The
MARYLAND LITIGATOR

MSBA LITIGATION SECTION JANUARY 2017

Message from the Chair

By Hon. Kathryn Grill Graeff

Happy New Year! And congratulations to all of the newly admitted members of the Maryland bar. You have become a member of a very noble and rewarding profession. Help yourself by finding a mentor and surrounding yourself with people and opportunities to guide you and help you keep learning.

The Litigation Section Council tries to help in that regard by presenting programs for new, as well as experienced lawyers. On November 3, 2017, the Section presented, in conjunction with the Young Lawyers Section, "Civil Practice in District Court" at the Sheraton Columbia Town Center. The program addressed topics of interest in District Court practice, such as personal injury claims, peace orders and protective orders, landlord and tenant issues, debt collection, small claims, and attorney's fees. Chief Judge John Morrissey spoke on the "State of the District Court." There was a big turn-out for the program, and it was very informative. Many thanks to Mary Ellen Flynn, who chaired the program, as well as Chief Judge John Morrissey, Robert Fiore, Christine Britton, Judge John McKenna, Judge Gary Everngam, Ronald Cantor, and Michelle McDonald, who helped coordinate the program and/or were speakers.

This spring, the Litigation Section is planning several programs. On March 24, 2017, the Litigation Section, in conjunction with the Criminal Law Section, will present a "nuts and bolts" District Court criminal practice program. It will be held at the Sheraton Columbia Town Center from 2:00 -5:00 p.m., with a reception to follow. Registration details will be available soon.

On April 18, 2007, the Section will be presenting a program, coordinated by Steve Klepper, on Litigating Family Law Appeals. A panel of experts, including Hon. Deborah S. Eyler, Court of Special Appeals, Stephen J. Cullen, Esq., Miles and Stockbridge, P.C., and Cynthia E. Young, Esq., will discuss what family law attorneys should know about appeals and what appellate attorneys should know about family law appeals. Additional details will be posted on the Litigation Section website in the next several weeks.

The Litigation Section has also planned our annual Dinner with the Judges program for April 27, 2017, at the Double Tree hotel in Annapolis. Lydia Lawless, who is the chair of this event, has planned a reception at 6:00 p.m., with dinner at 7:00 p.m. This program honors judges of the District Court of Maryland and federal magistrate judges of the United States District Court. Several judges will be seated at each table and asked to share with all of the lawyers tips for successful practice in the courts. The Section will also present at the dinner its annual Judge of the Year award, renamed last year as "The Honorable Glenn T. Harrrell, Jr. Award of Judicial Excellence." Registration details will be available soon.

In addition to programs, the Litigation Section has other sources of information for practitioners. Erin Risch, this year's editor of the newsletter, is in the process of getting the next edition of the *Litigator* ready to go out. If you have any ideas for articles, or are interested helping with the newsletter, please email Erin at erisch@ewmd.com.

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Keep up to date with the Litigation Section E-mail Discussion List!

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Glenn M. Grossman: The Man, The Myth, The Mensch[1]

By Lydia E. Lawless, Assistant Bar Counsel

Getsel 2016

On January 31, 2017, Glenn M. Grossman will retire as Bar Counsel following nearly 36 years of service to the Attorney Grievance Commission of Maryland and our bar. Glenn was born and raised in Queens, New York. He grew up the son of a children's shoe salesman and a homemaker. At the age of 5, Glenn began his career as a clothing model for Montgomery Ward. After retiring from modeling and graduating from high school, Glenn moved to Baltimore to attend the Johns Hopkins University and adopted both the city and the state as his own. He will gladly lead any who will follow on a tour of Baltimore, complete with notes about the architecture and highlights of significant events from his life. In 1972, Glenn graduated from Hopkins with a degree in Social and Behavioral Sciences.[2] He then set his sights on the law.

Soon after graduating from the University of Maryland School of Law, Glenn began a career of public service – first as an assistant city solicitor and then, in 1981, as an assistant bar counsel. Glenn has handled thousands of disciplinary cases and has argued over 100 cases in the Court of Appeals. In 1996, Glenn was appointed Deputy Bar Counsel and served in that role until his appointment, in 2010, as Bar Counsel.

In writing his first column for the Maryland Bar Journal as Bar Counsel, Glenn articulated his philosophy of attorney discipline:

I fully recognize the great responsibility involved in leading this office and I look forward to the challenges of attorney discipline and regulation in a climate of change and uncertainty…we will continue to pursue appropriate discipline when required, diversion from discipline when the circumstances warrant, and no action at all when the interest of justice so dictates. We do this to protect the public, but we know that the public is protected not only when misconduct is revealed and addressed but also when the integrity and professionalism of the Bar is promoted and enhanced.[3]

In the years Glenn has served the Commission, he has embraced his role as a public servant. Glenn has been a leader in the bar -- dedicating his days, evenings and weekends to the betterment of our profession. He has served on numerous Maryland State Bar Association sections and committees including the Litigation Section Council, the Special Committee on Ethics, the Committee on Membership, the Section on Legal Education, and the Section on Correctional Reform. Glenn is a Life Fellow of the Maryland Bar Foundation and a member of the Historical Committee of the Bar Association of Baltimore City. Glenn is a long-time member of Serjeants' Inn, the Simon E. Sobeloff Law Society, and the National Organization of Bar Counsel.

In addition to his work to improve the leadership and administration of our bar,

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New ESI Principles in the District of Maryland

By Michael D. Berman, Howard R. Feldman, Thomas Barnard, and David Kinzer

I. Introduction and History of the ESI Principles in the District of Maryland

The "ESI Amendments" to the Federal Rules of Civil Procedure went into effect on December 1, 2006. Before that date, The Hon. Paul W. Grimm coordinated with the Federal Court Committee of the MSBA and Federal Bar Association – MD Chapter (the "Committee"), and convened a working group to discuss how best to aid the Bench and Bar in addressing issues concerning discovery of electronically stored information ("ESI") under the amendments. That group was comprised of members of the Judiciary, attorneys with diverse practice backgrounds, including members of the plaintiffs' and defense bars, and technical specialists. Judge Grimm formed working Sub-Committees which drafted a series of detailed practices addressing many aspects of managing ESI. Judge Grimm then circulated the draft to, and met with, a larger cross-section of the Bar to discuss and revise the draft. That revised draft was then presented to the Court as the proposed "ESI Protocol." Shortly after the 2006 amendments went into effect, the Protocol was posted on the Court website as a non-binding series of suggestions that counsel were free to apply to a given case if they found them helpful.

The ESI Protocol was well-received; however, by 2014, it had become outmoded by changes in technology and practice patterns. Therefore, the Committee established a new Sub-Committee to revise the ESI Protocol. This new Sub-Committee[1] included members of the Bar and technical experts who graciously volunteered their expertise and time. Proposed "ESI Principles" were drafted by the new Sub-Committee. In drafting the ESI Principles, the Sub-Committee reviewed and considered ESI principles, guidelines and practices from other Districts and Circuits, incorporated the December 1, 2015 amendments to the Federal Rules of Civil Procedure and Federal Rule of Evidence 502, and consulted with Judges Grimm and Coulson. Thereafter, the ESI Principles were posted for public comment. All comments that were submitted were considered and a revised draft was then presented to the Court and posted on the Court's website. Like the former ESI Protocol, the ESI Principles are a non-binding series of suggested practices that counsel may use if they are found to be helpful.

II. The Revision Process and Objectives

After first deciding that the ESI Protocol was outdated, the Sub-Committee met several times to consider the best way to update it. The debate first centered on whether to revise the ESI Protocol or to draft a new document. To inform its decision, the Sub-Committee reviewed ESI principles, guidelines and practices from other Districts and Circuits, including the Federal, Seventh and Ninth Circuits and District Courts in California, Florida, Illinois, Indiana, Kansas, Texas, New York, Pennsylvania, and Washington.

In reviewing the approaches taken by these other courts, the Sub-Committee noted areas that were not covered by the ESI Protocol, as well as the wide-ranging manner in which the different courts have addressed challenging topics like metadata, privileges and production specifications. Notably, the review found that several courts, including the Federal Circuit and the Northern District of California, have adopted a series of ESI principles or guidelines, and this general model was adopted by the Sub-Committee as the best approach to recommend for this District. The ESI Principles are, however, unique because they include several appendices that will be described in detail below. These appendices are designed to work hand-in-hand with the ESI Principles and to offer practical guidance that reflects the intent expressed in the Principles. After the Sub-Committee decided to structure the new documents as a set of Principles, it formed several working groups which were assigned to draft portions of the principles; draft the appendices; update the form discovery in the Local Rules; and review the Local Rules for any potentially inconsistent provisions.

The Court posted the ESI Principles to encourage parties to cooperate in conducting electronic discovery "with the goal of reducing cost, burden and delay and to 'secure the just, speedy, and inexpensive determination of every action and proceeding' pursuant to Fed. R. Civ. P. 1." ESI Principle 1.01. Although compliance with the ESI Principles is voluntary, parties are encouraged to cooperate "on issues relating to the preservation, collection, search, review, production, integrity, and authentication of ESI." ESI Principle 1.02. Parties are also encouraged to discuss the Principles, as they are intended to promote the avoidance or early resolution of discovery disputes in cases involving ESI. ESI Principle 1.01.

The Principles recommend cooperative exchanges of information early in litigation, so as to "help insure that conferences between the parties, as well as agreements between the parties, are meaningful." ESI Principle 1.02. To further the objective of reducing the cost of discovery, the ESI Principles explain that parties should apply the proportionality standard set forth in Fed. R. Civ. P. 26(b) to all phases of discovery, including by propounding document requests and responses that are "reasonably targeted, clear, complete, accurate, and as particularized as practicable." ESI Principle 1.03.

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Limited vs. Expansive *Voir Dire*: Where are we Headed?

By Nora A. Truscello, Esq.

I. Voir Dire

A French term meaning "to speak the truth," *voir dire* is the process used to impanel a jury.[1] Whether on trial for murder or defending a medical malpractice claim, each defendant entitled to a jury trial has the constitutional right to an impartial jury.[2] Litigants and their attorneys aim to impanel a jury that will most likely produce a favorable result. In other words, they seek a biased jury. Trial courts aim to impanel expeditiously a fair and impartial jury. Regardless of the goal, *voir dire* is necessary to learn about prospective jurors. Maryland, through appellate court decisions, has veered from its traditional practices by expanding the scope of inquiry during *voir dire*. This expansion, no doubt, will be welcomed by litigants and their attorneys, but could place a considerable burden on trial courts by protracting the jury selection process.

During jury selection, a litigant may request that the trial court disqualify a prospective juror for a specific reason—for *cause*. A litigant, conversely, may use a *preemptory strike* to disqualify a prospective juror for any reason, so long as it is not for a discriminatory purpose.[3] Preemptory strikes, although limited in number, tend to be more useful to litigants as they do not require the trial court's approval. Litigants and attorneys wish to expand *voir dire* to learn information that will assist in the use of preemptory strikes.

II. Scope

As there is no constitutional provision concerning the scope of *voir dire*, it is left to state courts and legislatures to determine its parameters.[4] States balance the litigants' desire for extensive *voir dire*, with the need to maintain the efficient administration of justice.[5] The vast majority of states have adopted *voir dire* that facilitates the parties' strategic use of preemptory challenges.[6] Maryland, however, continues to use "limited *voir dire*" that only seeks to uncover specific reasons for disqualification.[7]

The use of "limited *voir dire*" allows the trial court broad discretion in determining which questions should be asked of the jury panel. A review of *voir dire* precedent, particularly the decision in *Pearson v. State*, reveals an ongoing tension between keeping Maryland a "limited *voir dire*" state and accepting a more expansive approach to *voir dire*.

III. Precedent

In 1905, the Court of Appeals, in *Handy v. State*, found that *voir dire* was to be narrow in purpose so as not to subject prospective jurors to a cross-examination style line of questioning.[8] The Court held that jurors should be treated with fairness and that it was only appropriate for the trial court to ask questions of the prospective jurors, not the attorneys.[9]

In 1926, in *Whittemore v. State*, and again in 1959, in *McGee v. State,* the Court of Appeals confirmed that questions during *voir dire* must focus on specific reasons for disqualification.[10] In 1993, the Court of Appeals decided *Davis v. State* and again confirmed Maryland's use of "limited *voir dire*."[11] The Court reiterated that any question posed must be focused on the prospective juror's state of mind regarding the matter at hand or on whether the prospective juror could be fair and impartial.[12] The Court noted that the inclusion of questions to assist in the informed use of preemptory strikes would "unduly tax the efficiency of Maryland's judicial system."[13] Former Chief Judge Robert M. Bell dissented.[14] Judge Bell challenged the long-standing *voir dire* process in Maryland and opined that a question should be permissible if it identified an area that, if explored, may uncover bias.[15]

In 2000, the Court of Appeals deviated from the long-standing *voir dire* practices in its opinion in *Dingle v. State*. The trial court in *Dingle* posed a two-part question to the prospective jurors. The prospective jurors were instructed to respond if they had been victims of crimes and if their prior experiences would prevent them from being impartial.[16] The Court found that the two-part question was improper as it allowed each prospective juror to determine whether he or she could be fair and impartial—a determination only for the trial judge.[17] Judge Irma S. Raker dissented, noting that "the majority has effectively taken [Dingle's] bait" and allowed "a non-majority principle to triumph over past majority decisions of this Court."[18]

After its decision in *Dingle*, the Court of Appeals continued to expand *voir dire* by allowing questions about strong feelings. In 2002, the Court decided *State v. Thomas*, and, shortly thereafter, *Sweet v. State*. The Court held in both cases that the trial court committed reversible error when it refused to ask the proposed strong feelings questions.[19] Judge Lynne A. Battaglia pointedly dissented stating that "if the majority is desirous of expanding Maryland's traditionally conservative *voir dire* process to include eliciting information to aid the attorneys in exercising peremptory challenges, then it should do so explicitly and without reservation."[20] In 2011, the Court further expanded the strong feelings question with its decision in *State v. Shim*. The Court found that, upon request, a trial court must ask the all-encompassing question whether "any member of the jury panel [has] such strong feelings about the charges in this case that it would

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Mid-Year Appellate Update: Noteworthy Cases from the Civil, Criminal, and Family Law Dockets

By Brian Kleinbord, Esq.

As we head into the New Year, let's pause to take a look back through the first half of the 2016-17 appellate docket. The Court of Special Appeals, in particular, has been quite busy already, issuing 51 decisions from September 1 through the end of the year. And, while many of the Court of Appeals' high-profile cases from this term are still pending decision, the Court has already issued a number of important opinions. This article will take a look at one of those decisions, *Mitchell v Motor Vehicle Administration*, as well as two cases of note from the Court of Special Appeals.

I. Civil

***John T. Mitchell v. Maryland Motor Vehicle Administration*, __ Md. __ (filed October 28, 2016)**

In 2009, a Maryland resident named John T. Mitchell applied for vanity license plates bearing the Spanish word "MIERDA," which translates into English as "shit." The MVA approved the request and Mitchell began driving around with his new plates.[1] However, two years later, another driver spotted Mitchell on the road and lodged a complaint to the MVA. The MVA then investigated the word more thoroughly and determined that the plates ran afoul of MVA regulation prohibiting "profanities, epithets, or obscenities" and rescinded Mitchell's plates.

Mitchell pursued a series of challenges to the MVA's decision. An ALJ affirmed the MVA's decision, and the Circuit Court for Prince George's County, in turn, affirmed the ALJ's ruling. The Court of Special Appeals, in a reported opinion authored by Judge Deborah Eyler, also affirmed, holding that vanity plates constitute a nonpublic forum for First Amendment purposes, and that the MVA's actions were reasonable and viewpoint neutral. *Mitchell v. Maryland Motor Vehicle Admin.*, 225 Md. App. 529 (2015).[2]

The Court of Appeals granted cert, and, in a unanimous opinion written by Judge Harrell,[3] held that the characters or message on a vanity license plate represent private speech in a nonpublic forum, and that Maryland's regulation prohibiting profanities, epithets, or obscenities was a reasonable and viewpoint-neutral restriction. Accordingly, the Court held, the MVA acted reasonably in rescinding Mitchell's plates.

Mitchell's main contentions in the Court of Appeals were that the use of the word "MIERDA" on a vanity license plate constituted private speech in a designated and/or limited public forum, and that either forum triggers strict scrutiny review of government regulations. Alternatively, Mitchell maintained that, regardless of the forum, the Maryland regulation fails even the lower standard of reasonableness and viewpoint neutrality, and that neither "mierda" nor "shit" was profane or obscene. The Court of Appeals rejected all of Mitchell's claims. First, the Court held that vanity license plates are a nonpublic forum because they bear unique, personalized, user-created messages that cannot reasonably be attributed to the government. Following the formula derived from *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), for distinguishing a public from a nonpublic forum, the Court concluded that Maryland did not intend to create a public forum via vanity plates.

Next, the Court held that the MVA's regulation restricting the use of "profanities, epithets, or obscenities," and its application to Mitchell's plates, satisfied the requisite standards of reasonableness and viewpoint neutrality. The Court concluded that the State has a reasonable interest in not associating itself with perceived profanities such as "MIERDA." Moreover, it is reasonable for the MVA to wish to protect members of the public, particularly minors, from exposure to foul language that may be understood by many as offensive. With respect to viewpoint neutrality, the Court noted that regulation does not concern itself with a vehicle owner's intent in choosing a particular message, only the words that convey its sentiment. Finally, the Court had no difficulty in concluding that "Mierda" and "shit" could be viewed as a profanity or obscenity under ordinary definitions of the words. The Court therefore concluded that the MVA acted properly when it determined that state regulations prohibited Mitchell's vanity plates bearing the word "MIERDA."

II. Criminal

***State v. Sizer*, __ Md. App. __ (filed November 29, 2016)**

Whenever Judge Moylan writes on the Fourth Amendment, the results are generally interesting and noteworthy, and *State v. Sizer*, __ Md. App. __ (filed November 29, 2016), is no exception. Writing for the Court, Judge Moylan held that the defendant's flight from the police gave the police officers reasonable suspicion to perform a Terry stop-and-frisk, from which they lawfully seized a handgun and narcotics. In characteristic fashion, Judge Moylan opened this opinion with a theme-setting quotation, here citing the Book of Proverbs, Verse 1: "The wicked flee when no man pursueth; but the righteous are bold as a lion."

The case involved a stop in Columbia, Maryland. On the evening of November 20, 2015, at approximately 5:30 p.m., officers on bike patrol encountered a group of approximately five to seven people standing around a mini-van in a parking lot near the Owen Brown Village Center, an area described by the officers

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Case Update: Commissioner v. Brown, Brown & Brown, P.C. The Court of Appeals Forecloses on Unlicensed Credit Services Business Activities by Law Firms

By Jamar R. Brown - Rosenberg Martin Greenberg, LLP

Ask any number of homeowners who have had their homes foreclosed, and they will tell you it is an agonizing experience. In 2008, during the escalation of the Great Recession there were more than 3.1 million foreclosure filings in the United States.[1] As a result of those filings, a total of 861,664 American families lost their homes to foreclosure that year.[2] In Maryland, foreclosure filings increased by 71% in 2008 with a total of more than 32,000 Marylanders facing foreclosure in that year alone.[3] One homeowner in Capitol Heights, Maryland described her fight to prevent a bank from foreclosing on her home after living in it for over 65 years as an emotional impaling: "I get upset when I talk about it. It's like somebody took a nail and drove it through your heart."[4] As a more macabre example of the emotional and mental toll that fear of foreclosure had on families in the years following the 2008 financial crisis, a study by the American Journal of Public Health linked an increase in suicide rates from 2005 to 2010 to an increase in foreclosure rates during that same period.[5]

Like thousands of American families and Marylanders, Miguel and Teresa Batres found themselves facing this economic quagmire in the wake of the 2008 financial crisis. This experience of the Batres family provides the backdrop for the decision by the Court of Appeals of Maryland in the case of *Commissioner of Financial Regulation v. Brown, Brown, & Brown, P.C., et al.,* 449 Md. 345 (2016).

In July 2008, Miguel and Teresa Batres feared losing their Maryland home to foreclosure and were seeking a modification of their mortgage loan to fend off foreclosure. Teresa Batres, a native Spanish speaker who did not read English, responded to a Spanish-language radio advertisement for mortgage analysis and consulting services by a business called Mortgage Analysis & Consulting LLC. This now defunct Virginia-based business advertised in Spanish-language media and accepted fees from homeowners to analyze their mortgage status and refer homeowners in jeopardy of foreclosure to a mortgage loan modification service. After Ms. Batres paid Mortgage Analysis & Consulting $150 to analyze her mortgage, the business referred her to Brown, Brown & Brown, P.C. to help her obtain a loan modification.[6]

Brown, Brown & Brown, P.C. ("BB&B") was a small Virginia law firm headed up by managing partner Christopher Brown, an attorney licensed in Virginia and the District of Columbia, but not licensed in Maryland. BB&B and Mr. Brown employed lawyers licensed to practice in Maryland who consulted with hundreds of Maryland homeowners facing foreclosure. Mortgage Analysis & Consulting referred the vast majority of these homeowners to BB&B, and this referral stream accounted for 90 percent of the homeowners who consulted BB&B during this time period. Ultimately, BB&B entered into at least 57 agreements with homeowners between June 2008 and March 2009. Under each agreement, a homeowner paid BB&B an amount varying from $2,500 to $7,500 up front before BB&B had rendered any services. In return, BB&B would agree to attempt to renegotiate the mortgage loan so that the homeowner could avoid foreclosure. In particular, the agreements provided that BB&B would (1) represent the homeowner in negotiations with the homeowner's lender, foreclosure defense, and possible litigation; (2) engage the appropriate party in discussions to renegotiate the terms of the mortgage loan; and if renegotiation was unsuccessful, (3) "assess the chances of success in state or federal court and costs involved" for an additional fee.[7]

On July 23, 2008, Miguel and Teresa Batres signed an agreement with BB&B and paid $1,500 of the $3,000 BB&B requested as an advance payment. Approximately six months after signing with BB&B, Miguel and Teresa Batres received a notice initiating a foreclosure action on their home along with a form notice from the Commissioner of Financial Regulation (the "Commissioner") advising homeowners in foreclosure of their potential remedies. Miguel and Teresa Batres believed that BB&B had not done anything to obtain a loan modification on their behalf, and they weren't alone. BB&B had made little effort to actually renegotiate any of the loans, as many homeowners had paid them to do. The Batreses never received a loan modification. In fact, BB&B did not obtain a loan modification for any of the 57 Maryland homeowners with whom it had signed agreements. Miguel and Teresa Batres eventually lost their home to foreclosure.[8]

The Batreses filed a complaint against BB&B with the Commissioner. After investigating BB&B, the Commissioner issued an order requiring BB&B to cease and desist on March 6, 2009, based on what the Commissioner had determined were violations of the Maryland Credit Services Business Act ("MCSBA"), Maryland Code, Commercial Law Article ("CL"), §14-1901 *et seq.*

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Chair's Message...

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The Litigation Section is still taking nominations for the Litigator of the Year. The criteria includes litigation skills and results, professionalism and civility, and extra-curricular contributions to the profession and the community. The deadline for nominations is April 11, 2017. The form for nominating someone for Litigator of the Year is included in this newsletter, and it is located on the Litigation Section's Website. This award is given prior to one of the Litigation Section's programs at the MSBA annual meeting in Ocean City in June 2017.

I hope to see you at one of our spring programs or in Ocean City this summer.

SAVE THE DATE

Annual Judge's Dinner &
Presentation of

The Honorable
Glenn T. Harrell, Jr.
Award of Judicial Excellence

April 27, 2017 6 p.m.
DoubleTree, Annapolis

Grossman...

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Glenn has spent enumerable hours educating law students, lawyers and judges. Glenn's cv evidences his dedication to legal education. While space here does not permit a full recitation of Glenn's accomplishments, I will note a few. He has been an adjunct professor at the University of Baltimore School of Law, The University of Maryland Francis King Carey School of Law and the Catholic University Columbus School of Law. He regularly participates in the Court of Appeals' Course for New Admittees to the bar and the CNA Loss Control Seminar.[4] Glenn has presented to bar associations and inns of court throughout our state as well as to the Maryland Judicial Institute. Glenn is a regular fixture at the MSBA Annual Meeting in Ocean City.

In his spare time, Glenn has served in leadership roles at the Bolton Street Synagogue, as a member of the Daily Record Editorial Board, and as a member of the Clarence M. Mitchell, Jr. Courthouse Centennial Committee. He has been painting for years and has recently developed an affinity for creating digital art.[5] His works hang in the homes and offices of lawyers throughout the state. Glenn makes cufflinks for his friends and owns and uses a pizza stone. In 2014, Glenn made his small screen debut on The House of Cards.[6]

In October 2011, I had the great fortune of being hired by Glenn as an assistant bar counsel. Over the years I have grown to appreciate not only his perfectly accessorized and tailored suits but also the grace with which he handles attorney discipline. Glenn is tough, to be sure. He also believes in redemption. He believes that people are inherently good. He knows that the hardest part of the job is not the investigation and prosecution of a disciplinary case but rather the use of discretion where discretion is just.

In his own words, Glenn has described our profession:

[M]y experience is that most attorneys try to do the right thing, to represent their clients within ethical bounds, and to seek justice. Many, I hope, most, experienced attorneys try to inculcate novices with a culture of civility and with a love for the profession that celebrates its achievements and grieves when lawyers fall short.[7]

In the years that I have worked with Glenn, his door has always been open. While those who enter may be subjected to a lecture on some little known historical fact or event, a recounting, in detail, of a classic American film or a diatribe on what is "wrong" with his computer, they will also receive thoughtful and considered legal advice and counsel. Glenn is generous with both his time and his knowledge. Glenn has had the great privilege of being married to Ellen for over forty years. The two have an adult son, Max, a daughter-in-law, Karen, and a granddog, Chewy. In 2015,

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Grossman...

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Glenn was awarded the Steven P. Lemmey Advancement of Public Service Award by the Maryland State Bar Association. In accepting the award, Glenn thanked Ellen, who he described as his "North Star and guiding light."

While Glenn is retiring from our office, I am comforted with the knowledge that he is not going far. I trust that he will remain an active member of our legal community and will continue to share his knowledge with anyone who cares to learn. When Glenn took over at the helm of our office in 2011, he sought to be "a Bar Counsel whom [we] can trust."[8] He has succeeded by any measure.

Endnotes

[1] A "mensch" is "someone to admire and emulate, someone of noble character. The key to being 'a real mensch' is nothing less than character, rectitude, dignity, a sense of what is right, responsible, decorous." Leo Rosten, The Joys of Yiddish*, McGraw-Hill (1968).*

[2] Glenn's reappearing alter ego, Dr. Wolfgang Helmut Grossman, III, has lectured at numerous legal education programs. Dr. Grossman is infamous for being the leading authority on Schmartypants Syndrome. Obviously, Wolfgang has education that supports his ability to diagnose such disorders. His training and experience remain dubious.

[3] Maryland Bar Journal, September/October 2010, 43-Oct Md. B.J. 62.

[4] Among practitioners, this seminar has come to be known as the "Glenn and Al Show." Glenn, along with his close friend and fierce opponent, Al Frederick, teach ethics using humor, style and showmanship in the best Vaudevillian tradition.

[5] Glenn's current digital application pieces are created under his pseudonym, Getsel.

[6] Glenn can be seen for approximately 30 seconds in Season 2, Episode 3 at 00:37.

[7] Maryland Bar Journal, September/October 2011, 44-Oct Md. B.J. 54.

[8] Maryland Bar Journal, September/October 2010, 43-Oct Md. B.J. 62.

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III. Review of the Major Components of the Principles

The Principles are designed to flow in a logical manner, to allow practitioners to easily find the principles which apply to a given situation involving ESI, while not losing sight of the major concepts that are applicable to all forms of discovery.

In the first section, titled "General Principles," the overarching concepts are reiterated to reinforce the goals the Principles are drafted to achieve. The reference to Fed. R. Civ. P. 1, as well as the discussion of cooperation, emphasizes not only the Rules, but suggested practice in this jurisdiction. Principle 1.02 details the types of information that parties may typically exchange to aid in the management of ESI. The discussion of "Proportionality" in Principle 1.03 suggests that parties should consider the factors set forth in Rule 26(b), and sets the tone for Section II of the Principles.

Section II provides useful and practical guidance for all the phases of electronic discovery. Principle 2.01 outlines five fundamental concepts for the conduct of preservation, providing a roadmap that attorneys of all levels of experience can apply. Four of these five concepts refer to Principle 1.03, which is a common theme in the ESI Principles, that the interpretation of each step of electronic discovery is best viewed with the backdrop of the proportionality paradigm envisioned in the Federal Rules. Principle 2.02 provides some helpful structure for parties conducting a discovery conference on how to properly and thoroughly consider ESI issues. Because counsel may require technical assistance with complicated ESI discovery, Principle 2.03 suggests that parties consider appointing an E-Discovery Liaison.

Principle 2.04 is a practical tool designed to provide a blue-print for attorneys to use when producing ESI. Naturally, parties cannot always agree on every aspect of the e-discovery process, and Principle 2.05 outlines a process consistent with the Local Rules for resolving these disputes.

Although brief, Section III serves an important function. As technology becomes more widely used in the discovery process, and attorneys have had more opportunity to experience and learn about ESI, Principle 3.01 explains that all attorneys who practice in the District should be familiar with (a) the electronic discovery provisions of the Federal Rules of Civil Procedure and the Rules of Evidence, (b) rules of professional responsibility applicable to electronic discovery and (c) the Local Rules and Discovery Guidelines.

The ESI Principles are unique because they include appendices with practical examples that attorneys can use in conducting

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their own cases. These appendices are valuable resources, generated in collaboration by attorneys from the District with the assistance of information technology, forensic, and e-discovery experts from around the country. They are intended to level the playing field by providing those unfamiliar with production specifications a readily-accessible menu of options. The appendices are: (1) Suggested Topics for ESI Discussions; (2) Sample Production Protocols; and (3) Metadata Reference Guide.

Appendix 1 to the ESI Principles sets forth suggested topics for ESI discussions between parties who participate in a conference as contemplated by ESI Principle 2.02. Appendix 1 explains that early discussions are often helpful in cases involving ESI. The suggested topics pertain to preservation of ESI, designation of ESI liaisons, ESI collection, search methodologies, ESI production and assertion of privileges. While every case has unique issues, including with respect to ESI, the topics suggested in Appendix 1 are designed to assist parties in preparing to confer on ESI matters, and serve as a foundation for cooperation between parties.

Appendix 2 offers two different approaches to production formats, the Hybrid Production Protocol (Appendix 2.1) and the Native Format Production Protocol (Appendix 2.2). While both protocols provide details for producing ESI in a format ready to be loaded into industry standard databases, there are differences between the two options. The Hybrid Protocol provides for documents to be produced in image format, with associated searchable text and metadata. This format necessitates upfront expenditures to convert ESI, much of which may never be used in proceedings. By contrast, the Native Protocol allows for ESI to be produced in the form in which it was created, used, and stored by the native application employed by the producing party in the ordinary course of business. For example, Microsoft Word documents would be produced in their native ".DOC" or ".DOCX" format. The main difference between these two options is that the Native Protocol may be less burdensome on the parties in terms of time and cost to produce ESI, but it does require parties to be slightly more technically proficient. Whatever production format the parties decide upon, these two options provide solid foundations and identify key considerations.

Finally, for many lawyers, the preservation and production of metadata can be a difficult concept to define and resolve. Metadata is often defined as "data about data" that is created by a computer system or application. Metadata is unlike other discoverable information because its import may flow from its probative value as relevant evidence, its utility in searching, sorting, and interpreting ESI, or both. The Metadata Reference Guide (Appendix 3) is a comprehensive, yet user-friendly guide that can help counsel understand and navigate many common issues associated with metadata. Appendix 3 defines in everyday language the technical aspects of metadata and important considerations related to the production of ESI. It is advisable that the parties discuss the preservation and production of metadata as early as possible and in conjunction with the format of production.

IV. Accounting for the 2015 Rule Changes

The 2015 Amendments to the Federal Rules of Civil Procedure emphasize the goal of securing "the just, speedy and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. To that end, the Rules re-emphasize that the scope of discovery should be "proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). The emphasis on proportionality is also reflected by amendments to specific discovery rules which refer to Rule 26(b)(1). *See e.g.,* Fed. R. Civ. P. 30(a)(2), (d); 31(a)(2); 33(a)(1).

In light of these amendments to the Rules, the ESI Principles were drafted to help implement the requirement of proportionality in e-discovery. For example, Principle 1.03 emphasizes that parties should apply the proportionality standards set forth in Fed. R. Civ. P. 26(b) to all phases of the discovery of ESI. The goal of proportionality in discovery is also reflected in ESI Principle 2.01(b)-(c), pertaining to preservation; ESI Principle 2.02(b)(5), which suggests phasing of discovery, where appropriate; and ESI Principle 2.02(b)(7), which suggests that parties discuss opportunities to reduce costs.

In 2015, Rule 26(f)(3) was amended so as to require parties to address issues about disclosure, discovery or preservation of ESI in the parties' discovery plan. ESI Principles 2.01 (pertaining to preservation of ESI) and 2.02 (pertaining to a conference of the parties) will assist the parties in satisfying this requirement of Rule 26(f).

V. The Future of the ESI Principles

The Sub-Committee realizes that the area of electronic discovery is constantly changing in part because volumes of ESI continue to grow and technology used to create ESI continues to change. As such, the Sub-Committee will monitor the effectiveness of the ESI Principles by considering "lessons learned" under the ESI Principles and whether revisions are appropriate. The Sub-Committee solicits feedback as counsel use – or choose not to use – the Principles. Comments, suggestions, and criticisms may be sent to the Sub-Committee Co-Chairs at: hfeldman@wtplaw.com (Howard R. Feldman); tbarnard@bakerdonelson.com (Thomas Barnard); dkinzer@bakerdonelson.com (David Kinzer).

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The Maryland State Bar Association Litigation Section

Asks you to:

NOMINATE A DISTINGUISHED MARYLAND LITIGATOR

For The 2016-2017 "Litigator of the Year" Award

Background Information and Instructions:

- In the areas below and on the second page, provide requested information about you and any information that is reasonably available to you about the nominee. You may attach extra pages, as necessary.
- Any person may make nominations. A person may make more than one nomination.
- Current members of the Section Council are not eligible to be nominated.
- To be eligible for nomination, a person must:
    1. Currently be licensed to practice in Maryland;
    2. Be a current dues-paying member of the MSBA;
    3. Practice predominately in the area of litigation;
    4. Practice predominately in Maryland; and
    5. Be actively engaged in the practice of law in the 12-month period prior to the nomination deadline.

- Criteria for evaluation of nominations:
    1. Assessment of litigation skills;
    2. Assessment of legal management skills;
    3. Results of litigation;
    4. Professionalism and civility;
    5. Extra-curricular contributions to the profession, i.e., bar service, service to judiciary, etc.; and
    6. Extra-curricular contributions to the community-at-large.

- The award will be presented at the MSBA annual meeting in June 2017 in Ocean City during the Section's annual meeting program.
- The Section Council will select the recipient. Please submit your completed nomination form by mail or e-mail, by the close of business on **April 11, 2017** to:

Hon. Kathryn G. Graeff, Chair
MSBA Litigation Section
Maryland Court Of Special Appeals
Robert C. Murphy Court of Appeals Building
361 Rowe Blvd.
Annapolis, MD 21401
Kathryn.graeff@mdcourts.gov

PAST AWARD WINNERS

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Ava E. Lias-Booker, Esquire	2015-2016

Nomination for "Litigator of the Year"

Information about You:

Name: _____

Law Firm/Employer: _____

Business Address: _____

_____

_____

Telephone No. _____

Are you related to the nominee by blood or marriage: Yes____ No____

(If yes, please describe relationship: _____)

Information about Nominee:
(Use additional sheets if necessary)

Name: _____

Law Firm/Employer: _____

Business Address: _____

_____

_____

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Telephone No. _____

Litigation experience (length of practice, experiences showing expertise and integrity, collegiality (including observance of the MSBA Code of Civility), etc:

Nomination for ***Litigator of the Year Award*** *(con't.)*

Contributions to Improving Litigation Practice (legislation, continuing legal education, community, etc.):

Personal Professional and Academic Accomplishments (bar, memberships and activities, professional association, etc.):

Other:

To the best of my knowledge, the nominee meets the criteria for nomination set forth in the instructions above.

_____

Signature of Person Making Nomination

ESI...

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Endnotes

[1] The Sub-Committee was comprised of a number of Maryland attorneys. In addition, significant contributions were made by Craig Ball, Esq., a member of the Texas Bar; Mr. Scott Fischer, a technologist from New York; and Mr. James Shoemaker, a litigation support specialist from Baltimore.

Voir Dire...

(continued from page 4)

be difficult…to fairly and impartially weigh the facts."[21]

The shift toward expanded *voir dire* is most apparent in the 2014 opinion of *Pearson v. State*. Although the Court addressed three issues pertaining to *voir dire*, its discussion of questions about associations with law enforcement and questions about strong feelings are most telling of the direction of *voir dire* in Maryland.

The Court in *Pearson* explicitly overruled the holding in *Davis* and adopted Chief Judge Bell's conclusion with respect to the law enforcement question. The Court held that, where the state's case relies substantially on evidence from law enforcement agencies, a trial court must, if requested, ask if any prospective juror has ever been a member of a law enforcement agency.[22] Moreover, in *Pearson*, the Court modified the strong feelings question. The Court discussed the holding in *Shim* and specifically addressed the format of the question. The Court stated that the two-part question impermissibly required prospective jurors to evaluate their own potential bias. The Court found that this directly contradicted its ruling in *Dingle*.[23] As a result, the Court abrogated *Shim*, *Sweet*, and *Thomas*, and rephrased the strong feelings question. The Court found that, upon request, a trial court must ask if any prospective juror has "strong feelings about the crime with which the defendant is charged?"[24]

IV. Ramifications

Imagine 100 prospective jurors sitting in a courtroom and participating in the jury selection process in a murder trial. The defendant's attorney requests that the judge ask the jury panel "do any of you have strong feelings about murder?" She does. One would expect, and hope, that every prospective juror would respond in the affirmative. Everyone should have strong feelings about murder. The question, as it is required to be phrased, necessarily requires follow-up questions with each prospective juror that responds. The time and resources spent on this jury selection just increased exponentially. Undoubtedly, the decision in *Pearson* places trial courts in a difficult position. Under *Shim*, the purpose of the question was clear—to identify prospective jurors who, as a result of prior experience, could not be fair and impartial. After the decision in *Pearson*, trial courts, unable to use the two-part question, are forced to improvise. Many trial courts now give a preamble to the strong feelings question in hopes that the number of responses will be minimal and, more importantly, relevant. Evidenced by the difference in opinions among the Court of Appeals judges, the expansion of *voir dire* will have advantages, but will certainly come at a cost. Trial courts constantly make decisions based on the needs of litigants and prospective jurors. As *voir dire* expands, trial courts will lose discretion, a notion that will be popular among some, and unpopular among

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Voir Dire...

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others. In addition, trial courts will have less ability to protect jurors from unnecessary and probing questions. On the other hand, the trial court will not have such broad discretion in deciding what questions to ask during *voir dire*. Litigants and their attorneys will be more equipped to strategically pick a jury, yet prospective jurors will spend even more time waiting and away from their responsibilities. Every jury is composed of individuals with independent thoughts, beliefs, and opinions. Whether the *voir dire* process is limited or expanded, it is impossible to know everything that will influence a juror's decision during deliberations. Perhaps Maryland will follow the suggestion of Judge Harrell and embrace the change.[25] Alternatively, the Court may continue to expand voir dire but remain a "limited *voir dire*" state. In the end, what matters most is that the selected jurors can listen carefully to the evidence and the court's instructions, deliberate respectfully with fellow jurors, and render a fair and impartial verdict.

Endnotes

[1] Voir dire, *Black's Law Dictionary (10th ed. 2014)*

[2] *U.S. Const. amend. VI; Md. Decl. of Rts. art. 21*

[3] See *Batson v. Kentucky, 476 U.S. 79 (1986) (holding that parties may not use race as a basis for preemptory challenges); Accord Rivera v. Illinois, 566 U.S. 148, 153 (2009) (holding that under* Batson*, exercising preemptory challenges based on race, ethnicity, or sex is unconstitutional).*

[4] See *Davis v. State, 333 Md. 27, 40 (1993).*

[5] See id.

[6] See Washington v. State*, 425 Md. 306, 312-13 (2012).*

[7] See Pearson v. State*, 437 Md. 350 (2014)(citing* Washington v. State*, 425 Md. 306 (2012)).*

[8] *See Handy v. State*, 101 Md. 39, (1905).

[9] Id.

[10] See generally *McGee v. State, 219 Md. 53, (1959) (affirming the trial court's refusal to ask questions regarding age and/or occupation and finding that the proposed questions were not directly related to matter at hand); Whittemore v. State, 151 Md. 309 (1926) (holding that a trial court may refuse to ask questions calling for a prospective juror's opinions on matters of law or seeking information as to how the juror would react to specified contingencies).*

[11] See generally *Davis v. State, 333 Md. 27, 42 (1993) (holding that a question asking prospective jurors of their associations with law enforcement failed to shed light on the issue of disqualification).*

[12] See id *at 37.*

[13] Id. *at 42.*

[14] *Judge Robert M. Bell became Chief Judge of the Court of Appeals in 1996, after the opinion in* Davis v. State. See Maryland Manual On-line; A Guide to Maryland & Its Government, *http://msa.maryland.gov/msa/mdmanual/29ap/former/html/msa11654.html (last visited Dec. 14, 2016).*

[15] See Davis*, 333 Md. at 57.*

[16] See generally *Dingle v. State, 361 Md. 1, 5 (2000) (Reversing the trial court's decision to ask whether an individual had been the victim of a crime and, if so, whether that would prevent him or her from being impartial but only instructing the prospective jurors to respond if there was an affirmative answer to both questions)*

[17] See id *at 17-18.*

[18] *Id. at* 23.

[19] See generally *State v. Thomas, 369 Md. 202 (2002) (Finding that the trial court committed reversible error by refusing to ask whether "any member of the jury panel [has] such strong feelings regarding violations of the narcotics laws that it would be difficult…to fairly and impartially weigh the facts at a trial where narcotics violations have been alleged?"); Sweet v. State, 371 Md. 1, 9 (holding that a strong feelings question similar to that in* Thomas *must also be asked where a defendant was charged with sexual molestation of a minor.)*

[20] Thomas*, 369 Md. at 223 (Battaglia, J. dissenting).*

[21] Pearson*, 437 Md. at 369.*

[22] See Pearson*, 437 Md. at 361.*

[23] See Pearson*, 437 Md. at 364.*

[24] Id.

[25] See Pearson v. State*, 437 Md. 350, 364 (2014) (Harrell, J. concurring) (encouraging the Court to expand voir dire as other states have).*

The Litigation Section Extends Sincere Thanks

to the contributors to this fall's publication…

• Thomas Barnard • Michael D. Berman
• Jamar R. Brown
• Howard R. Feldman
• The Honorable Kathryn Grill Graeff
• David Kinzer • Brian Kleinbord
• Lydia E. Lawless • Nora A. Truscello

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as a "high crime area." The group was loud and appeared to be "passing an alcoholic beverage back and forth," and one member of the group was observed throwing a glass bottle on the ground. One of the officers recognized one of the individuals as a "repeat offender" who had been banned from the Village Center.

As the group of uniformed officers approached the group, they announced, "Police. Stop. Don't run." At that point, the appellee, Jamal Sizer, "turned and immediately began sprinting away." Two officers gave immediate pursuit and issued "multiple commands to stop running." Because the officers were on bikes and Sizer was on foot, the officers easily caught up to Sizer. As the officers were about to take Sizer to the ground, he threw up his hands and yelled, "Okay, I have a pistol. I have a pistol."

As two officers were wrestling Sizer to the ground, a third officer arrived on the scene. This officer recognized Sizer from prior encounters and knew that Sizer had outstanding arrest warrants for distribution of marijuana and a violation of probation. The police informed Sizer of the outstanding warrant and placed him under arrest. As he was being arrested, Sizer announced to the officers, "I have a piece and pills on me."

At the scene, the police recovered from Sizer's backpack a .38 caliber revolver loaded with five rounds of ammunition. At the station, the police conducted a further search of Sizer's belongings, during which they found four additional rounds of ammunition in the backpack and a bag of narcotics in Sizer's sock.

Sizer moved to suppress the evidence recovered from him, arguing that the police did not have reasonable suspicion to detain him, and that the discovery of the arrest warrant did not cure the illegal stop.

The Court of Special Appeals reversed the suppression court's ruling. First, the Court, citing the Supreme Court's ruling in *Illinois v. Wardlaw*, 528 U.S. 119 (2000), held that Sizer's unprovoked flight from the police, in a high crime area, constituted reasonable articulable suspicion to support a *Terry* stop for further investigation. Moreover, a suspect who physically resists being detained can be physically restrained, and this includes being tackled and/or being handcuffed. Accordingly, there was no improper use of force in this case. As of the moment Sizer was wrestled to the ground, the police had reasonable suspicion to stop him, and the ensuing search of the backpack for weapons would also qualify as a reasonable *Terry* frisk for weapons.

Alternatively, the Court held that even if the *Terry* stop had been unconstitutional, the prior existence of two warrants for Sizer's arrest constituted an independent source for the discovery of the .38 caliber revolver and the plastic baggie of 27 pills taken from Sizer's sock. Judge Moylan noted that the pre-existing arrest warrant rendered the *Terry* stop "totally irrelevant." The contraband was lawfully recovered by virtue of the lawful arrest warrant, and thus there could be no "fruit of the poisonous tree" in this case. Judge Andrea Leahy joined Moylan's opinion.

Judge Graeff wrote separately to say that while she agreed with much of the majority opinion, (including that the police had reasonable suspicion to detain Sizer, and that the discovery of the arrest warrant served as a separate basis to support the search), she disagreed on the theory of why the arrest warrant cured any initial illegality. According to Judge Graeff, it was the attenuation doctrine, not the independent source doctrine, that applied to prevent exclusion of the evidence.

Judge Graeff would have followed the rationale of the United States Supreme Court in *Utah v. Strieff*, 136 S. Ct. 2056 (2016), and the Maryland Court of Appeals in *Cox v. State*, 397 Md. 200 (2007) and *Myers v. State*, 395 Md. 261 (2006). Those cases all hold that evidence discovered on the defendant's person was admissible because the unlawful stop was sufficiently attenuated by the discovery of the pre-existing arrest warrant, which gave the police the police authority to conduct the search.

III. Family

***Morris v Goodwin*, __ Md. App. __ (filed Oct. 26, 2016)**

Though the doctrine of annulment does not arise all that often (a quick Westlaw search reveals that there have been a scant ten cases in the last 50 years squarely dealing with the doctrine), the recent case of *Morris v Goodwin*, __ Md. App. __ (filed Oct. 26, 2016), presented an interesting question: whether a marriage can be annulled by someone other than the spouses.

This case began when Katherine Morris married Isaac Jerome Goodwin on August 3, 2011. At the time of the wedding, Morris was a fourth-year student at the University of Maryland, College Park, and Goodwin was a Staff Sergeant in the U.S. Army stationed at Fort Bragg, North Carolina. Following the wedding, Goodwin returned to Fort Bragg, and Katherine continued to reside on campus. Less than a year after the marriage, however, Katherine committed suicide on or about May 6, 2012.

Katherine's mother, Marguerite Morris, was appointed personal representative of Katherine's estate, and, on June 14, 2013, she filed in the Circuit Court for St. Mary's County a petition to annul Katherine's marriage to Goodwin on the basis of Goodwin's fraud. Specifically, the complaint alleged that Goodwin married Morris in order to increase his military housing allowance, that he continued to have sexual relationships with several other women during the course of the marriage, and that Goodwin kept for his own

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personal use an approximately $700 a month military allowance and did not provide any care or benefits to Morris.

After several motions for default judgment were denied, on June 5, 2014, the Circuit Court, without holding a hearing, issued a Memorandum Opinion and Order dismissing appellant's petition for annulment with prejudice. The Circuit Court concluded that Marguerite Morris lacked standing to sue for an annulment on behalf of her daughter. Mrs. Morris filed a notice of appeal on June 30, 2014.

The Court of Special Appeals, in an opinion by Judge Woodward, affirmed. First, the Court set forth some background on the doctrine of annulment and noted that the law does not favor annulments of marriages, and it has "long been a settled judicial policy to annul marriages only under circumstances and for causes clearly warranting such relief." The Court noted that fraud is a recognized ground for annulment in Maryland, but only when the fraud relates to essential matters affecting the health or well-being of the parties themselves.

The pivotal issue in this case was whether annulment-by-fraud rendered a marriage void, or merely voidable. Maryland, like the majority of jurisdictions, has recognized the distinction between "void" and "voidable" marriages. The main difference between void and voidable marriages is whether, with proper consent, the parties could have established a valid marriage. If not, the marriage is considered void. Bigamous and incestuous marriages are examples of void marriages because they are invalid regardless of the parties' consent. Voidable marriages, on the other hand, are ones in which the parties could have lawfully married, but a defect in the marriage goes to a party's consent. A marriage procured by duress or undue influence, for example, is voidable.

In this case, the Court of Special Appeals decided, as a matter of first impression in Maryland, that marriage procured by fraud is voidable, rather than void, because a marriage procured by fraud goes to the legal adequacy of the party's consent, rather than whether the parties could have established a valid marriage *ab initio*.

The next question for the Court was one of standing: when and by whom may a suit for an annulment of such a marriage be brought? The Court noted that the first question had previously been answered by the Court in dicta, in which the Court stated that voidable marriages may only be challenged while the married parties are still alive. The Court adopted that principle as a holding in this case. The Court thus followed the majority rule, which it found was "soundly based" on public policy. The Court observed that the marriage contract is "so uniquely personal" that any action to annul or dissolve it cannot be commenced after the death of either of the parties to the marriage except on the ground that the marriage was void from its inception.

Further, the Court found that since the right to seek annulment of a marriage on a voidable ground lapses with the death of either spouse, an executor necessarily lacks the power to seek annulment of a voidable marriage. The Court thus held that an action to annul a marriage on the ground of fraud can only be brought by the defrauded spouse while both parties to the marriage are living.[4]

In this case, appellant filed the annulment petition over a year after Morris died. Because appellant's petition for the annulment of Katherine's marriage to appellee was based on fraud, a voidable ground, the Court concluded that appellant, as personal representative of Katherine's estate, did not have standing to bring an action challenging Katherine's marriage to appellee on Katherine's behalf. Accordingly, the trial court did not err by dismissing appellant's petition with prejudice.

Finally, the Court held that, although the circuit court erred in dismissing her petition with prejudice without holding a hearing, the Court saw "no purpose" in remanding the case to the circuit court to hold a hearing when the court's dismissal was mandated by law based on lack of standing. Such a remand, the Court said, would be "an exercise in futility and a waste of judicial resources." Accordingly, the Court of Special Appeals affirmed the judgment of the circuit court, notwithstanding its error in dismissing appellant's petition without first holding a hearing.

Brian Kleinbord is a Senior Assistant State's Attorney in the Montgomery County State's Attorney's Office, where he is the Chief of the Collateral Review Division and the Director of Training. Previously, Mr. Kleinbord was an Assistant Attorney General and Chief of the Criminal Appeals Division of the Office of the Attorney General from 2008 through 2016.

Endnotes

[1] One of the more interesting arguments in this case was that, by putting the word "MIERDA" on the commemorative agricultural plates, Mitchell was making some sort of political statement in favor of environmental causes such as organic farming or, possibly, composting. Perhaps not surprisingly, Mitchell did not press this argument in the Court of Appeals, and the Court deemed it "of no real moment to our analysis."

[2] Alan Sternstein previously wrote an excellent review of the Court of Special Appeals' opinion in this case in a post on the Litigation Section's Maryland Appellate Blog. See *http://mdappblog.com/2015/12/29/with-mitchell-v-maryland-motor-vehicle-admin-hard-cases-still-make-bad-law/, last visited December 30, 2016).*

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Appellate Update...

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[3] It would seem that this opinion was destined to be written by the 2015-2016 "Judge of the Year" award winner Judge Glenn Harrell, whose pop culture bona fides have been well-documented. (See., e.g, http://thedailyrecord.com/2015/04/02/the-resident-humorist-on-the-court-of-appeals/ last visited, December 30, 2016.) Judge Harrell opened this opinion with a reference to "Seinfeld," asking "What does Petitioner, John T. Mitchell, have in common with "Seinfeld's" Cosmo Kramer?" recalling the "Seinfeld" episode in which Kramer was erroneously sent vanity plates intended for a proctologist bearing the word "ASSMAN." (Episode 107 (27 April 1995)). The opinion also contained a George Carlin reference, with Judge Harrell noting that the Court was "mindful" of the risk of "being haunted by the spirit of the late comedian and social commentator George Carlin."

[4] The Court noted that if Morris had initiated an annulment action on her own behalf prior to her death, appellant, as Katherine's personal representative, may have been permitted to continue such lawsuit, because Katherine, herself, would have made the initial decision to attack her own marriage.

Case Update...

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BB&B requested a contested case hearing, and the Commissioner referred the matter to the Office of Administrative Hearings for a hearing and proposed decision by an administrative law judge ("ALJ"). Following an evidentiary hearing, the ALJ issued a proposed decision concluding that BB&B had violated the MCSBA. The ALJ recommended that the Commissioner issue a final cease and desist order and assess a civil monetary penalty in the amount of $114,000 against BB&B. Finally, the ALJ found that BB&B's violations of the MCSBA had been willful, and accordingly, recommended that the Commissioner order that BB&B pay treble damages to Miguel and Teresa Batres and the other homeowners who signed agreements with the law firm.[9] On May 5, 2011, the Deputy Commissioner of Financial Regulation issued a proposed order adopting the ALJ's findings and recommended order, to which BB&B took exceptions. Following an exceptions hearing, the Deputy Commissioner issued a Final Order that (1) concluded that BB&B and its managing partner Christopher Brown had violated MCSBA, (2) declared BB&B's agreement with the Batreses and all Maryland homeowners void, (3) ordered the law firm to cease and desist from engaging in any credit services business activities with Marylanders, (4) held BB&B and Mr. Brown jointly and severally liable for a civil monetary penalty of $114,000, and (5) directed BB&B and Mr. Brown to pay a total of $720,600 as treble damages to the 57 Maryland homeowners, including the Batreses.[10] BB&B filed a petition for judicial review in the Circuit Court for Baltimore City, and argued that the MCSBA did not apply to it and that even if it did apply, BB&B's violations of the statute were not willful. The Circuit Court reversed the Deputy Commissioner's decision on the basis that BB&B's agreements with Maryland homeowners were for legal services, not credit services; therefore, the MCSBA did not apply to BB&B.[11] The Court of Special Appeals affirmed the decision of the Circuit Court in an unreported opinion from which the Commissioner appealed to the Court of Appeals. This case invited the Court of Appeals to articulate whether and to what extent a law firm is required to be licensed as a credit services business under the MCSBA. The Court was asked to consider two questions: (1) Did BB&B's business activities – evidenced by its agreements with Maryland homeowners – fall within the definition of "credit services business" under the MCSBA?, and, if so, (2) did BB&B qualify for the MCSBA's attorney exemption? In a unanimous decision, the Court held that the MCSBA requires a law firm to obtain a license to operate as a credit services business, when it engages in credit services business activities "on a regular and continuing basis."[12] Turning to the statutory framework of the MCSBA, the Court explained that the law places restrictions on individuals and entities who offer, in return for the payment of money, to assist consumers in

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obtaining credit. The MCSBA refers to such an individual or entity as a "credit services business." The law defines a "credit services business" as a person who sells – or represents that such person will provide or perform, in return for payment of money – the service of obtaining an extension of credit for a consumer where the extension includes the right to defer payment of debt primarily for personal, family, or household purposes.[13] The Court reasoned that this definition applied to BB&B's actions in offering and agreeing to renegotiate the terms of mortgage loans on behalf of homeowners in default. The Court explained that renegotiating the key terms of a mortgage loan in default means seeking to modify terms concerning the principal, interest rate, and length of the loan term.Any modification of such terms of a distressed mortgage loan would inevitably result in a deferral of the original payment terms, and any such deferral amounted to "obtaining an extension of credit" for primarily "personal, family, or household purposes" as defined in the MCSBA.[14] Therefore, when BB&B offered to renegotiate a mortgage loan for a Maryland homeowner facing foreclosure, it was offering to obtain an extension of credit as a credit services business under the MCSBA.[15] The Court also held that BB&B was not entitled to the attorney exemption from the MCSBA's requirement that it be licensed as a credit services business. The Court explained that to qualify for the attorney exemption, the attorney engaged in a credit services business must (1) be licensed in Maryland, (2) render the services within the course and scope of the individual's practice as a lawyer, and (3) not engage in the credit services business "on a regular and continuing basis."[16] Each prong of the attorney exemption test must be met for the exemption to apply.[17] The Court found that there was substantial evidence in the administrative record that BB&B did not satisfy the third prong of the attorney exemption test, because it engaged in a credit services business on a regular and continuing basis. Evidence adduced at the administrative hearing supported the Court's conclusion: BB&B, a small out-of-state law firm, consulted with hundreds of Maryland homeowners and entered agreements with 57 of them in the nine months between June 2008 and March 2009. These consultations and agreements with Maryland homeowners also constituted a very significant part of BB&B's business and the work of its Maryland attorneys during this time period.[18] BB&B argued that all Maryland lawyers qualify for the MCSBA attorney exemption. The Court flatly rejected this argument, noting that such a claim would render the third prong of the attorney exemption test superfluous. The Court explained that this prong reflected the General Assembly's intent to not exempt all practicing Maryland attorneys from the MCSBA's licensing requirement by imposing an additional limitation that only those who do not regularly engage in credit services business will receive the benefit of the attorney exemption. Therefore, the attorney exemption did not apply to BB&B because it engaged in credit services business activities during the relevant period on a regular and continuing basis.[19] The Court's holding in *Brown, Brown, & Brown, P.C.,* requiring law firms like BB&B which regularly engage in credit services business activities with Maryland consumers like Miguel and Teresa Batres to be licensed under the MCSBA, highlights important themes for regulatory, business, and legal communities. This case underscores the need for regulatory safeguards that provide critical protection to society's most vulnerable citizens when systemic economic and political calamities, like the financial crisis of 2008, expose them to predatory business practices. Importantly, this case also cautions members of the Maryland private bar to take great care to keep in sharp focus the often blurred lines between the practice of law and the business opportunity the practice provides. As *Brown, Brown, & Brown, P.C.,* clearly demonstrates, the Court of Appeals remains unwavering in its charge to hold Maryland lawyers to the highest legal, ethical, and professional standards. We at the bar should take heed.

Endnotes

[1] http://money.cnn.com/2009/01/15/real_estate/millions_in_foreclosure/

[2] *Id.*

[3] http://www.realtytrac.com/news/foreclosure-trends/maryland-foreclosure-activity-up-71-percent-in-2008/

[4] http://www.nbcwashington.com/investigations/Skyrocketing-Maryland-Foreclosures-Are-Tail-End-of-Housing-Crisis-238656431.html

[5] Jason N. Houle & Michael T. Light, *The Home Foreclosure Crisis and Rising Suicide Rates, 2005 to 2010,* Am. J. Pub. Health, e1 (2014).

[6] *Brown, Brown, & Brown, P.C.,* 449 Md. at 355.

[7] *Id.* at 353-354.

[8] *Id.* at 355-356.

[9] *Id.* at 356-357.

[10] *Id.* at 357-358.

[11] Having found that the MCSBA did not apply, the Circuit Court did not consider whether any violations by BB&B were willful. The Court of Appeals also declined to consider this issue, but instructed the Circuit Court to do so on remand.

[12] *Id.* at 370.

[13] CL § 14-1901(e)(1)(ii).

[14] *Id.*

[15] *Brown, Brown, & Brown, P.C.,* 449 Md. at 365.

[16] CL § 14-1901(e)(3)(vi).

[17] *Brown, Brown, & Brown, P.C.,* 449 Md. at 365-366.

[18] *Id.* at 366-367.

[19] *Id.* at 367-370.

SAVE THE DATE

Criminal Practice in District Court

March 24, 2017
Sheraton Columbia

Program 2-5pm,
with reception to follow

Litigating Family Law Appeals

April 18, 2017
Details to follow

Maryland State Bar Association
Litigation Section
520 West Fayette Street
Baltimore, Maryland 21201

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