which pop up when you send a "reply-all" email. If a matter involves highly sensitive information, reasonable efforts suggest implementing specialized security measures like confidentiality agreements with "claw-back" provisions, or creating unique in-house email platforms, structured to disable "reply-all" and "autofill" functions system-wide. Comparing the time and expense necessary for such measures in more sensitive matters with the probability of disclosure and interference with representation, confidentiality agreements are likely the preferable solution.

Comment 26 of Rule 1.6 give guidance that applies more closely to preventing unauthorized access and disclosure. It directs lawyers to use "reasonable precautions" to prevent unauthorized disclosures, but says "special security measures" are not needed if the communication method carries a "reasonable expectation of privacy." Comment 26 gives definition to the meaning of reasonable expectations of privacy in confidentiality contexts, with a factor test inquiring into: 1) the information's sensitivity, and; 2) the extent to which the message's privacy is protected by law or a confidentiality agreement. Finally, the comment provides the same caveat as Comment 25: that a client is free to require additional measures or consent to less protection. The primary takeaway from Comment 26 is that attorneys must be aware of the network's integrity used to transmit confidential information. In other countries, cyber crime, intellectual property theft, and industrial espionage run rampant. *See e.g.,* Jack Wagner, *China's Cybersecurity Law: What You Need to Know,* https://thediplomat.com/2017/06/chinas-cybersecurity-law-what-you-need-to-know/ (June 1, 2017). Unless communications are transmitted in the United States, attorneys should be prepared to frequently change passwords on personal devices and WEP/WPS network encryption, and use encrypted email and messaging and Virtual Private Network (VPN) services. Finally, attorneys should consider wiping hard drives of personal devices, using entirely new devices, or communicating exclusively through postal services before travelling to places without a legal infrastructure that confers a reasonable expectation of privacy. Dept. Homeland Sec., *Cybersecurity While Traveling Tip Card,* https://www.dhs.gov/sites/default/files/publications/ (accessed Dec. 13, 2017).

What this all means is that attorneys must be more cognizant of personal habits and risks to confidentiality when using technology. Though this does not require lawyers to become IT experts overnight, they should consider it an obligation to learn the workings of their email platforms and other software used to transmit and store confidential client information. In essence, attorneys should treat the technological implications of Rule 1.6(d) as imploring lawyers to use reasonable caution, common sense or "street smarts" when using technology to transmit work product, especially relating to the infrastructure used for internet connectivity when conducting work product or attorney-client communication online. ■

Mark Nolfi is a sole practitioner that practices primarily family law, foreclosure defense, and land use, among other areas.

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