The
MARYLAND LITIGATOR

MSBA LITIGATION SECTION FEBRUARY 2015

Message from the Chair

By John P. Markovs

"*Difficulties mastered are opportunities won*"
– Winston Churchill.

This quote is a source of inspiration for me. When we encounter difficulties during our legal careers, it is often our bar colleagues who help us on the path forward. Looking back on my own experiences over the last 25 years, I cherish my membership in MSBA and the relationships that I have with lawyers who took the time to mentor and to help me develop as a trial lawyer. Although critical thinking, trials skills, and managing clients' expectations remain important to a successful legal career, the "business" of law has changed the playing field. The traditional path after graduating from law school meant working for a firm, the government, or a judicial clerkship. Jobs for new graduates were not as difficult to come by as they are today.

The work you perform early in your career lays the foundation for your success. Legal acumen is forged by hard work and, if you are fortunate enough, through the supervision of experienced lawyers and judges. These opportunities are reduced for our newest members of the bar. Graduates face a very competitive job market that many senior members of the bar did not have to overcome. Firms have evolved from pyramid partnerships to more linear business models with fewer associates hired per partner. There are hiring freezes for state and local governments in spite of the increased demands placed on those lawyers. Many graduates have difficulty securing their first legal jobs and gaining that all important practical experience in a mentored environment. As the adage goes, there really is no substitute for experience so the Litigation Section is doing its part to help our members gain valuable training by offering practical litigation skills programs. Our bar is strengthened by taking on the difficulties facing our new members. Please encourage new lawyers to join the MSBA-Litigation Section and to attend our programs.

An outstanding trial skills program was held on November 21, 2014. The Litigation Section co-sponsored with the Litigation Institute for Trial Training of the American Bar Association, the American College of Trial Lawyers (MD Chapter), the Federal Bar Association (MD Chapter), and MSBA CLE Department a program titled "Anatomy of a Trial - One Day Bootcamp Trial Training for Young Lawyers." The program allowed new lawyers the opportunity to hear lectures and live presentations of opening statements through closing arguments. I want to thank The Honorable Marvin J. Garbis and Paul Mark Sandler for their roles in making the program a success. Judge Garbis was the presiding judge and Paul Mark Sandler organized the program and the presenters. The program sold out three months in advance which reflects our newest members' appetite for trial advocacy skills.

It is testament to the great trial bar that we have in Maryland that so many talented judges and lawyers are willing to participate

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Social Media and Juror Contact: Lawyers Still Have to Play by the Rules

By Richard J. Berwanger, Jr., Esq. and Erin A. Risch, Esq.

It is no secret to the legal profession that social media websites, such as Facebook, Twitter, LinkedIn, and Google+, have impacted the way we practice law. Such websites offer a unique set of tools that lawyers in all practice areas, especially litigation, can use to enhance their ability to investigate a case. Moreover, a client's or opposing party's social media presence can offer litigators a wealth of material, both helpful and hurtful, for discovery and trial. The rise of social media, however, has also complicated many ethical issues that attorneys face. Indeed, social media websites did not exist when most ethics rules were drafted, which can make it difficult to apply those rules to the current world of instant online connectivity. As a result, members of the legal profession must now carefully consider how we can use social media as part of our practice while maintaining the ethical standards set forth in our Rules of Professional Conduct.

In April 2014, the American Bar Association's Standing Committee on Ethics and Professional Responsibility (the "ABA Standing Committee") addressed the issue of whether attorneys may review the social media content of jurors and prospective jurors in connection with trial.[1] Indeed, in Formal Opinion 466, the ABA Standing Committee discussed the circumstances under which an attorney is permitted to review a juror's or potential juror's social media entries, and what obligations an attorney has if the attorney witnesses a juror's improper conduct through the use of social media.[2]

ABA Model Rule of Professional Conduct 3.5(b) prohibits an attorney from holding *ex parte* communications with jurors and prospective jurors during a proceeding unless authorized to do so by law or Court Order. The ABA Standing Committee opined that a lawyer's "passive review of a juror's website or [social media content], that is available without making an access request, and of which the juror is unaware, does not violate [Model] Rule 3.5(b)."[3] The Committee reasoned that "the mere act of observing that which is open to the public would not constitute a communicative act that violates [Model] Rule 3.5(b)."[4] The Committee, however, found that a lawyer may *not* send a request to access a juror's or potential juror's social media content under the Model Rules.[5] The Committee opined that a request to access information that a juror or potential juror has not made public is considered a communication to the juror or potential juror, and is therefore improper.[6]

Maryland's version of Model Rule 3.5(b), Maryland Rule of Professional Conduct ("MRPC") 3.5(a)(3), prohibits attorneys from having *any* communication with any member of the jury or anyone known to be on the jury list in a matter with which the attorney is connected. The language of MRPC 3.5(a)(3) appears to be so substantially similar to ABA Model Rule 3.5(b) that a similar analysis regarding contact with jurors via social media websites would likely apply. That is, nothing in MRPC 3.5(a)(3) appears to prohibit attorneys from viewing jurors' and prospective jurors' social media content that is publicly accessible without the attorney initiating an "access request" through the social media website in question. If, however, an attorney initiates a

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Glenn v. CSX Transp., Inc. and the Licensee/Invitee/Trespasser Distinction in Maryland Tort Law

By Harmon L. (Monty) Cooper, Esq.

In November 2014, the U.S. District Court for the District of Maryland decided a case that offers a primer in Maryland tort law regarding the distinction between licensees, invitees, and trespassers in negligence claims. Given that many litigators have not reviewed this category of tort law since law school, *Glenn v. CSX Transp., Inc.*, No. CIV.A. RDB-14-802, 2014 WL 6065664, at *1 (D. Md. Nov. 12, 2014) provides an excellent refresher.

In *Glenn*, Plaintiff, Richard Glenn, sued Defendant, CSX Transportation, due to injuries Plaintiff sustained while attempting to pass between the cars of a train located on Defendant's railroad tracks in Baltimore City. In the process of going between the train's cars, Plaintiff walked along a well-worn footpath that had been created due to pedestrian traffic over time.

At the time of the incident, Plaintiff had just finished cutting lawns on the road near the tracks. In addition, the train was long enough that Plaintiff could not see the beginning or the end of the train. While attempting to cross, without warning, the train began to move, causing Plaintiff to fall onto the tracks. While there, the train's wheel ran over Plaintiff's right foot and severed his toes, which eventually led to doctors amputating his leg.

Based on the incident and Plaintiff's injury, Plaintiff filed suit in the Circuit Court for Baltimore City, seeking damages for Defendant's alleged breach of duty to Plaintiff because of its allegedly willful and wanton, negligent, and abnormally dangerous conduct. The case was eventually removed to federal court.

Upon filing its motions to dismiss, Defendant argued the following: Plaintiff's claim for wanton conduct should be dismissed because Plaintiff had alleged facts that were mere inaction – not willful or wanton conduct; Plaintiff's negligence claim should be dismissed because Plaintiff was a trespasser, not an invitee or licensee; and Plaintiff's "abnormally dangerous activity" claim should be dismissed because Plaintiff failed to show that Defendant's simple operation of a railroad could rise to such a level under the law.

In the end, the court agreed with the railroad company. In the Order, the court immediately tackled the negligence issue: i.e. whether Plaintiff was a licensee, invitee, or trespasser. The crux of Plaintiff's argument was that Defendant was negligent because (1) it did not have any footbridge, signs, watchmen, or other personnel to monitor whether anyone was in a vulnerable location at the time the train started moving and (2) it did not issue a warning before beginning to move the train. In response, Defendant argued that it owed no duty to Plaintiff to refrain from acting negligently because Plaintiff was a trespasser at the time of the incident.

Under Maryland law, the duty a defendant owes to a plaintiff is contingent on which classification applies to the plaintiff: licensee, invitee, or trespasser. *Sherman v. Suburban Trust Co.*, 384 A.2d 76, 79 (Md. 1978). There are two types of licensees: a licensee by invitation and a bare licensee. A licensee by invitation is "a social guest and is owed a duty of reasonable care." *Wagner v. Doehring*, 553 A.2d 684, 686-87 (Md. 1989). "A bare licensee is one who enters upon property, not as a social guest, but for his or her own convenience or purpose and with the landowner's consent." *Id.* at 686-87.

The court ultimately held that neither licensee-type applied here. Plaintiff had not alleged facts to show that he was a social guest (thus not a licensee by invitation) and Defendant had never given its consent to allow Plaintiff to cross the tracks (thus not a bare licensee).

Under Maryland law, an invitee is "defined as one permitted to remain on the premises for purposes related to the owner's business." *Id.* at 686. Further, Maryland recognizes the doctrine of "implied invitation," as discussed in *Crown Cork & Seal Co. v. Kane*, 131 A.2d 470, 474 (Md. 1957). Under the doctrine, a plaintiff can be considered an invitee if the plaintiff entered the property because he was led by the owner's conduct to believe that the property was intended to be used in the manner in which the plaintiff used it. Further, to satisfy the doctrine, the plaintiff must show that his use was in accordance with the property's design.

The court did not find Plaintiff to be an invitee either. It reasoned that because Plaintiff attempted to cross the railroad tracks in order to go home, he was not on the premises for a purpose related to Defendant's business – thus not an invitee. Plaintiff was not an implied invitee either because he had not shown that anything in the track's design allowed Plaintiff to cross over it; Plaintiff had not satisfied the doctrine merely

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Court of Special Appeals Reviews Mechanics of Local Government Tort Claims Act

By Ann M. Sheridan, Esq.

The Court of Special Appeals recently provided a comprehensive overview of the Local Government Tort Claims Act[1] ("LGTCA" or the "Act") in *Holloway-Johnson v. Beall*.[2] The appeal arose from a wrongful death suit filed by a woman, Connie Holloway-Johnson, whose son, Haines Holloway-Lilliston ("Holloway-Lilliston"), had been killed in a motor vehicle collision involving a Baltimore City police officer, Timothy Everett Beall ("Officer Beall").[3] Officer Beall had been in pursuit of Holloway-Lilliston when his police cruiser struck Holloway-Lilliston's motorcycle causing Holloway-Lilliston's death.[4] Ms. Holloway-Johnson provided timely notice of her claim to the State Treasurer and the City of Baltimore[5] before filing an action against Officer Beall in the Circuit Court for Baltimore City for negligence, gross negligence, battery, and a violation of Article 24 of the Maryland Declaration of Rights.[6] The action sought compensatory damages and punitive damages of $20 million.[7]

The circuit court granted Officer Beall's motion for judgment on the gross negligence, battery, constitutional, and punitive damages claims, so only the negligence claim was submitted to the jury for deliberation.[8] The jury found in favor of the plaintiff on the negligence claim and returned a verdict in the amount of $3,505,000.[9] Officer Beall then moved for a new trial or in the alternative to revise the judgment.[10] The circuit court granted Officer Beall's motion to reduce the judgment to $200,000 in accordance with the LGTCA.[11] The plaintiff appealed, arguing that: (1) Officer Beall waived the protections of the LGTCA by failing to raise the issue until after the verdict and judgment had been entered, and (2) the circuit court erred in granting Officer Beall's motion for judgment on the claims for gross negligence, battery, violation of Article 24, and punitive damages.[12] The Court of Special Appeals affirmed the judgment of liability on the negligence claim, and reversed and remanded on all other judgments.[13]

Addressing the plaintiff's first issue, Judge Moylan began with an explanation of the mechanics of the LGTCA.[14] The Act requires the plaintiff to sue the local government employee directly.[15] However, if the employee meets the qualified immunity provisions[16] of the statute – *i.e.*, has acted within the scope of his or her employment and without actual malice – the plaintiff may not execute a judgment against the employee.[17] Instead, the plaintiff must execute the judgment against the local government whose liability is capped at $200,000 per individual claim, and $500,000 per occurrence.[18] The Act benefits (1) the plaintiff by providing a source of funding for a judgment, (2) the employee by protecting his assets from the execution of a judgment, and (3) the local government by capping its liability at $200,000.[19] Because the statutory damages cap exists solely for the benefit of the local government, it may not be waived by the employee.[20] Thus, Officer Beall's failure to raise the damages cap until after the entry of the judgment did not constitute a waiver of the cap.[21] Additionally, the damages cap "is exclusively a post-trial phenomenon, affecting only the ability of a successful plaintiff to execute on a judgment."[22] It does not act to reduce the nominal judgment.[23] In any event, the cap is a statutory limitation on a waiver of governmental immunity and, thus, only the General Assembly may alter it.[24] "Officer Beall did not possess any remote authority, expressly or passively, to waive the cap, no matter what he did or did not do."[25]

Although the Court determined that the damages cap had not been waived, it held that the evidence was legally sufficient to create a jury issue on plaintiff's claims of gross negligence, battery, violation of Article 24, and punitive damages.[26] The plaintiff, therefore, was entitled to a retrial on those claims.[27] If, on retrial, the jury concludes that Officer Beall acted with malice, the plaintiff may then execute her judgment against the Baltimore City Police Department for up to $200,000 and against Officer Beall for any excess judgment.[28] The Police Department could then seek indemnification from Officer Beall for reimbursement of the amount it had been required to pay on his behalf.[29]

Endnotes

[1] Md. Code Ann., Cts. & Jud. Proc., § 5-301, *et seq.* (West 2014).
[2] 220 Md. App. 195 (2014) (Moylan, J.)
[3] *See id.* at 202.
[4] *See id.* at 205-06.
[5] The Court of Special Appeals explained that the Baltimore City Police Department is a hybrid entity – a state agency for certain purposes and a city agency for other purposes – but that it is considered a unit of local government for purposes of tort law. *See id.* at 212.
[6] *See id.* at 203.
[7] *See id.*
[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *See id.*
[12] *See id.* Officer Beall cross-appealed, contending that the court erred in denying his motion for judgment on the negligence claim because he was entitled to statutory immunity as the operator of an emergency vehicle in emergency service. *See id.* at 204; *see also* Md. Code Ann., Transp. § 19-103(b) (West 2014). The Court of Special Appeals determined that Officer Beall was not entitled to immunity under this statute because, shortly prior to the collision, he had received an order from his shift commander to "break off the pursuit." *Holloway-Johnson*, 220 Md. App. at 234.
[13] *See id.* at 237.

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Court of Appeals Clarifies Standards in Wage Payment and Collection Law Cases

Regarding the Recovery of Unpaid Overtime Wages, the Burden of Establishing a Bona Fide Dispute (or Lack Thereof), and the Proper Calculation of Enhanced Damages

By N. Tucker Meneely, Esq.

In *Peters v. Early Healthcare Giver, Inc.*, 439 Md. 646 (2014), a unanimous Court of Appeals "tread[ed] new ground" concerning Maryland's Wage Payment and Collection Law ("WPCL"), Md. Code, § 3–501 *et seq.* of the Labor and Employment Article ("LE"), and reaffirmed a prior decision concerning the scope of the law. In an opinion authored by Judge Sally D. Adkins, the Court held that individuals have a right to bring a private cause of action under the WPCL to recover unlawfully withheld overtime wages. Regarding which party bears the burden of demonstrating a bona fide dispute over the withholding of wages—a threshold determination before the trier of fact may award treble or "enhanced" damages—the Court concluded that the employer bears that burden because it is the party who withheld the wages. With respect to enhanced damages, the Court held that three times the amount of wrongfully withheld wages—not treble damages plus the wrongfully withheld wages—was the maximum damages that an employee could recover in such an action.

Appellant, Muriel Peters, previously worked as a certified nursing assistant for Appellee, Early Healthcare Giver, Inc. ("EHCG"), where she provided in-home care for an elderly patient of EHCG. Peters regularly worked 119 hours in every two-week pay period, and she always received $12 per hour, even for hours she worked in excess of 40 hours per week. After leaving EHCG, Peters sued EHCG in the Circuit Court for Montgomery County, asserting that EHCG unlawfully withheld her overtime wages.

The trial court initially found in favor of EHCG, holding that Peters's work fell under the Fair Labor Standards Act ("FLSA"), which it held preempted Maryland law and exempted EHCG from paying overtime. On appeal, the Court of Special Appeals reversed, holding that the FLSA did not apply and remanding the case for the trial court to consider whether Peters was entitled to recover overtime wages under the WPCL or the Maryland Wage and Hour Law ("WHL").

On remand, Peters asserted a claim under the WPCL and the WHL, seeking unpaid overtime wages as well as treble damages under LE § 3-507.2(b). The trial court awarded her $6,201 in unpaid overtime wages, but it declined to award her treble damages.

Peters noted an appeal to the Court of Special Appeals and filed a Petition for Writ of Certiorari with the Court of Appeals, which the Court of Appeals granted before the lower appellate court could hear the case. The Court of Appeals tackled three main issues in its decision: (1) whether overtime wages were recoverable under the WPCL; (2) which party bears the burden of producing evidence regarding a bona fide dispute over withholding wages; and (3) whether the award of up to treble damages under the WPCL should be made *in addition* to the award of unpaid wages.

First, regarding the recoverability of overtime wages under the WPCL, the Court acknowledged that this was settled law, citing its recent decision *Marshall v. Safeway, Inc.*, 437 Md. 542 (2014), wherein it had rejected a narrow reading of the WPCL. It reaffirmed in *Peters* that both the WPCL and the WHL allow for the recovery of unlawfully withheld overtime wages.

Next, addressing the issue of whether a bona fide dispute existed over the withholding of Peters's overtime wages, the Court observed that there was a gap in the law. It is well-settled that the plaintiff carries the initial burden of proving that he or she performed the work that was not compensated, but the law was previously silent regarding who bears the burden of establishing a bona fide dispute concerning the withholding of those wages.

The Court initially looked to other states for guidance, finding that, in the other cases addressing the issue where the underlying statute was also silent, courts have often placed the burden on the employer because of the employer's inherent knowledge of its own mental state. The rules of evidence also supported shifting the burden of establishing a bona fide dispute to the employer, because, as the Court recognized, in a civil trial, the burden of production can shift between parties concerning a particular issue. Concluding that the employer bears the burden of production regarding a bona fide dispute over withholding wages, the Court reasoned that an employer would be in the best position to introduce evidence regarding its own subjective beliefs.

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Sublet, Harris, and Monge-Martinez v. State:
Will The Court Of Appeals Adopt The "Reasonable Juror" Standard or Require a Greater Degree of Proof to Authenticate Digital Communication Evidence?

By Matthew McCloskey, Esq.

In 2011, the Court of Appeals established the standard for authenticating evidence of social media postings in *Griffin v. State*, 419 Md. 343 (2011), requiring a "greater degree of authentication" than is required of other types of evidence. In the intervening time, the use of social media websites and other forms of digital communication has reached near ubiquitous levels. Now more than ever, Maryland courts are tasked with determining whether evidence collected from Facebook, Twitter, and other digital sources is admissible evidence. In the wake of *Griffin*, courts have wrestled with the precise amount of proof that is necessary to establish that social media evidence is authentic, as well as the extent to which *Griffin* is applicable to specific types of social media evidence.

The Court of Appeals has granted certiorari in three cases, *Sublet v. State*, *Harris v. State*, and *Monge-Martinez v. State*, all of which deal with the authentication of social media evidence.[1] The parties have framed their arguments largely around a fundamental question: should Maryland abolish the *Griffin* standard in favor of the "reasonable juror" standard applied in authentication determinations in federal courts, or should Maryland double down on *Griffin* and apply that standard to all forms of digital communication evidence? The resolution of this issue will likely define Maryland authentication law for years to come.

I. MARYLAND LAW ON THE AUTHENTICATION OF SOCIAL MEDIA EVIDENCE

The authentication of evidence in Maryland is governed in general by Rule 5-901, which provides, in pertinent part:

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Rule:

(1) Testimony of Witness With Knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

***

(4) Circumstantial Evidence. Circumstantial evidence, such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be.

When a litigant seeks to authenticate certain evidence obtained from social media, the Court of Appeals has adopted a heightened standard for what constitutes "evidence sufficient to support a finding."

In *Griffin v. State*, 419 Md. at 348, the defendant was charged with murder in the shooting death of a man in Perryville, Maryland. At trial, the State attempted to enter into evidence a post purportedly published by the defendant's girlfriend, Jessica Barber, on MySpace. *Id.* The post at issue was made by MySpace member "Sistasouljah," a 23 year old female from Port Deposit, Maryland with a birthday listed as October 2, 1983, and provided: "FREE BOOZY!!!! JUST REMEMBER SNITCHES GET STITCHES!! U KNOW WHO YOU ARE!!" *Id.* The "Sistasouljah" profile also featured a picture of a woman that looked like Ms. Barber. *Id.* at 348, 50.

At trial, the State called Ms. Barber, but did not question her regarding the post. *Id.* Rather, the State questioned the lead investigator in the case, Sergeant John Cook, with respect to how he obtained the post. *Id.* Sergeant Cook testified that he knew the "Sistasouljah" profile belonged to Ms. Barber because it featured her picture, provided her correct birthdate, and referred to "Boozy," which was the defendant's nickname. *Id.* at 348-49. He admitted, however, that he could not state that Ms. Barber made the post herself. *Id.* at 349. Over objection, the trial court held that the evidence was sufficiently authenticated. *Id.*

The Court of Appeals disagreed, holding that Ms. Barber's picture, birthdate, and location were not "sufficient 'distinct characteristics'" to authenticate the posting, "given the prospect that someone other than Ms. Barber could have not only created the site, but also posted the 'snitches get stitches' comment." *Id.* at 356-57. Citing to several studies and cases detailing the prevalence and misuse of fake social media profiles, it expressed serious concern regarding the ease with which an indi-

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The Elusive Concept of a Final Judgment

By Harris W. Eisenstein, Rosenberg Martin Greenberg, LLP

Understanding when and how to access the appellate courts is critical for every Maryland attorney. Unfortunately, these concepts continue to induce confusion among members of the Bar. This article discusses a recent decision of the Maryland Court of Appeals which aims to offer clarity.

For the majority of appeals, the process commences after the trial court enters an unqualified, final disposition that resolves all issues litigated (a final judgment).[1] But finality alone is insufficient. Under Maryland Rule 2-601(a), a final judgment becomes appealable only when it is set forth on a separate document signed by a judge or clerk and entered on the court docket. In other words, the 30-day clock to note an appeal does not start ticking until a final judgment is properly docketed.[2]

These rules are seemingly not perplexing. In application, of course, a simple rule is not always so simple. When should an appeal be noted in multi-party litigation which produces separate court decisions resolving the multiple claims at different times? Suppose, moreover, that all claims against the last-standing defendant resolve by voluntary dismissal?

In *Hiob v. Progressive American Ins. Co.*, 440 Md. 466 (2014), the Court of Appeals quashed any lingering uncertainty regarding when to commence an appeal in procedurally complex litigation.

I. *Multiple Dispositions in the Circuit Court*

In February 2008, Deborah Hiob, Douglas Hiob, Margaret Nelson, and the personal representatives of Virginia Hiob and Laura Dusome (collectively, "Petitioners") sued Progressive American Insurance Company ("Progressive") and Erie Insurance Exchange ("Erie") in the Circuit Court for Baltimore County in connection with a dispute over uninsured motorist coverage under two insurance policies.[3] All Petitioners asserted claims against Progressive while only the Estate of Virginia Hiob brought a claim against Erie.[4]

Progressive prevailed on a motion for summary judgment in September 2009, which resolved all claims brought against that defendant.[5] The Circuit Court docketed the summary judgment order on October 7, 2009.[6]

On January 10, 2011, after 14 months of no activity on the court docket, the Estate of Virginia Hiob voluntarily dismissed its claim against Erie by filing a Line of Dismissal (the "Line"), which was docketed that day as "Voluntary Dismissal (Partial)."[7] Concurrently with filing the Line, Petitioners filed a motion requesting that the summary judgment order in favor of Progressive be reduced to a final judgment.[8] The motion was granted on February 8, 2011 and the Circuit Court signed an order stating "final judgment is entered" that same day.[9] The clerk did not make a docket entry indicating that final judgment had been entered until February 25, 2011.[10] On February 15, 2011, 10 days *before* the February 8th order was docketed but 36 days *after* the Line had been entered on the docket, Petitioners noted their appeal from the entry of summary judgment in favor of Progressive.[11]

II. *Appeal to the Court of Special Appeals*

The intermediate appellate court did not reach the merits of Petitioners' appeal.[12] Instead, the Court of Special Appeals dismissed the appeal as untimely, holding that the Line coupled with the summary judgment order in favor of Progressive constituted a final judgment, and that Petitioners' failure to note an appeal within 30 days of the docketing of the Line divested the appellate court of jurisdiction.[13]

III. *The Court of Appeals' Ruling*

After granting certiorari, the Court of Appeals held that the Line did not qualify as a final judgment and that the requirements of Rule 2-601 were not satisfied until February 25, 2011, when the Circuit Court signed and docketed the order incorporating the summary judgment ruling into a final judgment.[14] Under the savings provision of Rule 8-602(d) discussed below, the Court held that the notice of appeal was timely.[15]

IV. *Significance of Hiob*

The significance of *Hiob* lies not in the Court's revival of an appeal but rather its interpretation of vesting appeal rights in a case of complicated — yet common — procedural history.

The *Hiob* Court explained that, as a threshold matter, a judgment must be *final* before it is appealable, meaning the judgment is "'intended by the court as an unqualified, final disposition of the matter in controversy … [and] it must adjudicate or complete the adjudication of all claims against all parties. '"[16] While finality is required, it is not independently "sufficient to constitute a final, appealable judgment and start the time for an appeal."[17] Under Rule 2-601(a), the judgment must also be: (i) set forth on a separate document, distinct from "an oral ruling of the judge, a docket entry, or a memorandum";[18] (ii) signed by a judge or clerk;[19] and (iii) entered on the court docket.[20] As the Court in *Hiob* observed, "it is the separate document, not

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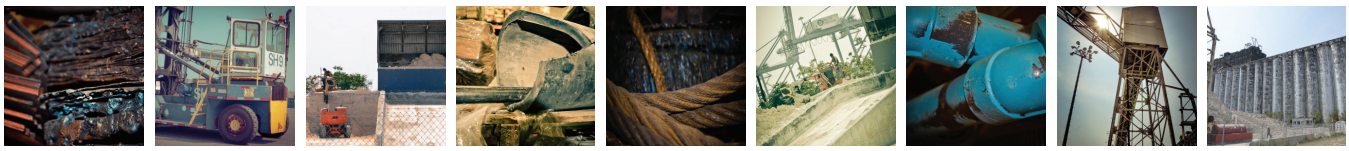
MSBA

SAVE THE DATE: MARCH 20, 2015

MSBA CONSTRUCTION LAW AND LITIGATION SECTIONS PRESENT:

EVIDENCE, EXPERTS AND EXHIBITS – BUILDING AND SUPPORTING A COMPLEX CONSTRUCTION CASE



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Unbundling "Unbundling"

By Lydia E. Lawless, Esq., Assistant Bar Counsel

The idea of *a la carte* or unbundled legal services is not new. The practice refers to "breaking legal representation into separate and distinct tasks . . . where, instead of handling an entire case from start to finish, a lawyer may handle only certain parts."[1] The lawyer may be retained to draft pleadings, consult on discreet substantive or procedural issues, conduct legal research, appear at depositions or a specific hearing, or represent the client at mediation or settlement conferences.

For years, Maryland courts and bar associations have sponsored self-help centers, clinics and referral panels to assist self-represented litigants. The self-represented include those individuals who do may not qualify for free or reduced fee legal services but find it financially impossible to retain an attorney for full representation[2] as well as "savvy legal consumer[s] who [are] capable of and prepared to handle many of the tasks that a lawyer and his or her team might perform in handling a case."[3] In an effort to provide more access to lawyers and to encourage lawyers to participate in nonprofit and limited legal services programs, the Court of Appeals adopted Rule 6.5 of the Maryland Lawyers' Rules of Professional Conduct. Rule 6.5, entitled Nonprofit and Court-Annexed Limited Legal Services Programs, relieves the attorney of some of the restrictions of the conflict rules but requires the attorney to work "under the auspices of a program sponsored by a nonprofit organization or court."

In September 2009, the Maryland Access to Justice Commission ("MAJC") published a white paper entitled "Limited Scope Representation in Maryland".[4] The white paper reviewed the current rules governing the scope of representation in Maryland and Maryland Ethics Opinions and addressed potential concerns relating to malpractice and coverage for same. MAJC concluded that limited scope representation "can enhance access to justice for Marylanders"[5] and requested that specific provisions concerning limited representation be added to the Maryland Rules.[6]

On February 19, 2015, a hearing was held on the One Hundred Eighty-Sixth Report of the Standing Committee on Rules of Practice and Procedure.[7] At the hearing, the Court of Appeals voted to adopt the substantial proposed changes to Rule 1.2 of the Maryland Lawyers' Rules of Professional Conduct. The path has now been cleared for limited scope representation in Maryland.

The amendments to Rule 1.2 read as follows:

> Rule 1.2. Scope of Representation and Allocation of Authority Between Client and Lawyer.
>
> (c) A lawyer may limit the scope of the representation in accordance with applicable Maryland Rules if (1) the limitation is reasonable under the circumstances, ~~and~~ (2) the client gives informed consent, and (3) the scope and limitations of any representation, beyond an initial consultation or brief advice provided without a fee, are clearly set forth in a writing, including any duty on the part of the lawyer under Rule 1-324 to forward notices to the client.[8]

The Rules Committee proposes a comment that sheds additional light on the new Rule: Proposed Comment [8] provides:

> A lawyer and a client may agree that the scope of the representation is to be limited to clearly defined specific tasks or objectives, including: (1) without entering an appearance, filing papers, or otherwise participating on the client's behalf in any judicial or administrative proceeding, (i) giving legal advice to the client regarding the client's rights, responsibilities, or obligations with respect to particular matters, (ii) conducting factual investigations for the client, (iii) representing the client in settlement negotiations or in private alternative dispute resolution proceedings, (iv) evaluating and advising the client with regard to settlement options or proposed agreements, or (v) drafting documents, performing legal research, and providing advice that the client or another attorney appearing for the client may use in a judicial or administrative proceeding; or (2) in accordance with applicable Maryland Rules, representing the client in discrete judicial or administrative proceedings, such as a court-ordered alternative dispute resolution proceeding, a *pendente lite* proceeding, or proceedings on a temporary restraining order, a particular motion, or a specific issue in a multi-issue action or proceeding. Before entering into such an agreement, the lawyer shall fully and fairly inform the client of the extent and limits of the lawyer's obligations under the agreement, including any duty on the part of the lawyer under Rule 1-324 to forward notices to the client.[9]

While the new Rule allows attorneys to draft or ghostwrite pleadings for clients in Maryland state courts, those attorneys will still be responsible for the content of the pleading if it is filed for improper purposes and may be sanctioned under Rule 1-311. Lawyers who ghostwrite pleadings for clients are still obligated to conduct their own due diligence to ensure there is a reasonable, good faith basis for any facts alleged so as not to assist a client in perpetrating a fraud on the court.[10] Similarly,

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Upcoming Changes to the Federal Rules of Civil Procedure

By Evelyn Lombardo Cusson, Esq.

There are a number of proposed amendments to the Federal Rules of Civil Procedure slated to take effect in 2015. The proposed changes, which encompass Rules 1, 4, 16, 26, 34, and 37, are designed to encourage early case management, streamline the discovery process, and also address discovery violations involving preservation of electronically stored information.

Early Case Management

Several proposed changes focus on the initial phase of litigation, and are intended to reduce delay and involve judges early in the process. Proposed Rule 4(m), governing service of process, reduces the time period for effecting service from 120 days to 90 days. Failure to serve a defendant within 90 days will result in dismissal, unless a plaintiff shows "good cause."

In a similar vein, pursuant to proposed Rule 16(b)(2), the scheduling order will issue no later than 90 days (presently 120 days) after any defendant has been served or 60 days (presently 90 days) after any defendant has entered an appearance. In litigation involving "complex issues, multiple parties, and large organizations," however, judges have discretion to set a later time to issue a scheduling order to encourage collaboration between counsel and their clients. Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 12, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx.

Another change designed to facilitate early case activity, new Rule 26(d)(2), allows discovery to commence sooner, prior to the initial Rule 26(f) scheduling conference. The new provision permits delivery of Rule 34, Requests for Production, 21 days after service of process, although the time for responding does not begin until after the Rule 26(f) conference. The Committee Note explains that the change is "designed to facilitate focused discussion during the Rule 26(f) conference," and that "[d]iscussion at the conference may produce changes in the requests." Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 45, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx.

Proposed Rule 16(b)(3) adds to the list of permitted contents in the scheduling order. For instance, the judge may include a requirement that the parties seek a conference with the court before moving for a discovery order. The scheduling order may also provide for preservation of electronically stored information, presumably following discussions prompted by the new requirement in Rule 26(f)(3)(C), which will require parties to state their views on "disclosure, discovery, or preservation" of ESI. Thomas Y. Allman, The Civil Rules Package as Approved by the Judicial Conference (September, 2014), at 6, available at http://www.theediscoveryblog.com/2014/10/07/part-iii-frcp-amendments/.

Scope of Discovery

In recognition of the burdens and expense of discovery, proposed amendments to Rule 26 governing the scope of discovery focus on "proportionality." Proposed Rule 26(b)(1) limits discovery to that which is "proportional to the needs of the case," and lists several factors for courts to consider, including "the importance of the issues at stake in the action," "the amount in controversy," and "the parties' relative access to relevant information." The proportionality rubric has raised some questions regarding who bears the burden of proving that the discovery sought is proportional, as well as whether the change will encourage boilerplate refusals to produce information on the basis that it is not proportional, although the Committee Note counsels against such objections. Oliver H. (Scott) Barber III, *Upcoming Changes to Federal Rules of Civil Procedure: Modernizing the Scope of Discovery and Clarifying Consequences of Failure to Preserve*, available at http://www.stites.com/learning-center/articles/upcoming-changes-to-federal-rules-of-civil-procedure-modernizing-scope; Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 39, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx.

Another major change to Rule 26(b)(1) eliminates the phrase "reasonably calculated to lead to the discovery of admissible evidence," which, according to the Committee Note, "has been used by some, incorrectly, to define the scope of discovery." Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 44, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx. The "reasonably calculated" phrase is replaced by the statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id. See also* Oliver H. (Scott) Barber III, *Upcoming Changes to Federal Rules of Civil Procedure: Modernizing the Scope of Discovery and Clarifying Consequences of Failure to Preserve*, available at http://www.stites.com/learning-center/articles/upcoming-changes-to-federal-rules-of-civil-procedure-modernizing-scope.

Other changes are similarly aimed at streamlining the discovery process. For instance, pursuant to proposed Rule 26(c)(1), a protective order issued to protect against undue burden

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Chair's Message...

(continued from page 1)

in the professional development of the newest members. I want to thank the presenters for their participation in the order that they appeared during the program: Gloria Shelton, Esquire, the Honorable Joseph F. Murphy, The Honorable Benson Legg, Gregg Bernstein, Esquire, James Wyda, Esquire, Rod Rosenstein, Esquire, Harriet Cooperman, Esquire, Andrew D. Levy, Esquire, Ava E. Lias-Booker, Esquire, K. Donald Proctor, Esquire, Anthony F. Vittoria, Esquire, Kenneth Ravernell, Esquire, Andrew J. Graham, Esquire, The Honorable Richard D. Bennett, The Honorable Catherine C. Blake, The Honorable J. Frederick Motz, The Honorable George L. Russell, III, The Honorable W. Michel Pierson, William J. Murphy, Esquire, Paul B. DeWolfe, Esquire, Kathleen Cahill, Esquire, Timothy Maloney, Esquire, Joshua Treem, Esquire, Natalie McSherry, Esquire, Abbey Hairston, Esquire, Paul D. Bekman, Esquire, and Kathleen Cahill, Esquire.

This spring we have three programs for you to attend.

Program: ***Recent Impact Decisions of the Maryland Appellate Courts***
Date and Time: March 19, 2015, 5:00 p.m. - 8:00 p.m.
Location: Court of Appeals of Maryland, Robert C. Murphy Courts of Appeal Building, Fourth Floor, 361 Rowe Boulevard, Annapolis, MD
Topic Covered: Recent impact decisions of the Maryland Appellate Courts with the speakers: Honorable Alan M. Wilner, Judge (retired), Court of Appeals of Maryland; Renée Hutchins, Professor of Law, University of Maryland Francis King Carey School of Law; and Bruce L. Marcus, Esquire, MarcusBonsib LLC

Program: ***Evidence, Experts and Exhibits – Building and Supporting a Complex Construction Case (Jointly sponsored by the Construction Law and Litigation Sections)***
Date and Time: March 20, 2015, 10:30 a.m. – 5:30 p.m.
Location: 401 Log Canoe Circle, Stevensville, MD
Topic Covered: The Honorable Paul Grimm will speak over lunch on electronic evidentiary issues and in the afternoon the topics to be covered will include: Ethical Issues in Dealing with Court Reports; Evidence Inspection – A Hands-on Primer; Developing Compelling Demonstratives in Real Life; and Complex Construction Issues – Supporting and Valuing Plan Sufficiency and Scheduling Claims.

Program: ***MSBA's Litigation Section Dinner Program: "Practicing in the Maryland Circuit Courts and Federal District Courts: The Judge's Perspective"***
Date and Time: April 23, 2015, 6:00 p.m. to 8:30 p.m.
Location: Doubletree Hotel, 210 Holiday Court, Annapolis, MD
Topic Covered: Dinner with the Circuit Court and Federal District Court Judges that begins at 6:00 p.m. with a reception and dinner to follow. Several judges will be seated at each table and will be asked to share with all of the lawyers in attendance a single practice tip, pointer, or advice for the improvement of the quality of practice before the court.
In the next edition of The Maryland Litigator, I will highlight the programs scheduled for the 2015 Annual Conference. See you in Ocean City!

APRIL 23, 2015

PRACTICING IN THE MARYLAND CIRCUIT COURTS AND FEDERAL DISTRICT COURTS: THE JUDGE'S PERSPECTIVE

RECEIVE ADVICE AND ENJOY AN OPPORTUNITY TO DINE AND CHAT WITH THE MEMBERS OF MARYLAND'S CIRCUIT COURT BENCH AND FEDERAL DISTRICT COURT BENCH

TIME: 6:00 – 8:30 P.M.

WHERE: DOUBLETREE HOTEL ANNAPOLIS, 210 HOLIDAY COURT, ANNAPOLIS, MD

Social Media...

(continued from page 2)

request to view that which the juror or prospective juror has chosen not to make public, the Court of Appeals or the Attorney Grievance Commission would almost certainly conclude, as the ABA Standing Committee did, that the request constitutes improper contact with a juror or prospective juror.

Interestingly, the ABA Standing Committee and the Association of the Bar of the City of New York Committee on Professional Ethics (the "ABCNY Committee") have different opinions regarding whether a network-generated notice advising the juror that a lawyer has reviewed the juror's social media content constituted an improper communication with the juror.[7] The ABCNY Committee concluded that a communication sent to the juror that was generated entirely by a social networking site as a result of the lawyer's review of the juror's publicly accessible social media content constituted an improper communication by the lawyer if the lawyer was aware that his or her actions would cause such a notice to be generated.[8] The ABA Standing Committee, on the other hand, opined that such a notice was a communication from the social networking website, not the lawyer.[9] Therefore, the ABA Standing Committee concluded that a network-generated communication to a juror did not constitute an improper communication by the lawyer.[10] The ABA Standing Committee nevertheless recommended that attorneys familiarize themselves with the terms and conditions of social networking sites.[11] Attorneys should be aware of whether social media websites generate automatic notices upon the attorney reviewing social networking content because it is unclear how other jurisdictions, including Maryland, will view this issue. Attorneys should, therefore, use caution when reviewing the social media content of jurors or prospective jurors.

The final issue addressed in Formal Opinion 466 is the obligation of an attorney to report juror misconduct discovered through the attorney's use of social media. While the ABA Committee's Opinion does not focus on juror misconduct, the ABA Standing Committee recognized that, when viewing a juror's or potential juror's social media content, an attorney could become aware of juror misconduct that may require the attorney to notify the Court.[12]

ABA Model Rule of Professional Conduct 3.3(b) requires an attorney who represents a client in an adjudicative proceeding, and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding, to take reasonable remedial measures, including, if necessary, informing the tribunal. The ABA Standing Committee concluded that an attorney who, by passively viewing a juror's internet presence, learned of a juror's criminal or fraudulent conduct must take remedial measures including, if necessary informing the tribunal.[13] Under MRPC 3.3(b), however, it is unclear what obligations an attorney may have if he or she, through review of a juror's social media content, becomes aware of juror conduct that violates a court order or is otherwise improper, but does not rise to the level of criminal or fraudulent conduct.[14]

In Maryland, MRPC 3.5(b) governs an attorney's obligations under such circumstances. MRPC 3.5(b) states that "[a] lawyer who has knowledge of . . . any improper conduct by a prospective, qualified, or sworn juror . . . shall report it is promptly to the court or other appropriate authority." MRPC is broader than the corresponding ABA Model Rule regarding the obligations of an attorney who learns of a juror's improper conduct. Under the Maryland Rule, if an attorney, through the passive review of a juror's social media content or otherwise, learns of *any improper conduct*, not merely criminal or fraudulent conduct, the lawyer is required to report that conduct to the Court or other appropriate authority. While the issue of what constitutes "improper conduct" is not addressed in this article or Formal Opinion 466, Maryland attorneys who passively review the social media content of prospective, qualified, or sworn jurors and learn of potentially improper juror conduct must consider whether they are obligated to alert the court under MRPC 3.5(b).

Endnotes

[1] *See* American Bar Association Standing Committee on Ethics and Professional Responsibility, Formal Opinion 466, Apr. 24, 2014 (hereinafter "Formal Opinion 466"), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_466_final_04_23_14.authcheckdam.pdf.

[2] *See id.*

[3] *Id.* at 4.

[4] *Id.*

[5] *See id.*

[6] *See id.*

[7] *See* Association of the Bar of the City of New York Committee on Professional Ethics, Formal Opinion 2012-2: Jury Research and Social Media, *available at* http://www.nycbar.org/ethics/ethics-opinions-local/2012opinions/1479-formal-opinion-2012-02.

[8] *Id.*

[9] *See* Formal Opinion 466, *supra* note 1, at 5.

[10] *See id.*

[11] *See id.* at 5-6.

[12] *See id.* at 6-9.

[13] *See id.* at 8.

[14] *See id.* at 9.

Glenn v CSX...
(continued from page 3)

because there was a well-worn footpath in proximity to Defendant's railroad tracks. Consequently, Defendant owed no duty to Plaintiff to reduce its speed or stop unless it actually saw Plaintiff on the tracks.

The court ultimately concluded that Plaintiff was a trespasser. A trespasser is one who intentionally and without consent or privilege enters another's property. *Wagner*, 553 A.2d at 687. Here, Plaintiff entered Defendant's property and did so without the intent of returning home. Further, Defendant did not give Plaintiff consent to cross over the tracks. Thus, Plaintiff was a trespasser and Defendant owed no duty to Plaintiff to refrain from acting negligently.

The Court went on to dismiss Defendant's motions regarding claims of willful and wanton conduct and abnormally dangerous activity. Regarding willful and wanton conduct, the court found that Plaintiff failed to show that Defendant's conduct of simply operating a railroad showed that Defendant deliberately or reasonably expected him to suffer severe injuries. *See Doehring v. Wagner*, 526 A.2d 762, 767 (Md. 1989) (finding that in order for the conduct to be willful or wanton, it needed to be "of a more deliberate nature" or "reasonably expected to lead to a desired result."). With regard to "abnormally dangerous activity," the court held that Maryland was bereft of law supporting a finding that the operation of a railroad was such an activity. *See Gallagher v. H.V. Pierhomes, LLC*, 957 A.2d 628, 632 (Md. 2008) (recognizing strict liability in Maryland and citing the several factors that constitute "abnormally dangerous activity," including the activity's risk of harm, lack of reasonable care, common usage, appropriateness in relation to place, and value to community). Maryland already limits the ability of the law to deem activity to be "abnormally dangerous" because of the heavy burden it places upon the landowner. Plaintiff's complaint simply was not able to overcome that limitation.

As mentioned, *Glenn*'s primary contribution is that it provides a simple and straightforward analysis of Maryland's negligence law with respect to licensees, invitees, and trespassers. It is a case worth keeping in mind when faced with such issues.

Tort Claims Act...
(continued from page 4)

[14] *See id.* at 207-11.
[15] *See id.* at 208.
[16] The LGTCA provides immunity from damages but not from suit in contrast to the Maryland Tort Claims Act which provides state employees with immunity from suit. *See id.* at 209.
[17] *See id.*
[18] *See id.* at 209.
[19] *See id.* at 212-14.
[20] *See id.* at 214.
[21] *See id.* at 214-15.
[22] *Id.* at 214.
[23] *See id.* at 210.
[24] *See id.* at 217.
[25] *Id.* at 218.
[26] *See id.* at 220-28.
[27] *See id.*
[28] *See id.* at 233; *see also* Md. Code Ann., Cts. & Jud. Proc. § 5-302(b).
[29] *See Holloway-Johnson*, 220 Md. App. at 234; *see also* Md. Code Ann., Cts. & Jud. Proc. § 5-302(b).

Court of Appeals...
(continued from page 5)

Turning its attention to the facts of the *Peters* case, the Court queried why EHCG withheld overtime wages and whether such a reason could be deemed a bona fide dispute. The record revealed that EHCG contended that it refused to pay overtime wages because Peters allegedly exercised around the neighborhood during work hours, an argument that the trial court had rejected. EHCG did not present any other evidence, however, that could justify its belief that federal law or any other law exempted it from paying overtime wages to Peters. EHCG, therefore, failed to meet its burden of producing evidence of a bona fide dispute.

Determining that there was no evidence of a bona fide dispute, the Court of Appeals addressed Peters's argument that the lower court erred in denying her treble damages. First, although the Court recognized that the WPCL is a remedial statute that is to be construed liberally in favor of the employee, it rejected Peters's contention that there should be a presumption in favor of granting enhanced damages. The Court further declined to set forth explicit guiding principles that trial courts should follow when exercising their discretion to award enhanced damages, instead stating that "trial courts are encouraged to consider the remedial purpose of the WPCL when deciding whether to award enhanced damages to employees."

The Court last addressed Peters's argument that the proper interpretation of "additional damages" or enhanced damages under LE § 3-507.2(b) is that such damages should be awarded in addition to the damages awarded for unpaid wages, or "quadruple damages." The Court looked to the plain language of the statute, which provides, in pertinent part:

If, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.

The Court determined that Peters's reading of LE § 3-507.2(b) was not supported by the plain language of the statute because nowhere in subsection (b) is it indicated that the award is "in addition" to the unpaid wage. The Court of Appeals instead agreed with the Court of Special Appeals's interpretation of LE §3-507.2(b) in *Stevenson v. Branch Banking & Trust Corp.*, 159 Md. App. 620 (2004), wherein the lower appellate court, after finding no case addressing whether the statute is capped at three times the unpaid wage, "explicitly adopt[ed]" this construction based on the plain language of the statute. The Court held that the plain language of §3-507.2(b) dictates that the total amount of damages that an employee may recover for unpaid wages under the WPCL is three times the unpaid wage.

Peters's case was then remanded to the Circuit Court for Montgomery County to reconsider its decision regarding its award of enhanced damages in light of the Court's holding that there was no evidence of a bona fide dispute and the Court's instructions as to the remedial purposes of the statute. At the time of publication, the trial court had yet to conduct further proceedings in the case.

Sublet, Harris, Monge-Martinez...
(continued from page 6)

vidual could "fabricat[e] or tamper[] with electronically stored information on a social networking site."[2] *Id.* at 351-54.

The Court also drew support from *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534 (D. Md. 2007), a decision by Judge Paul W. Grimm of the U.S. District Court for the District of Maryland. According to the Court of Appeals, *Lorraine* stood for the proposition that "the 'complexity' or 'novelty' of electronically stored information, with its potential for manipulation, requires greater scrutiny of 'the foundational requirements' than letters or other paper records, to bolster reliability." *Griffin*, 419 Md. at 356 (quoting *Lorraine*, 241 F.R.D. at 543-44). Relying in part on *Lorraine*, and in light of the potential for "abuse and manipulation" of social media websites, the Court held that a "greater degree of authentication" than what was provided by the State was required to authenticate social media postings. *Id.* at 357-58.

The Court cautioned, however, that it "should not be heard to suggest that printouts from social networking sites should never be admitted." *Id.* at 363. It suggested three methods by which social media postings could be authenticated: (1) eliciting testimony from the person who created the social media posting to establish that the profile belongs to that person and that they made the posting that the party seeks to authenticate; (2) searching and examining "the computer's internet history and hard drive to determine whether that computer was used to originate the social networking profile and posting in question"; and (3) obtaining "information directly from the social networking website that links the establishment of the profile

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to the person who allegedly created it and also links the posting sought to be introduced to the person who initiated it." *Id.* at 363-64.

Two judges dissented. Relying on a number of federal court decisions, they contended that a more appropriate standard to apply was whether "a reasonable juror could find in favor of authenticity." *Id.* at 366 (Harrell, J., dissenting). Under this standard, the dissenting judges believed Sergeant Cook's testimony was sufficient for a reasonable juror to conclude that the MySpace posting was authentic. *Id.* at 367. Noting that any concerns regarding fraud or forgery could be raised for the jury on cross-examination or in a rebuttal case, the dissent argued that the majority's concerns with abuse and manipulation of social media profiles were relevant not to the admissibility of the posting, but rather to the weight that the trier of fact could choose to give the evidence. *Id.*

Other forms of electronic evidence can be authenticated through less stringent means. The *Griffin* Court specifically noted that "authentication concerns attendant to e-mails, instant messaging correspondence, and text messages differ significantly from those involving a MySpace profile and posting printout, because such correspondence[] is sent directly from one party to an intended recipient or recipients, rather than published for all to see." *Id.* at 361 n.13 (majority opinion). Relying on this rationale, the Court of Special Appeals subsequently addressed the issue of email authentication in *Donati v. State*, 215 Md. App. 686, 694, *cert. denied*, 438 Md. 143 (2014).

In *Donati*, the defendant had attempted to sell marijuana to a security guard at Growlers Pub, but the security guard and several of his co-workers removed the defendant from the pub and called the police. *Id.* at 695-96. The defendant was charged with several crimes in relation to this incident, and the guards who removed him from the pub were set to testify against him at trial. *Id.* at 696. Shortly thereafter, the Montgomery County Police Department began receiving emails from an unidentified tipster stating that several of the security guards at Growlers were growing marijuana in certain state parks. *Id.* at 696. Through surveillance, the police eventually came to believe that the defendant was sending the emails, and he was arrested and charged with obstruction of justice, making a false statement to a police officer, intimidating a witness, and electronic mail harassment. *Id.* at 704-05, 696. At trial, the State sought, and was permitted, to enter into evidence dozens of emails purportedly sent by the defendant to the Montgomery County Police Department from a number of different email addresses. *Id.* at 711. On appeal, the defendant argued that the emails were not properly authenticated. *Id.* at 708.

The Court of Special Appeals held that the emails were sufficiently authenticated through circumstantial evidence, and set forth in detail the evidence that satisfied the authentication requirement. *Id.* at 712-13. It noted that the police discovered lists of email addresses both at the defendant's home and on his computer which referenced the names "Mr. Tipper" and "Mr. Essex." *Id.* at 713-14. Many of the emails the State sought to admit referred to Mr. Tipper or Mr. Essex in either their address or the name associated with the address.[3] *Id.* at 714. *Id.* Because the emails from Mr. Tipper and Mr. Essex were thus clearly linked to the defendant, the Court turned to the content of those emails. *Id.* The emails associated with those names pertained to the same specific subject matter as the emails from the other addresses: "a marijuana grow in State parks operated by the staff of Growlers." *Id.* Consequently, the Court held that even those emails that were not from Mr. Tipper or Mr. Essex were circumstantially linked to the defendant, and thus sufficiently authenticated. *Id.*

Contrasted with *Griffin*, *Donati* illustrates what may be a key distinction in the authentication of certain electronic media. When social media postings are at issue, concerns regarding authenticity are heightened due to the danger of faked social media profiles. In such a case, authenticity seemingly must be demonstrated by some extrinsic proof other than what is set forth on the social media profile and in the messages themselves. On the other hand, the *Griffin* Court seems to have indicated that other types of electronic messages "sent directly from one party to an intended recipient or recipients, rather than published for all to see," would be subject to a less substantial authentication threshold than social media postings. *Griffin*, 419 Md. at 361 n.13. Consistent with that notion, the Court of Special Appeals has held that, when emails are at issue, authenticity may be shown through the intrinsic elements of the email itself, such as the email address, the name associated with that address, and its contents. The yet-unanswered question is whether, based on the Court of Appeals' logic in *Griffin*'s footnote 13, the analysis in *Donati* could be applied to any type of directly targeted digital messaging.

II. THE CURRENT CASES

It is within this legal framework that the cases before the Court of Appeals have arisen. In *Sublet*, the defendant was charged with assault and several other crimes related to an occasion where he allegedly beat another individual, Crishell Parker, at a party. The defendant alleged he was defending himself, while Ms. Parker maintained the defendant was the aggressor. The defendant attempted to impeach Ms. Parker by entering into evidence a Facebook conversation between her and several of her friends which referenced the events at the party.

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No less than six Facebook profiles participated in the conversation, including one named "Cece Parker," which Ms. Parker testified belonged to her. Ms. Parker also testified, however, that she shared the login information for her profile with several of her friends, including one friend who was also involved in the Facebook conversation on a separate profile. She admitted to having sent some of the messages in the conversation, but denied having sent others. Ms. Parker noted that she believed some messages in the conversation had been deleted, and that she did not know who may have deleted them. The circuit court held the evidence was inadmissible because several people had access to the profile, somebody may have tampered with the statements in the conversation, and because the court did not "find by a preponderance of the evidence that there [was] a sufficient basis for reliability to admit it."[cite]

In *Harris*, the defendant was charged with murder. At trial the State sought to admit into evidence two types of Twitter messages purportedly made from the defendant's Twitter profile that seemed to indicate the defendant was preparing to commit a murder with the help of an accomplice. . Several of the messages were direct messages – messages that could only be seen by the sender and the recipient – while other messages were public postings that any of the Twitter profile's followers could read. The direct messages were sent between the Twitter profiles "TheyLovingTc" and "Omgitsloco," and the publicly posted messages were made by "TheyLovingTc."

At trial, the State elicited testimony from a witness who stated that he knew the defendant's Twitter profile was "TheyLovingTc" and that the "Omgitsloco" Twitter profile was operated by another individual named Foulke, who was the defendant's friend. The State moved to have the direct messages and public postings admitted into evidence. Over objection, the circuit court determined that the State had introduced sufficient evidence to authenticate all of the messages and admitted them into evidence.

In *Monge-Martinez*, the defendant was charged with assaulting his ex-girlfriend. At trial, the state sought to admit Facebook messages purportedly sent by the defendant directly to his ex-girlfriend apparently apologizing to her for something the defendant did in a fit of anger. To authenticate the evidence, the State elicited testimony from the ex-girlfriend that the defendant was the one who sent the messages, and noted that the Facebook profile that sent the messages was named "Carlos Monge" and contained a picture of a man who looked like the defendant. The circuit court admitted the evidence.

III. THE ISSUES BEFORE THE COURT OF APPEALS

Sublet, *Harris*, and *Monge-Martinez* straddle a key distinction the Court of Appeals made in *Griffin*. All three cases involve social media, as opposed to email or text messages, but all three also involve targeted messaging as opposed to messages "published for all to see." *Griffin*, 419 Md. at 361 n.13. At first blush, it would appear that the Court of Appeals has poised itself to resolve the issue of whether all evidence collected on social media is subject to the standard announced in *Griffin*, or whether direct messages sent using social media may be authenticated under a lesser standard. Interestingly, however, in *Harris* and *Monge-Martinez*, the petitioners and the State separately argue that there is no meaningful difference in the distinction the *Griffin* Court drew between social media postings anyone could see and other forms of digital communication. From this common starting point, they argue for different, fundamental modifications of authentication law in Maryland.

The State argues that Maryland should abolish the higher authentication standard from the *Griffin* majority and adopt the "reasonable juror" standard endorsed by the *Griffin* dissent. Under this standard, evidence of any kind, electronic or otherwise, could be authenticated as long as evidence is introduced sufficient to allow a reasonable juror to find that the evidence is what it purports to be. The State notes that Rule 5-901 was intended to be materially similar to Federal Rule of Evidence 901, and that federal courts have almost uniformly applied the reasonable juror standard as the standard for authentication. The State also cites several cases from the Court of Special Appeals which have applied this standard, and urges that the Court of Appeals adopt it as the authentication standard for all types of evidence.

Several rationales underpin the State's argument. Initially, it notes that *Lorraine*, one decision on which the *Griffin* Court relied to support a higher authentication standard for social media postings, actually applied the reasonable juror standard. For his part, Judge Grimm has stated that *Griffin* "sets an unnecessarily high bar for the admissibility of social media evidence" and "acknowledged but did not apply" the analysis in *Lorraine*. Honorable Paul W. Grimm, et al., *Authentication of Social Media Evidence*, 36 Am. J. Trial Advoc. 433, 441, 457 (2013). To that extent, the State argues the *Griffin* decision misapplied *Lorraine*'s rationale.

The State also emphasizes that the trier of fact is well-suited to make a credibility determination regarding social media evidence which is alleged to be inauthentic. It argues that the *Griffin* standard potentially filters out relevant, authentic evidence merely because it cannot survive the standard's requirement.

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(continued from page 16)

Where evidence's authenticity is genuinely disputed, parties are free to raise that issue to the trier of fact, which could then factor in that consideration in weighing the evidence. Finally, the State argues that *Griffin* has caused confusion among the lower courts, and that the reasonable juror standard, which closely resembles the Rule 5-104(b) conditional relevance standard, would be easy for courts to understand and apply.

By contrast, the *Harris* and *Monge-Martinez* petitioners argue that the Court of Appeals should extend its holding in *Griffin* to apply not only to direct messages sent from social media, but to all forms of digital communication. Harris contends that the concerns with "abuse and manipulation" underlying the *Griffin* decision are even more prevalent today than they were when *Griffin* was decided. He asserts that advances in technology, particularly the prevalence of the smartphone and the advent of smartphone-to-computer communications, have made fraudulent use of communication technologies easier. Previously, one needed to either hack another individual's login credentials or access their home computer in order to gain access to that person's digital accounts. Now, however, an individual needs only a moment with another's smartphone to forge an email, text message, or social media message.
Monge-Martinez devotes his argument to listing the numerous cases from other states which have cited and approved of *Griffin*'s rationale regarding the dangers of faked social media communications. Moreover, he emphasizes that digital communications of any kind are subject to the same danger of abuse or manipulation that the *Griffin* Court relied upon in requiring a greater level of authentication of social media posts. For instance, a fake email address can be created just as easily as a fake Facebook profile, and a fake direct message using social media can be sent just as easily as a public post. Consequently, Harris and Monge-Martinez both urge the Court of Appeals to extend the requirement of extrinsic proof of authenticity to all digital communication evidence.

The resolution of this issue will undoubtedly control the Court of Appeals' holding in each case. If the Court abandons the logic in *Griffin* in favor for the reasonable juror standard, the distinction between extrinsic and intrinsic proof of authenticity will be all but abolished. Consequently, it is likely that the messages at issue in each case will be considered sufficiently authenticated. If, on the other hand, the Court reaffirms the *Griffin* rationale, it would be logically consistent to extend *Griffin*'s rationale to all forms of digital communication. In that scenario, the Court would have to address the factual quirks present in each case.

If the Court chooses to extend *Griffin*'s holding, *Sublet* provides an excellent opportunity for the Court to clarify the nature of its authentication standard. Although *Griffin* certainly established that a higher standard of authentication must be met for social media posts, it did not expressly require a finding that the evidence was authenticated by a preponderance of the evidence. The trial court in *Sublet*, however, required the offering party to establish by a preponderance of the evidence that the messages offered were authentic. This is indicative of the struggle that Maryland courts have faced in applying *Griffin*, which did not announce a specific standard but rather provided nonexclusive examples of sufficient (and insufficient) authentication. If the Court reaffirms its holding in *Griffin*, it is likely that it will use *Sublet* to provide guidance regarding the specific level of proof of authenticity that is required for digital communication evidence.

CONCLUSION

In *Sublet*, *Harris*, and *Monge-Martinez*, the Court of Appeals is presented with an opportunity to conclusively establish a clear and concise standard for the authentication of digital evidence. Regardless of the standard the Court adopts, these three cases will provide an important clarification for authentication law that any litigator should be prepared to apply.

Endnotes

[1] Oral argument in all three cases was heard on February 6, 2015.

[2] Among the cases cited by the Court was *United States v. Drew*, 259 F.R.D. 449 (D.C.D. Cal. 2009). In that case, a woman (Drew) created a MySpace profile for a fictitious 16-year-old boy named Josh and sent flirtatious messages to one of her daughter's former friends. *Id.* at 452. After gaining the young woman's trust, Drew informed her, through the guise of the fictitious boy, that "Josh" no longer liked her and that "the world would be a better place without her in it." *Id.* The young woman subsequently killed herself. *Id.*

[3] The emails were sent from the following names and addresses: (1) "Robert Fox" at "barsecurity123 @gmail.com"; (2) "John Fox" at "barsecurity12345@gmail.com"; (3) "Mr. Tipster" at "mrtpstr83@gmail.com"; (4) "Mr. Tipper" at "mrtipper008@gmail. com"; (5) "Henry Clay" at "hclay3508@gmail.com"; (6) "Mr. Tipper" at "mr. tipper@hotmail.com"; (7) "Mr Tipper" at "mrtppr48@gmail.com"; (8) "Mr. Tipper" at "mr.tipper2@hotmail.com"; (9) "Mr. Tipper" at "mrtipper2011111 @hotmail.com"; (10) "Mr. Tipper" at "weedlocator@hotmail.com"; (11) "Stanley Skimmerhorn" at "stanleyskimmerhorn@yahoo.com"; and (12) "Mr. Essex" at "mr. essex@ymail.com." *Donati v. State*, 215 Md. App. 686, 714, *cert. denied*, 438 Md. 143 (2014).

Elusive Concept...

(continued from page 7)

finality alone, that starts the time for filing an appeal."[21]

Deciding whether Petitioners' appeal was timely hinged on the answer to one question: Did the Line of Dismissal satisfy the final judgment rule? The Court of Appeals held that it did not.

Although the Line settled the lone unresolved claim in the case, it lacked any indicia of a final judgment. Indeed, the parties filed the Line without court participation or approval.[22] The Line did not require the signature of a clerk or a judge; it did not on its face establish that judgment had been issued;[23] it failed to incorporate the earlier summary judgment ruling in favor of Progressive, which under Rule 2-602(a) the trial court retained authority to modify until the entry of a final judgment;[24] and the accompanying docket entry did not indicate to the parties or the public that the court had "reached a final, unqualified decision."[25] Because the Line did not strictly comply with Rule 2-601, which "is interpreted in favor of the preservation of appeal rights[,]"[26] its docketing did not trigger Petitioners' 30-day deadline in which to note an appeal from the summary judgment ruling.

Hiob addressed the common fact pattern in which pieces of litigation are resolved at different times. In complex, multi-party cases, one defendant (or one plaintiff) often obtains a final outcome before the other(s). The *Hiob* opinion therefore offers a valuable lesson for those who navigate this space—when the final claim in a case is resolved, whether by dispositive ruling, jury verdict, or voluntary settlement, always confirm that the resolution is memorialized on a separate document, which is signed by a judge or clerk and entered on the docket. Only then will your client's appeal rights vest.

V. *Better Safe Than Sorry*

The old adage of better being safe than sorry has special meaning in the appellate context. Under the savings provision of Rule 8-602(d), a notice of appeal filed after a trial court announces or signs a decision, but before that decision is docketed, is treated as filed on the same day as, but after, the decision is entered on the court docket.[27] The *Hiob* Court applied the savings provision to find that Petitioners' notice of appeal, which was filed after the final judgment was announced but before it was docketed, was timely.[28]

Nevertheless, the takeaway is clear. After the trial court announces a dispositive ruling which resolves all claims in your case, eliminate the risk of missing your appellate window by promptly commencing an appeal. And when the dispositive ruling is docketed, simply file an amended notice of appeal. What do you have to lose?

Endnotes

[1] "There are, of course, exceptions to this general rule." *Hiob v. Progressive Am. Ins. Co.*, 440 Md. 466, 475, n.5 (2014) (summarizing exceptions).
[2] Md. Rule 8-202(a).
[3] The merits of Petitioners' claims against Progressive and Erie were not before the Court of Appeals and thus are not discussed herein.
[4] *Hiob*,440 Md. at 481.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 481-82.
[8] *Id.* at 482.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 482-83.
[14] *Id.* at 503.
[15] *See infra* at § V (examining the timeliness of an appeal commenced after a final judgment is announced but before it is docketed).
[16] *Hiob*, 440 Md. at 489 (quoting *Rohrbeck v. Rohrbeck*, 318 Md. 28, 41 (1989)).
[17] *Id.*
[18] *Id.* at 479-80.
[19] "Who must sign the document depends on the type of judgment. When there is a decision by the court denying all relief, the clerk 'shall prepare, sign, and enter the judgment.' Rule 2-601(a). More complex types of judgments require a signature by the judge." *Id.*
[20] The separate-document rule is "mechanically applied in determining whether an appeal is timely" to fulfill the "purpose of providing clear and precise judgments and to eliminate uncertainty as to when an appeal must be filed." *Id.* (internal citations and quotations omitted).
[21] *Id.* at 490.
[22] *Id.* at 495.
[23] *Id.* at 496.
[24] *Id.* at 495.
[25] *Id.* Emphasizing that the docket entry reading "Voluntary Dismissal (Partial) as to Erie Insurance Exchange" is "ambiguous as to whether judgment has been entered" (*id.* at 500), the Court of Appeals opined that "[t]he ambiguity as to finality is especially apparent … because neither the docket entry, nor the Line of Dismissal, indicates that the prior summary judgment order in favor of Progressive is now a final order." *Id.* at 501.
[26] *Id.* at 480.
[27] However, Maryland Rule 8-602(d) will not save an appeal that is improperly noted. If, for instance, Petitioners had noted their appeal after the trial court entered summary judgment in favor of Progressive but then failed to take any action when the final judgment was announced and entered 14 months later, the notice of appeal would have been fatally premature.
[28] *Id.* at 484.

UNBUNDLING...

(continued from page 9)

attorneys should know that the United States District Court for the District of Maryland specifically prohibits ghostwriting. The Local Rules provide, "attorneys who have prepared any documents which are submitted for filing by a *pro se* litigant must be members of [the U.S. District Court for the District of Maryland] and must sign the document."[11]

To effectuate limited scope representation, the Court also voted to adopt the proposed amendments to Rules 1-321 (service after entry of limited appearance), 1-324 (notification to and service on attorneys who have entered a limited appearance), 2-131 and 3-131 (permitting the entry of a limited appearance, notice of same and guidance regarding informed consent of the client regarding the limited scope of the representation), and 2-132 and 3-132 (notice of withdrawal for limited appearance attorneys).

As stated by MAJC, the key to successful limited scope representation is clear communication with the client about what is included in the representation and the associated costs.[12] The amendments to the rules attempt to ensure that the attorney and client clearly understand the terms of the representation. While it is encouraged (especially by Bar Counsel) that all attorneys enter into written retainer agreements with their clients for all matters, in the past, the rules only required a written retainer agreement in contingency fee cases.[13]

The new rule changes will require written retainer agreements for all limited scope representations. For any representation involving a matter pending before a court, the attorney must file a notice of appearance attaching an "Acknowledgement of Scope of Limited Representation" signed by the client.[14] The amended rule provides a form Acknowledgement, copied in full as an appendix to this article, that all practitioners are encouraged to review.[15] When an attorney enters her limited appearance, she would then, under the amendment to Rules 2-132 and 3-132, be permitted to simply file a notice of withdrawal when the particular proceeding or matter for which the appearance was entered has concluded.[16]

It necessarily follows that attorneys should also communicate the potential downside of limited scope representation and the consequences of retaining an attorney piecemeal. Limited scope representation should not in any way limit the quality of legal services provided and attorneys should carefully evaluate the appropriateness of the contemplated representation given the specific type of case and circumstances of the client. Rule 1.2(c)(1) itself is the guide: "[T]he limitation [must be] reasonable under the circumstances."

Additionally, attorneys should be aware that in those jurisdictions not yet using the Maryland Electronic Courts system, the attorney will receive all notices from the court during the pendency of his or her appearance, regardless of whether or not they are related to the limited representation.

For those attorneys interested in learning more about unbundled legal representation the American Bar Association provides a wealth of information and resources. The ABA Standing Committee on the Delivery of Legal Services has compiled articles, rules, ethics opinions as well as practice handbooks and checklists, all available on its website.[17]

It is anticipated that the new rules will go into effect July 1, 2015.

Endnotes

[1] ABA "Unbundling Fact Sheet" available at: http://www.americanbar.org/content/dam/aba/migrated/legalservices/delivery/downloads/20110331_unbundling_fact_sheet.authcheckdam.pdf (last visited February 1, 2015).
[2] The Bar Association of Baltimore City, Lawyer Referral and Information Service , Unbundled Legal Services Panel available at: www.baltimorebar.org/lris/pdfs/Unbundled%20Legal%20Services%20Panel.pdf (last visited February 1, 2015).
[3] Maryland Access to Justice Commission, "Limited Scope Representation in Maryland" available at: http://mdcourts.gov/mdatjc/pdfs/08climitedscopewhitepaper.pdf (last visited February 1, 2015).
[4] *Id.*
[5] *Id.*
[6] Standing Committee on Rules of Practice and Procedure 186th Report at 99, available at: http://www.courts.state.md.us/rules/reports/186th.pdf (last visited February 1, 2015).
[7] *Id.*
[8] *Id.* at 94-95
[9] *Id.* at 97.
[10] *See* Maryland Lawyers' Rules of Professional Conduct, Rule 4.1(a) ("In the course of representing a client a lawyer shall not knowingly (1) make a false statement of material fact or law to a third person; or (2) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.")
[11] United States District Court for the District of Maryland, Local Rule 102(1)(a)(ii) (2014).
[12] Maryland Access to Justice Commission, "Limited Scope Representation in Maryland" at 1-2.
[13] Maryland Lawyers' Rules of Professional Conduct, Rule 1.5(c).
[14] 186th Report at 105-08, 112-15.
[15] *Id.*
[16] *Id.* at 109-11, 116-17.
[17] *See* www.americanbar.org/groups/delivery_legal_services/resources.html (last visited February 1, 2015).

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Unbundling "Unbundling" Appendix
Form Acknowledgement of Scope of Limited Representation

[CAPTION]

ACKNOWLEDGMENT OF SCOPE OF LIMITED REPRESENTATION

Client: _____

Attorney: _____

I have entered into a written agreement with the above-named attorney. I understand that the attorney will represent me for the following limited purposes (check all that apply):

- ❑ Arguing the following motion or motions:
  _____.
- ❑ Attending a pretrial conference.
- ❑ Attending a settlement conference.
- ❑ Attending the following court-ordered mediation or other court-ordered alternative dispute resolution proceeding for purposes of advising the client during the proceeding:
  _____.
- ❑ Acting as my attorney for the following hearing, deposition, or trial:
  _____.
- ❑ With leave of court, acting as my attorney with regard to the following specific issue or a specific portion of a trial or hearing:
  _____
  _____.

I understand that except for the legal services specified above, I am fully responsible for handling my case, including complying with court Rules and deadlines. I understand further that during the course of the limited representation, the court may discontinue sending court notices to me and may send all court notices only to my limited representation attorney. If the court discontinues sending notice to me, I understand that although my limited representation attorney is responsible for forwarding to me court notices pertaining to matters outside the scope of the limited representation, I remain responsible for keeping informed about my case.

_____
Client

_____
Signature

_____
Date

or expense may also specify the "allocation of expenses" for the disclosure or discovery. Similarly, proposed Rule 34(b)(2) requires that the basis for objecting to a request for production be stated "with specificity" and include "the reasons." A new provision, Rule 34(b)(2)(C), requires a party to state as part of the objection to a request for production "whether any responsive materials are being withheld on the basis of an objection." This change is designed to end the confusion that arises when a party states several objections and nonetheless produces information, "leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections." Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 54, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx.

The above changes regarding proportionality of discovery are brought into greater relief when read in conjunction with amended Rule 1, which governs the scope and purpose of the Federal Rules of Civil Procedure as a whole. Proposed Rule 1 states "[t]hese rules . . . should be construed, administered *and employed by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding." The change is intended to foster "cooperative behavior among litigants," and, therefore, provide for expedient litigation of every case, taking into account the magnitude of each dispute. Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 13, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx.

Preserving Electronically Stored Information

The last major proposed change is to Rule 37(e), governing sanctions for failing to preserve electronically stored information, or "ESI." Under the present rule, the federal circuits have established different standards for imposing sanctions or curative measures on parties who fail to preserve ESI, leading to some harsh results and also over preservation. Thomas Y. Allman, The Civil Rules Package as Approved by the Judicial Conference (September, 2014), at 13, available at http://www.theediscoveryblog.com/2014/10/07/part-iii-frcp-amendments/; Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 58, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx.

The text of proposed Rule 37(e) is as follows:

(e) Failure to Preserve Electronically Stored Information.
If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
(1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
(2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
(A) presume that the lost information was unfavorable to the party:
(B) instruct the jury that it may or must presume the information was unfavorable to the party; or
(C) dismiss the action or enter a default judgment.

New Rule 37(e) does not apply when a loss of ESI occurs despite a party's reasonable efforts to preserve such evidence. The new rule applies only if the lost information should have been preserved in anticipation of litigation. The Committee Note embraces the holdings of many courts that "potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable." Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 59, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx.

If the judge determines a party has failed to take reasonable steps to preserve ESI, and the requesting party has been prejudiced, then the judge may order measures to "cure the prejudice" under subsection (e)(1). For instance, the judge may exclude certain evidence or permit argument to the jury regarding the loss of information. Report of the Judicial Conference Committee on Rules of Practice and Procedure, at 64, available at http://www.uscourts.gov/RulesAndPolicies/rules/pending-rules.aspx. At this point, it is unclear how extensive orders may be under the new proposed rule. The Committee Note does go a long way, however, to distinguish sanctions available under subsections (e)(1) and (e)(2). The judge is permitted to presume the lost information was unfavorable, instruct the jury as much, or enter a judgment of default only upon a finding that a party has "acted with the intent to deprive another party of the information's use in the litigation." .

The proposed amendments have been approved by the Judicial Conference of the United States, and are now pending before the United States Supreme Court. They are slated to take effect on December 1, 2015, absent some action by Congress. The intent seems to be clear that the federal courts want to expedite litigation while giving litigants a fair opportunity to have their cases handled appropriately. The message for federal practitioners is understand your case early on, give thought to what you need in discovery, be cognizant of preserving ESI and when that obligation is triggered, and be prepared to take advantage of the available judicial resources.

Litigation Section – Maryland State Bar Association

NOMINATE A DISTINGUISHED MARYLAND LITIGATOR
For The 2014-2015 "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:
  - Currently be licensed to practice in Maryland
  - Currently be a dues-paying member of the MSBA
  - Practice predominately in the area of litigation
  - Practice predominately (*i.e.,* have personal principal office location) in Maryland
  - 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.
6. extra-curricular contributions to the community-at-large

- The award will be presented at the annual meeting of the Litigation Section in June 2015 in Ocean City during the Section's annual MSBA 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 1, 2015**, to

John P. Markovs., Chair
MSBA Litigation Section
Office of the County Attorney
101 Monroe St. 3rd Floor
Rockville, MD 20850-2503
John.markovs@montgomerycountymd.gov

PAST AWARD WINNERS

Andrew Jay Graham, Esquire	2011-2012
Alvin I. Frederick, Esquire	2012-2013
Timothy F. Maloney, Jr., Esquire	2013-2014

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: _____
_____
_____
_____
Telephone No. _____

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

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

THE LITIGATION SECTION OF THE MARYLAND STATE BAR ASS'N AND ITS APPELLATE PRACTICE COMMITTEE

PRESENT

RECENT IMPACT DECISIONS OF THE MARYLAND APPELLATE COURTS

Thursday, March 19, 2015
5:00 – 8:00 p.m.

Court of Appeals of Maryland
Robert C. Murphy Courts of Appeal Building
Fourth Floor
361 Rowe Boulevard
Annapolis, MD 21401

5:00 - 6:00 p.m. Social Hour Reception – Foyer to the Courtroom
(front doors to the Courthouse close at 6:00 p.m.)
Cash Bar (Beer & Wine) & Heavy Hors D'oeuvres
6:00 p.m. - 8:00 p.m. – Court of Appeals Courtroom
Speaker Presentations and Audience Questions

$10.00 for MSBA Litigation Section
$25.00 for others

SPEAKERS:

HON. ALAN M. WILNER, *Judge (retired), Court of Appeals of Maryland*

RENÉE HUTCHINS, *Professor of Law, University of Maryland Frances King Carey School of Law*

BRUCE L. MARCUS, ESQUIRE, *MarcusBonsib LLC*

SPACE IS LIMITED

Please register on-line at http://www.msba.org/RecentImpactDecisionsMarch2015.aspx or complete information below and mail with a check in the amount of $_____ payable to the MSBA, c/o Theresa L. Michael, 520 West Fayette Street, Baltimore, MD 21201.

Name(s) of attendee:

_____

e-mail address or telephone number:

_____