



MSBA

BARBULLETIN

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Scurti Named 2019-2020 President-Elect Nominee

The MSBA Board of Governors has named the Honorable Mark F. Scurti as the Association's President-Elect Nominee for the 2019-2020 bar year. Scurti tops a slate of nominees that includes Maryland State Delegate Erik L. Barron as Secretary-Elect and Kramon & Graham PA Principal and Maryland Bar Foundation President M. Natalie McSherry as Treasurer-Elect.

Scurti, an Associate Judge of the District Court of Baltimore City, has served as Treasurer since 2016. His past MSBA service includes the Board of Governors and Executive Committee, as well as the Committees on Audit and Budget & Finance. He has also actively participated in the Sections on Alternative Dispute Resolution, Consumer Bankruptcy, Delivery of Legal Services, and Family & Juvenile Law.

A Baltimore native, Scurti procured his J.D. from the University of Baltimore School of Law and was admitted to the Maryland Bar in 1991. He spent over a decade in solo and small firm practice before joining Pessin Katz Law, P.A., in 2007. There, Scurti focused his practice on family law, LGBTQ legal issues, mediation, corporate startups, estate planning, and bankruptcy before then-Governor Martin O'Malley appointed him to the bench in 2013.

Scurti's extensive service to the legal profession has also included the Bar Association of Baltimore City, of which he served as President during the 2006-2007 bar year, and the Board of Directors of the Pro Bono Resource Center of Maryland. His professional affiliations also include, among others, the American

Bar Association, the Federal Bar Association, the District of Columbia Bar, the Baltimore County Bar Association, the LGBTQ Bar Association of Maryland, the Maryland Trial Lawyers Association, and the Maryland Bar Foundation, which presented its Edward F. Shea Professionalism Award to Scurti in 2000. Maryland Volunteer Lawyers Service recognized Scurti in 2011 as its Volunteer of the Year, and again in 2017 with its Pro Bono Service Award.

Current President-Elect Dana O. Williams, a trial attorney and partner at the Towson law firm of Heisler, Williams & Lazzaro, LLC, will be installed as MSBA President on Saturday, June 15, 2019, at the MSBA Legal Summit & Annual Meeting in Ocean City, Maryland. Scurti is slated to succeed Williams as President for the 2020-2021 bar year. ●



2019-2020 President Elect Hon. Mark F. Scurti



Secretary-Elect Erik L. Barron



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Current President-Elect Dana O. Williams

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EXECUTIVE DIRECTOR'S COLUMN

The MSBA Sections are the lifeblood of our organization. Sections are driving value to our members by providing educational programs, networking opportunities, and other member events. With the help of our Section Value Task Force, and under the leadership of MSBA President, Hon. Keith Truffer, our MSBA Sections are working harder than ever to deliver more value, by developing and curating content for the MSBA website.



Real Property Section Council



Criminal Law & Practice Section Council



Family & Juvenile Law Section Council

MSBA Sections also provide members with their first look into the MSBA. They provide leadership opportunities, act as resources through MSBA Email Discussion Lists, and are the lookout posts for particular areas of law by staying abreast of new developments.

As many of you know, I spent the first 18 months of my time criss-crossing the state to speak with individual attorneys and members. This year, I am spending some of my time with our Section Councils. Over the past few months, I have attended several of our Section Council meetings, including Criminal Law, Family Law, and Real Property, and others. Although these Sections focus on different practice areas, their goals are similar, in that they want to produce more value for their members. Through these meetings, the MSBA and Section leaders are working together to enhance member experience, provide greater value through content, and position the MSBA for the future.

Together...we are the MSBA. ●



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Members should address their written ethics inquiries to Patricia Weaver, Ethics Committee, 4800 Hampden Lane, Suite 700, Bethesda, MD 20814, or call (301) 951-9360, or e-mail tweaver@paleyrothman.com. Opinions of the Ethics Committee are available online at www.msba.org/ethics. Please consult the Rules and MSBA Ethics Opinion Website before calling.



PRESIDENT'S MESSAGE



FEBRUARY 2019

MSBA President Judge Keith R. Truffer shares his updates in his February monthly video message.

▶ To watch his most recent message, select the "President's Messages" playlist from our YouTube channel at www.youtube.com/user/MDStateBar/playlists.



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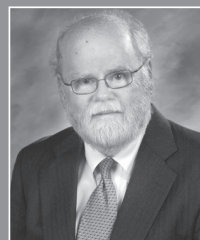
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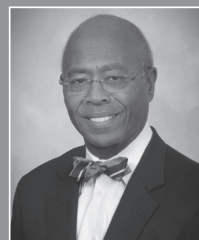
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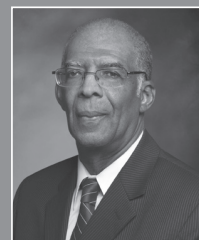
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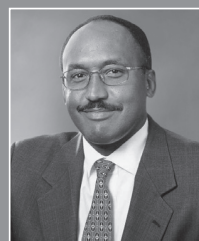
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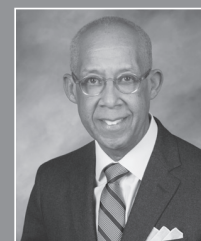
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Dateline

FEBRUARY

19 You are invited to attend the **MSBA Mid-Year Meeting**. Registration is complimentary to the first 100 member registrants. The meeting will be held at Sheraton North Hotel, 903 Dulany Valley Road, Towson, MD with registration beginning at 11:00am. Programs will include a luncheon, CLE opportunities, and a networking reception. For more information and/or to register, please visit msba.org/midyear2019.

23 The **MSBA Young Lawyers' Section and Montgomery County Bar Association** present the *Zengo Charity Ride and Happy Hour*. The ride will begin at 1:00pm at Zengo, an indoor cycling venue located at 4866 Cordell Avenue, Bethesda, MD. This 50 minute, full body workout takes place in a fun, energetic atmosphere. After the ride, there will be a social happy hour at 2:00pm at Brickside Food and Drink, just steps away from Zengo. All proceeds will benefit Comfort Cases, a local charity that provides a proper bag filled with comfort and essential items for the brave youth in foster care as they journey to find their forever home. For more information and/or to register please visit www.msba.org/product/charity-ride.

26 The **MSBA CLE Department** presents "Are you Lawyering or Laboring? 7 steps to reduce interruptions & chores and run a highly productive law firm." This live, one (1) hour webinar will begin at 12:00pm, and teach you 7 basic and advanced techniques for incorporating call-routing, web chat, and live receptionist services into your operations with minimal investment of time, energy, and money. For more information and/or to register visit: www.msba.org/product/are-you-lawyering-or-laboring.

27 The **ABA TECHSHOW 2019** kicks off in the Windy City, Chicago, Ill. MSBA Members receive a discount off registration when they use promo code EP1909. For more information and/or to register visit www.techshow.com.

MARCH

2 The **MSBA Young Lawyers' Section** presents an opportunity to engage in public service on Whispering Rise Farm & Animal Sanctuary. Come feed the pigs, participate in pig socialization, and network with other young attorneys while working the farm. For more Information and/or to register visit msba.org/YLSWhisperingRise.

5 The **MSBA CLE Department** presents "Appellate Practice in Maryland." The 2.5 hour program begins at 12:30pm and will be held at the University of Baltimore School of Law. The program will feature questions and answers on effective appellate practice with the Honorable Sally D. Adkins and the Honorable Daniel A. Friedman. For more Information and/or to register visit msba.org/AppellatePracticeBalt.

8 The **Pro Bono Resource Center of Maryland** along with other organizations presents "Representing Asylum-Seekers: Model Hearing Edition." The program will be held at the University of Maryland Francis King Carey School of Law from 8:30am to 4:00pm. For more Information and/or to register visit: probonomd.org/asylum.

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From the Boardroom

BY ANNA S. SHOLL, ESQ.

The Board of Governors held their last meeting on January 15, 2019 at the MSBA Headquarters in Baltimore, Maryland.

The meeting started with a report from MSBA President, Hon. Keith Truffer, and a recap of the Annapolis Summit that kicked off the opening of the 2019 Legislative Session in Annapolis, MD. Both Maryland Governor, Larry Hogan and Judge Truffer had the opportunity to speak at the summit. You can view Judge Truffer's interview on the MSBA youtube channel or at <https://youtu.be/vw6wbgS7T8I>.

In addition, during his report, Judge Truffer provided an update on the 2019 Legal Summit and Annual Meeting planning. At the end of the discussion, the Board approved a small change to the meeting schedule. In past years, the Board of Governors met twice at the Annual Meeting, once on the opening day of the Annual Meeting and once at the close of the meeting. This year, the meetings will be combined, and both incoming and outgoing governors will participate in the meeting on Wednesday afternoon. In addition, the keynote speaker, Jeffrey Toobin, CNN Chief Legal Analyst, and other high profile guests, including Attorney General, Brian Frosh, were announced. Based on the discussion, the 2019 Legal Summit and Annual Meeting is shaping up to be a can't miss event.

During the Executive Director's report, the upcoming release of the newly designed Bar Journal was highlighted. A timeline was shared with the Board of Governors, and the new journal is scheduled to hit mailboxes at the end of the month. There was also discussion about potential improvements to the Bar Bulletin.

Several MSBA Committees and Sections reported at the meeting. The first report was from the chair of the Audit Committee, Ed Gilliss. He indicated that the MSBA Audit for fiscal year 2017-18 was completed, and that the audit was clean. Richard Montgomery, III reported on behalf of the Laws Committee, and noted that there were no new bills to report at this time, given the short amount of time since the opening of the session. He anticipates a



more significant report at next month's meeting.

Finally, the Chair of the Young Lawyers' Section ("YLS"), Indra Sharma, reported that YLS has been very active this fiscal year. They have developed and/or sponsored several high quality educational, networking and public service events so far this year, including hosting a welcome happy hour for newly barred attorneys. In March, they will hold an open section meeting and present "Mastering Social Media". The YLS annual charity event will be held on April 12, 2019 and will benefit Capital Area Immigrants Right Care Coalition. For more information on the event and/or to register, please visit msba.org/YLS-Charity-Event.

The meeting closed in executive session for discussion regarding nomination of officers for the 2019-20 fiscal year.

The next Board of Governors meeting is scheduled for February 19, 2019 in conjunction with the MSBA Mid-year meeting in Towson, MD. For more information about Board of Governors meetings, including access to agendas and minutes, please visit the [Leadership page](#) located under the "About" tab of the MSBA homepage. ●



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Succession Top of Mind at Law Firms, But Getting It Done Is Hard

Baby-Boomer founders and senior partners are aging and retiring, so many law firms are facing transitions to new chairs and managing partners— whether they are prepared or not.



Are Cybersecurity Solutions and Consulting a New Revenue Stream for Law Firms?

The Big 4 accounting firms have identified legal services as an area for growth beyond traditional financial services and consulting services.



Does Artificial Intelligence Need a General Counsel? The Unintended Consequences of AI

As AI software evolves, it learns, and sometimes that evolution is not what the developers expect. What happens to developers of software when AI evolves in a way that results in an unintended violation of national laws?



Behavioral Health Practices 'Poised to Explode' at Law Firms

Law firms are adding resources and even entire practice groups to handle behavioral health, an area of the law that has grown due to increasing urgency around drug addiction and mental health in the U.S. and legislation that has followed those developments.

WATCH: The Future of MSBA



The MSBA has been the voice of the legal profession in Maryland for more than 100 years.

As we enter an era of dramatic change, we're leveraging our history of success to build an organization for the attorneys of tomorrow. Future-focused: For our members. For the profession.

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How a SCOTUS case involving Google may threaten access to justice in Maryland


BY REENA SHAH, ESQ.

Access for Justice Commissions and civil legal aid organizations have long argued that the cy pres doctrine can be used to direct class action residual funds to chronically under-resourced civil legal aid organizations that provide free legal services to the poor. Since over 80% of Marylanders do not receive the civil legal services they need, every viable funding stream for civil legal aid organizations is important. In 2019, this lesser known funding source could be slashed due to a Google case before the U.S. Supreme Court.

Google

In *Frank v. Gaos*, which was argued before the U.S. Supreme Court in October, 2018, petitioners Theodore Frank and Melissa Ann Holyoak challenged an unusual \$8.5 million

privacy settlement in the underlying case of *Gaos v. Google* that resulted in Google LLC paying almost the entire amount of the settlement to attorneys and third party charities, but nothing to the members of the class. Attorneys from the Google case argued that it would be infeasible to mete out the approximately 4 cent award to a prospective 130 million-person size class, so it earmarked the money for six separate charities instead.

 You can read more about Class Action Residual funds in the MD A2JC Report: msba.org/EnhancingAccessReport

The Maryland Access to Justice Commission and local civil legal aid organizations have worked to have unclaimed funds from class action lawsuits that could not

be distributed to the designated class – named “class action residual funds” – to be directed to Maryland’s many civil legal aid organizations.

Courts rely on their general equity power, or the doctrine of cy pres to justify the distribution of class action residual funds. The cy pres doctrine, borrowed from the estates and trust context, refers to the French phrase, “cy pres comme possible,” which means “as near as possible.” Under this equitable doctrine, funds can be redirected to another beneficiary to fulfill, “as nearly as possible,” the donor’s original intent. In the class action context, the doctrine is used to distribute unclaimed portions of a class action judgment or settlement

CONTINUED ON PAGE 16

PRO BONO PROFILE

PBRC PARTNER PROFILE:



Maria Ellena
Chavez-Ruark, Esq.,
Partner, Saul Ewing
Arnstein & Lehr LLP

A conversation with Maria Ellena Chavez-Ruark, Esq. PBRC Board President and Pro Bono Attorney

Why did you decide to join PBRC's board?

I wanted to do something more than I was already doing. I wanted to be part of PBRC because I was so taken with the people I had met there, from the leadership, to the staff attorneys, to the volunteers.

I've been a member of the MSBA since I was sworn into the bar almost 25 years ago. I believe in what it does, and I appreciate that they support pro bono through more than just words. As the pro bono arm of the MSBA, PBRC provides training and support for volunteers, and for other pro bono organizations. They do remarkable work, and make a real impact in so many lives in our community.

What is your first memory of doing pro bono work?

There was a case that I worked on about 20 years ago that has always stayed with me. I represented a woman who had gone through sex reassignment surgery, had transitioned into being a woman, and wanted to change her name. She felt that it was part of her identity. It was so important to her, and it went to the core of who she was. I represented her in a name change proceeding. For me it was a few hours of time, but for her it was life-changing. For many, many years after that she and I stayed in touch.

When the order came, I personally delivered it to her, and she just sobbed and kept saying, "Thank you! Thank you! Thank you!" I think of her often. That was probably the single most gratifying piece of work I've ever done.

Did anything surprise you about volunteering with PBRC?

The thing that surprised me the most was how well-organized and well-managed the projects are. I practice in one very specific area of law -- bankruptcy -- and I was very nervous about branching out into new areas such as drafting wills or negotiating utility bills. That hesitation is what had kept me from volunteering for these projects in the past.

The staff makes it so easy for the volunteers -- from the signup, to the training videos, to the day of the clinic. When I showed up, they gave a 30-minute introduction, which gave me good perspective on what to expect. Having staff on site while I was actually meeting the clients was also very helpful.

I also like that it's a limited time frame. You show up from nine to one. You work for four hours, and you don't have any ongoing responsibilities. So if I'm busy at work, I don't have to juggle everything to have the time I need.

What motivates you to do pro bono?

We want to live in great communities, but great communities don't just happen if nobody's putting work and time into them. We have a very unique skill set as attorneys, to help people who need help. I wish everyone knew how easy it is to volunteer and how great it feels afterwards. It really is rewarding.

PBRC's featured service opportunity

Volunteering with the Home Preservation Project for an Estate Planning Clinic
or a Tax Sale Prevention Clinic
probonomd.org/homepreservation

For more information about volunteering in Maryland, contact:
Annie Speedie, PBRC Director of Programming: aspeedie@probonomd.org, 443-703-3051.



The Pro Bono Resource Center of Maryland will match your skills with a wide range of pro bono opportunities.

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Thought Leader Series
Friday, June 14, 10-10:50 a.m.



JAYNE MILLER
Chief Investigative
Reporter, WBAL-TV

MSBA.ORG/ANNUALMEETING

Arbitrate the Bastard!

Waiving Arbitration Provisions

BY KENNETH A. VOGEL, ESQ.

Arbitrate the Bastard! Somehow, it just doesn't have a ferocious ring to it. How does one get into arbitration? How can one get out?

Construction contracts typically have arbitration provisions as the mandatory dispute resolution procedure. In a past article, this author discussed cases in which non-parties to an arbitration contract can be compelled to arbitrate. ("I Didn't Sign It!" MSBA Bar Bulletin, Nov. 2018). This article looks at how a party who signed a contract with an arbitration provision can nonetheless avoid mandatory arbitration.

Arbitration is a voluntary procedure. Parties agree to arbitration by contract. After a dispute arises, parties to a contract with an arbitration clause might decide that they would rather have the court resolve their dispute. The parties can simply agree to opt out of arbitration. They have a right to mutually and voluntarily waive the arbitration provision by amending their contract. There are a number of reasons why they might do this. Arbitration can be expensive. Large ADR providers such as the AAA and JAMS charge administrative fees which greatly exceed court

filing fees. The arbitrators on their panel charge from \$600 to \$800 or more per hour, generally split between the parties. On the other hand, judges are paid by the taxpayers. These high arbitration fees exclude some matters such as home warranty arbitrations and the like, which are done by panels providing a reasonable pre-determined flat fee.

For a large construction case, the cost of arbitration is not much compared with the amount of money at stake. But for a small case, perhaps under \$50,000 to \$100,000, the cost of an arbitration proceeding can become

disproportionate to the amount in dispute. Going to court might be much cheaper.

This is easier said than done. The arbitration clause was inserted in the contract by one or both sides for a reason. Parties might be hesitant to modify their contract once the dispute has arisen. Thus, high arbitration costs may very well act as a deterrent to a party filing for the arbitration. Ironically, this might even deter the very party who put the arbitration provision in its contract in the first place!

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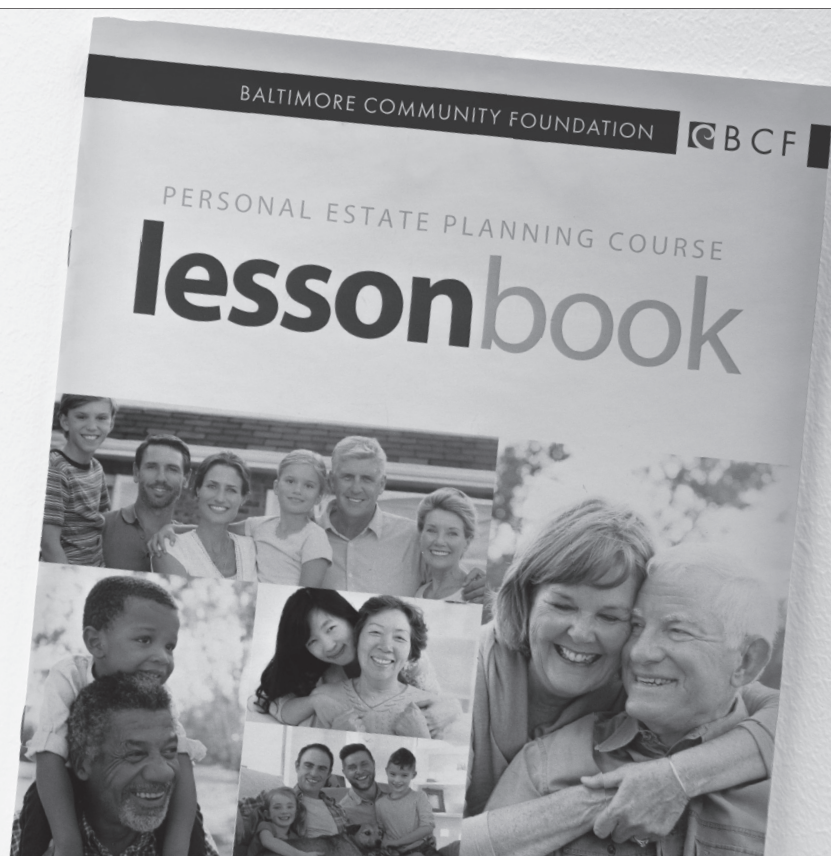
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U.S. Supreme Court Addresses Secret Sales as Prior Art under the America Invents Act

BY DAVID TAYLOR, ESQ.

On January 22, 2019, the U.S. Supreme Court issued its long-awaited decision, *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, No. 17-1229, ___ S.Ct. ___, 2019 WL 271945 (2019), addressing the effect of Congress' passage of the Leahy-Smith America Invents Act ("AIA") (2011) on prior art, in particular "secret sales."

As discussed in my August 2018 Bar Bulletin article, for an invention to be patentable it must be, among other things, novel and non-obvious over the prior art. Prior to the enactment of the AIA, "prior art" included a sale or offer for sale that occurred in the United States more than one year prior to the effective filing date of a patent application, even if the sale or offer for sale was subject to a duty of confidentiality (also known as a "secret sale"). 35 U.S.C. § 102(b) (pre-AIA); *Special Devices, Inc. v. OEA, Inc.*, 270 F.3d 1353, 1357 (2001).

Many in the patent community believed that the AIA changed the long-held pre-AIA precedent that "secret sales" are prior art that can invalidate a patent. This belief stemmed from AIA Section 102(a)(1), which provides that an inventor is "entitled to a patent unless ... the claimed invention was patented, described in a printed publication, or in public use, on sale, or otherwise available to the public before the effective filing date of the claimed invention" (emphasis added). (Section 102(b)(1) identifies exceptions for disclosures made one year or less before the effective filing date. These exceptions are not relevant to *Helsinn*.)

Those advocating that the AIA changed the law argued the "otherwise available to the public" language of the AIA's Section 102(a)(1) was a "catchall" that required all of the preceding categories of prior art, including "on

sale" activities, to be "available to the public" in order to constitute prior art. Indeed, that is how the U.S. Patent & Trademark Office ("PTO") has interpreted the AIA. See Manual of Patent Examining Procedure ("MPEP") § 2152.02(d).

Helsinn involved agreements between the patentee *Helsinn* and MGI, a US company, under which MGI agreed to purchase a drug from *Helsinn* and to keep proprietary information concerning the drug confidential. The agreements were publicly announced in a joint press release and a SEC filing, but neither disclosed the specific dosage formulations of the drug. A patent application on the drug's formulation was filed nearly two years later.

The District Court determined that the patented invention was not "on sale" under the AIA, despite the purchase agreement, because the specific dosage formulations were not publicly disclosed in the announcements. *Helsinn Healthcare S.A. v. Dr. Reddy's Labs Ltd.*, 2016 WL 832089 (D.N.J. Mar. 3, 2016). The Federal Circuit reversed, 855 F.3d 1356, 1360 (2017), but seemingly hinged its decision on the finding that the sale was "otherwise available to the public" because the existence of the sale was publicly disclosed by the announcements.

The Supreme Court affirmed, but on different grounds. The Court unanimously held that secret sales remain on-sale prior art that can invalidate a patent under the AIA, irrespective of whether the "existence" of the agreement is publicly disclosed. In the words of the Court, "a commercial sale to a third party who is required to keep the invention confidential may place the invention 'on sale' under the AIA." The Supreme Court reached its decision by couching the AIA as a "reenactment" of settled pre-AIA

precedent on the meaning of "on sale," and presuming that when Congress reenacted the same "on sale" language of the pre-AIA statute in the AIA it adopted the earlier judicial construction of that phrase. The Supreme Court viewed the AIA's addition of the "otherwise available to the public" catchall phrase as capturing material that does not fit neatly into Section 102(a)(1)'s enumerated categories, although the Court did not hint at what that other "capture [d] material" may be.

In the end, all of the scholarly and professional debate over the meaning of five words in the AIA has met a rather anticlimactic end. To quote a famous proverb, the more things change, the more they stay the same. Pre-AIA precedent perseveres. An "on-sale bar," whether pre-AIA or AIA, is triggered if the invention is (1) the subject of a commercial offer for sale not primarily for experimental purposes and (2) ready for patenting. *Pfaff v. Wells Elecs., Inc.*, 525 U.S. 55, 67 (1998). Confidentiality of the sale is irrelevant.

Helsinn serves as a cautionary reminder to inventors seeking to protect their innovations, and to their attorneys, to conduct an adequate due diligence investigation by identifying activities that may trigger a bar to patentability under AIA Section 102(a), and calendaring dates associated with the bar to ensure that a patent application covering the innovation is timely filed in the PTO and thereby not susceptible to a genuine invalidity attack. ●

David Taylor is a partner with the law firm of Berenato & White, LLC in its Bethesda office. The firm concentrates its practice in the area of intellectual property.

Finding Intellectual Property Right Under (Or On) One's Feet

BY DAVID TAYLOR, ESQ.

Most attorneys, particularly those who do not regularly practice in the field of intellectual property, tend to associate trademark registration with word marks, such as Nike, Amazon, Exxon, Google, and Pepsi, to name a few. However, such a narrow view of registration can prove to be a disservice to clients. The U.S. Patent & Trademark Office (USPTO) does not limit federally registerable subject matter to words only.

Trade dress, such as product-packaging trade dress and product-design trade dress, as well as other "non-conventional" source identifiers such as colors, scents or fragrances, and sounds, potentially constitute registerable subject matter.

The U.S. Court of Appeals for the Federal Circuit recently took up an appeal involving a product-design trade dress registration, specifically for Chuck Taylor All Star® shoes. *Converse, Inc. v. Int'l Trade Comm'n*, 2016-2497, --- F.3d ---, 2018 WL 6164571 (Fed. Cir. Oct. 30, 2018). Converse owns U.S. Trademark Registration No. 4,398,753 for the trade dress to the Chuck Taylor All Star shoes. Although Converse claims to have been using the trade dress since 1932, it apparently waited until 2012 to file a federal trademark application, which the USPTO issued as the '753 registration in 2013. The '753 registration includes the design reproduced below, together with a description of the mark as "consist[ing] of the design of the two stripes on the midsole of the shoe, the design of the toe cap, the design of the multi-layered toe bumper featuring diamonds and line patterns, and the relative position of these elements to each other":

Converse filed a complaint

“
The validity of Converse's trade dress turned on the issue of secondary meaning.

in the International Trade Commission (ITC) alleging that more than thirty respondents violated Section 337 of the Tariff Act of 1930 for actions relating to importation of shoes that Converse alleged infringed the '753 registration and Converse's common law rights in the trade dress. Some of those respondents were alleged to have started infringing Converse's mark before the 2013 registration date, while others were alleged to have started after. By the time the case reached the Federal Circuit, only four respondents (who intervened in the

CONTINUED ON PAGE 17

2018 Farm Bill Makes Hemp Production Legal; But State Still Needs to Act to Take Advantage of Change

BY PAUL GOERINGER, EXTENSION LEGAL SPECIALIST, UNIVERSITY OF MARYLAND

Farmers across the country are looking to begin producing hemp. This has nothing to do with the advent of the legalization of marijuana as may be applicable from place to place. Rather, these farmers are looking at the potential higher returns for hemp seed, fiber, or oil markets compared to returns with traditional crops (such as wheat, corn, and soybeans). The 2018 Farm Bill removes hemp from the definition of marijuana under the *Controlled Substances Act* and allows states and tribal governments to begin developing hemp production plans. Hemp is legal to grow in Maryland in certain situations, but the General Assembly needs to give the Maryland Department of Agriculture (MDA) the authority to develop a hemp production plan. This tension between federal and state law is explored in this article.

Under Section 12619 classification the definition of marijuana will no longer include hemp (12 U.S.C. § 802). Section 10113 defines hemp to be “the

plant *Cannabis sativa* L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration (THC) of not more than 0.3 percent on a dry weight basis.” (7 U.S.C. § 1639o(1)). Any hemp plants with a THC level greater than 0.3 percent on a dry weight basis is considered marijuana and still illegal under federal law.

To be legal, Section 10113 requires that a state, tribe, or federal government develop a hemp production plan. Using such a hemp production plan, a state, tribe, or federal government will monitor producers and regulate hemp production. Section 10113 lays out two routes for a producer to legally begin producing hemp. The first route is for a state or tribal government to take charge of regulating hemp production within their boundaries. To do so, a state department of agriculture will submit to USDA a hemp

production plan for approval. The hemp production plan must include:

1. The system of land where hemp is being produced, including the legal description of the land. The system will need to maintain land records for at least three years.
2. Testing procedures to demonstrate that hemp produced has less than 0.3 percent THC concentration level per dry weight basis.
3. Procedures for destroying any plants and products with THC concentrations higher than allowed by the law.
4. Procedures to enforce the law.
5. Procedures for conducting at minimum annual inspections of a random sample of hemp producers to verify hemp produced in the state does not violate the law.
6. A system to convey hemp producers information to USDA
7. Certification for USDA that the

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Maryland Judiciary Launches MDEC in Baltimore County

On February 19, 2019, the Maryland Judiciary will launch Maryland Electronic Courts (MDEC) in Baltimore County.

E-filing will be mandatory for attorneys filing cases in the District Court and the Circuit Courts in Baltimore County, as well as appellate filings that commence in Baltimore County.

MDEC's expansion increases efficiencies and productivity and allows attorneys more time to focus on other critical tasks for their clients.

MDEC goals include:

- A streamlined electronic process
- Consistency in the user experience
- Greater efficiency in and between courts

Training opportunities and tutorials on how to file and serve electronically with the Maryland Judiciary are available for registered users.

For questions regarding webinar training, contact mdcourts@service-now.com.



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The First Maryland Disability Trust, Inc., a Non-Profit organization.

Evidence to Impeach or an Ethical Breach?

Interpreting how social media research aligns with the professional conduct rules



BY ERIN MCCARTNEY, ESQ.

With social media being all the rage, many people are turning to their favorite sites to share the details of their daily lives. Willingness to disclose personal information in such a carefree manner could be particularly helpful in the discovery phase of litigation. Snooping on opposing parties, witnesses, or jurors through social media can provide a treasure-trove of information that ten years ago might have taken a private investigator months to obtain. A Google search alone can provide a subject's age, address, occupation and possibly even an embarrassing high school portrait. However, lawyers need to be aware of the emerging ethical violations that could result from their sleuthing activities.

Before *Facebook*, *Instagram* and *LinkedIn*, the Model Rules of Professional Conduct addressing communication with non-clients were a little more cut and dry. For example, Model Rule 4.2 advises that a lawyer shall not communicate with a person known to be represented by another lawyer in the matter, unless the lawyer has consent or is authorized to do so by law.¹ This rule is intended to protect a represented party against possible interference by other lawyers and the uncounseled disclosure of information relating to the representation. Given the straightforward language of the rule, most lawyers would agree that defense counsel is barred from making a phone call to the plaintiff to obtain

information to support their case. However, trying to interpret how social media's ever-evolving communication features align with the professional conduct rules has many ethics experts scratching their heads. Although these online forums are fairly new, the professional conduct rules that apply to them are not.

A few bar associations have addressed what constitutes online "communication" as it relates to the professional conduct rules. The San Diego County Bar Association reviewed a case in which the plaintiff's attorney was "friending" unhappy current employees of the defendant company with the intent to use information to advance the interests of his client.

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MSBA

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¹ ABA Model Rule of Professional Conduct 4.2.



Continuing Legal Education Opportunities

Continuing Legal Education Department: Raising the Bar for Education

BY ANDREA TERRY, ESQ.

March is an action packed month for MSBA CLE as we present our first series of appellate practice programs coming up in Baltimore City on March 5th and in Montgomery County on March 13th. Lead by an esteemed panel of Maryland appellate judges and experienced attorneys, the programs feature a concise two hour format, during which attendees will learn

effective brief writing and oral argument tips, and learn some unique features of the Maryland Court of Appeals, in addition to having a question and answer period with faculty. Attendees will have the opportunity to purchase the new, 2018 edition of Appellate Practice for Maryland Lawyers by Paul Mark Sandler and Steve Klepper (who also serve as faculty) at ten percent

off its regular price.

We're also proud to present Allan Gibber's "Recent Developments in Estate Administration" program on March 12th in Columbia, which will bring estate and trust lawyers up to date on the changes that have happened over the last year in statutory or case law for their practice area. Attendees will have the opportunity to

purchase Gibber on Estate Administration in Maryland at a ten percent discount. See below for more detail and go to <http://msba.inreachce.com> to register for any programs or their live concurrent webcast.



Additional information and online registration available at msba.inreachce.com

UPCOMING LIVE CLE PROGRAMS

Registration is open for:

- **Family Law University** - February 7, 2019 | Sheraton Columbia Town Center, Columbia, MD
- **Appellate Practice in Maryland** - March 5, 2019 | John and Frances Angelos Law Center, University of Baltimore
- **Recent Developments in Estate Administration** - March 12, 2019 | Learning Commons, University of Baltimore
- **Appellate Practice in Maryland** - March 13, 2019 | Universities at Shady Grove Conference Center, Rockville, MD
- **Land Use Institute** - March 20, 2019 | Sheraton Columbia Town Center, Columbia, MD
- **New VA Wartime Pension Benefit Laws: It Finally Happened!** - March 27, 2019 | Ecker Business Center, Columbia, MD
- **The Cybersleuth's Guide to Fast, Free and Effective Investigative Internet Research** - March 29, 2019 | Ecker Business Center, Columbia, MD
- **Finance for Lawyers** - April 1, 2019 | Student Center, University of Baltimore
- **Civil Pre-Trial Practice** - April 24, 2019 | Learning Commons, University of Baltimore

Registration Opening Soon!

- **Advanced Business Law Institute** - April 18, 2019 | Columbia, MD
- **Hot Tips in Workers' Compensation** - May 9, 2019 | Columbia, MD

VIDEO REPLAYS

- **Mindfulness as a Foundation for Ethical Lawyering** - February 19, 2019, Baltimore, MD | February 21, 2019, Rockville, MD.
- **Mental Health and the Law** - March 5, 2019, Baltimore, MD | March 7, 2019, Rockville, MD.
- **New VA Wartime Pension Benefit Laws: It Finally Happened!** - May 7, 2019, Baltimore | May 9, 2019, Rockville, MD
- **Civil Pre-Trial Practice** - May 28, 2019, Baltimore, MD | May 30, 2019, Rockville, MD

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NEW ONLINE, ON-DEMAND

- **Family Practice Update** - presented live August 9, 2018
- **2018 Succession Planning Seminar** - presented live August 30, 2018
- **Advanced Storytelling and Persuasion Skills with David Mann** - presented live August 31, 2018
- **Handling Collection Cases through Enforcement and Judgment** - presented live September 18, 2018
- **Advanced Real Property Institute** - presented live October 9, 2018
- **2018 MSBA Immigration Law Section Fall Conference: Federal Court Litigation and SIJS Nuts and Bolts** - presented live October 9, 2018
- **Financial Elder Abuse – 2018 Update** - presented live October 25, 2018
- **2018 Evidence and Family Law: Common Pitfalls and Practice Pointers** - presented live December 19, 2018

NEW & RECENT PUBLICATION UPDATES

(All titles available in print and electronically)

NEW—Intellectual Property for Maryland Business and Litigation Lawyers: What You Need to Know but Didn't Know to Ask, Second Edition

The Handbook is an essential, up to date and highly practical resource that explains everything about intellectual property law to business lawyers, litigators and business persons who need to understand patents, trademarks, copyrights and other forms of intellectual property.

NEW—Civil Pre-Trial Practice, 2019 Revised Edition (with downloadable forms)

This is an essential reference to civil practice beginning with the initial contact with a potential client up to trial. The author provides the "nuts and bolts" for handling a lawsuit, including legal research, service of process, discovery, settlement negotiations, pre-trial motions and trial preparation

NEW—Model Jury Selection Questions for Maryland Criminal & Civil Trials

Select your jury using the easy, practicable sets of questions (separate sets of questions for civil and criminal trials), generously endorsed by the Maryland Court of Appeals. See *Collins v. State*, 452 Md. 614 (2017).

NEW—The Maryland Rules of Evidence Pocket Edition, 2018

This easy-to-carry pocket guide allows you to have the rules of evidence at your fingertips.

Appellate Practice for the Maryland Lawyer: State and Federal, 5th Edition

Tailored for both expert practitioners and attorneys who rarely handle appeals in Maryland and federal courts, this book guides one through the entire appellate process both in state and federal courts, providing sample appellate submissions and tips on the standards of review, criminal appeals, appeals from administrative agencies, petitions for certiorari, the appellate brief, record extract (or joint appendix), and oral argument.

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Disconnect

Technology and your Mental Health

BY LISA CAPLAN

Anyone who has heard me speak, read one of my tip sheets, or knows me, knows that I am a proponent of living in the moment and not a huge fan, for myself, of using social media. Everyone is different and likes different things so that is just the way I live my life, but I do believe that overdoing anything can have a negative impact.

Technology is great and can be a very helpful tool, but like anything else, it has its pros and cons. It allows us to work remotely, faster, stay connected to friends, etc. On the other hand, it can lead to unhealthy things as well: limiting interaction with others, creating anxiety by always being connected, leading one to always expect immediate responses, distracting us, and causing us to compare ourselves to others.

Tips for healthy internet use

1. Boundaries. If you don't have boundaries for answering

your phone, texting, emailing, etc. clients, friends and family will assume you are available all the time. For example, set a bedtime and decide for yourself what time you put the phone and all other screens away for the night. Create a system where you update your clients on their matters on a routine basis, and educate your clients on when you return calls, emails, etc. This will lower their anxiety and decrease the number of phone calls, emails, etc. from your client seeking an update. Ultimately, this will have a healthy impact on you

and your practice.

2. No screens an hour before bed. Bright lights from the screens of your devices can affect melatonin, a hormone that regulates your sleep. So put the phone down, and create a healthy bedtime routine, that allows you to clear your mind and prepare for restful sleep.
3. Avoid looking up medical concerns on the internet. This has been known to raise anxiety significantly. Medicine is very complex and looking up your symptoms is only part of finding out what is going on. If you don't feel well go to your doctor and

“

Leave the phones in the other room and sit down with your family or friends for dinner and actually talk to each other.

avoid the internet.

4. Enjoy the people you are with. I don't know how many times I have been in a restaurant and seen people on their phones texting the entire time. Maybe they need to be spending time with the people they are texting? Have a “no phone” dinner rule. Leave the phones in the other room and sit down with your family or friends for

dinner and actually talk to each other.

5. Don't compare yourself to others. Social media is a great way to connect with others, but it is only a snapshot into someone's life. It doesn't give you the whole picture of what is going on in someone's life. In other words, don't assume

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The Business of Law

Start Paperless and Stay Paperless with Notability

BY PAUL J. UNGER, AFFINITY CONSULTING GROUP

Very few new apps today grab my attention and keep my attention. Notability for the iPad has impressed me for years, and their latest update knocked my socks off by adding the capability to search handwriting. Coupled with the iPad Pro and Apple Pencil, this \$9.99 iPad App is a must-have. It has completely replaced paper legal pads and journals for notetaking.

Notability performs three primary functions: handwriting/drawing, typing and synchronized audio recording.

Handwriting

Notability provides a great writing experience, with the ability to change the thickness of the point, add lines, width of lines, gridlines. All of these features are important to simulate an experience similar to writing on a piece of paper. With the release of the iPad Pro and Apple Pencil, I have yet to discover a better writing experience. It is so similar to writing on paper that I have almost completely stopped writing on paper-based legal pads.

You will enjoy the best experience with the 12.9" iPad Pro because it mimics the dimensions of an actual legal pad. I use it almost exclusively for legal pad note-taking and just email myself the PDF version of my notes and then save them within my document management system. Alternatively, you can save directly to Dropbox, Box, OneDrive, or even NetDocuments if that is your document management system. I have compared the writing experience with a Surface Pro and Lenovo Yoga using Microsoft OneNote, and I really enjoy the experience on the iPad with Notability much better. In part that is because the iPad is lighter and it's just a better tablet. Simply put, it's just plain easy and enjoyable. Writing on the Surface (or any other Windows-based tablet) is more work, a little awkward, and is still a little buggy switching between PC and tablet functions.

Notability has the ability to search text and find pretty mediocre cursive handwriting. It is pretty impressive. The indexing and searching is instantaneous. The moment you close the document, it is searchable.

Using the Apple Pencil is very natural and easy. It charges in minutes and holds its charge

quite well. I'm not sure why they call it a pencil because it is truly a pen, pencil, marker, highlighter, etc. of any color or point size.

Typing

You can also use Notability like a word processor and simply type notes like you are typing a Word document. I strongly recommend an external keyboard like Apple's Smart Cover with the Integrated Keyboard.

Recording

You can also record audio of your meetings or within a classroom,

and your audio recordings synchronize with your notes. This is helpful if your notes aren't complete.

Organize Notes in Notebooks – Save to your DMS

One of the most useful functions is easy access to all your notes, without having to carry around huge binders of paper. When you finish, save your notes in a notebook that you create for each of your matters/cases. This will keep your notes organized. ●

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Justin B. Aronson

Justin B. Aronson joined the law firm of **Coon & Cole, LLC** as a partner and manager of the firm's new Easton office.

Heather Heiman joined Maryland Volunteer Lawyers Service (MVLS) as the organization's new human trafficking prevention project (HTPP) coordinator. Ms. Heiman will be responsible for expanding the organization's legal services delivered to survivors of human trafficking. Previously, Ms. Heiman was the senior public policy attorney and forced marriage initiative project manager at Tahirih Justice Center in Falls Church, Virginia.



Heather Heiman

Andrew Illuminati joined **Webb Cornbrooks Wilber Vorhis Douse Leslie & Mathers, LLP**, as an Associate Attorney. Mr. Illuminati's practice focuses on criminal defense and civil litigation.



Andrew Illuminati

Alaina L. Storie has been elevated to Partner at the firm of **Turnbull, Nicholson & Sanders, P.A.** Ms. Storie is the Chair of the Law Day Committee and Vice Chair of the Family Law Committee for the Baltimore County Bar Association. She is former Chair of the Young Lawyers Committee. Ms. Storie will continue to focus her practice on family law matters.



Alaina L. Storie

Renee B. Sullivan has joined **Council Baradel** as an associate. Ms. Sullivan concentrates her practice on estate planning and estate administration.



Renee B. Sullivan

FIRM NAME CHANGE:

Jensen, Hassani & Focas, P.A., has changed its name to **Hassani, Focas & Fifer, P.A.**, after many years honoring the name of late co-founding partner, Wilbur Jensen. Established in 1988, the firm remains committed to advising clients with their Estate Planning, Estate and Trust Administration, Elder Law, Business, and Real Estate matters. The firm can still be reached at 410-339-7313 or by mail at 22 W. Pennsylvania Avenue, Suite 606, Towson, MD 21204.

Send your latest news and updates for inclusion in Et Alia:
BarBulletin@msba.org

Remembering Linda Schwartz

It is with great sadness that Paley Rothman announces the passing of our long-time partner, Linda Schwartz (Rosenthal). She was an amazing colleague, mentor and a friend to many and will be greatly missed. Linda loved the profession of law and believed in public service. She was very active in the Maryland and Montgomery County Bars and served on the Maryland State Board of Law Examiners for many years. In addition to many other Bar committee assignments and frequent speaking engagements, she served as an Adjunct Professor of Law at the Washington College of Law, American University and was a member of the American College of Real Estate Lawyers. Linda passed on January 16, 2019.

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Dateline

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12 The **MSBA Estate and Trust Law Section** presents "*Recent Developments in Estate Administration*." The program, held at the University of Baltimore Learning Commons beginning at 8:30am will cover changes in the law and procedure in Maryland estate administration. For more information and/or to register visit: msba.org/EstateAdministration2019

13 The **MSBA CLE Department** presents "*Appellate Practice in Maryland*." The 2.5 hour program begins at 12:30pm and will be held at the Universities of Shady Grove Conference Center. The program will feature questions and answers on effective appellate practice with the Honorable CJ Patrick L. Woodward, the Honorable Daniel A. Friedman, and the Honorable Irma S. Raker. For more information and/or to register visit: www.msba.org/AppellatePracticeRock.

20 The **MSBA Real Property Section** presents the "*2019 Land Use Institute*." The program will be held from 8:15am to 4:25pm at Sheraton Columbia Town Center Hotel. Attendees will hear from Maryland appellate judges and national and state practitioners about: Maryland appellate decisions, wireless transmitters, solar panels, RLUIPA, comprehensive rezoning legislation, micro breweries, Supreme Court decisions, and Maryland General Assembly legislation and more! For more information and/or to register visit: www.msba.org/LandUseInstitute.

21 The **MSBA Diversity & Inclusion Committee** invites you to attend its *Diversity & Inclusion Conference* to be held at the University of Baltimore School of Law from 8:30am to 4:30pm. For more information and/or to register please visit: www.msba.org/product/diversity-inclusion-conference.

26 The **MSBA Litigation Section's Appellate Practice Committee** presents "*Recent Impact Decisions of the Maryland Appellate Courts*." The program begins at 5:00pm and will be held at Robert C. Murphy Courts of Appeal Building in Annapolis, MD. For more information and/or to register visit: msba.org/Recent-Impact-Decisions.

28 The **MSBA and Wicomico County Bar Association** are co-hosting a member meet & greet in Salisbury, Maryland from 4:00pm to 6:00pm. More details to come. To register, please visit: www.msba.org/product/joint-meet-and-greet-with-wicomico-county.

29 The **MSBA Elder Law and Disability Rights section** presents "*New VA Wartime Pension Benefit Laws: It Finally Happened*." This new program will cover changes in the Veterans Affairs rules regarding war time pension benefits, and will be held at the Ecker Business Training Center in Columbia, Maryland. The program begins at 8:30 am. For more information and/or to register visit: www.msba.org/WartimePensionBenefits.

29 The **MSBA** presents "*The Cybersleuth's Guide to Fast, Free and Effective Investigative Internet Research*." The live program will be held at the Ecker Business Training Center in Columbia, Maryland from 8:30am to 4:30pm, and will also be available via webcast. For more information and/or to register visit: www.msba.org/Cybersleuth19.

31 **MSBA Professional Excursion** to Playa Mujeres, Mexico begins. The excursion provides a one-of-a-kind travel experience, where you can meet fellow MSBA members, gain valuable learning experiences, and explore a beautiful destination. It's not too late to book your trip! For more information or to register visit: www.msba.org/professional-excursions.

Access to Justice

CONTINUED FROM PAGE 5

fund to a charitable entity that will advance the interests of the class.

Class action lawsuits are often brought on behalf of consumers, low-income individuals and others with small claims who, acting on their own, would be unable to assert a claim effectively against large, institutional defendants. When those class actions are successful, the benefit to each individual may be small, although the benefit to the public at large is significant.

Civil legal aid organizations fulfill a purpose close to the goal of most class action lawsuits – to

assert claims and provide a voice for low- and moderate-income Marylanders who would otherwise be unrepresented in dealing with large, institutional defendants. Maryland's civil legal aid organizations represent aggrieved individuals, and work for systemic change to support vulnerable individuals, families and communities. They are experts on the types of issues facing low-income people, including consumer issues, public benefits, institutionalized persons, elder law, housing, protection from violence, child welfare, and family law.

CONTINUED ON PAGE 17

In the past, courts have found civil legal aid organizations to be appropriate recipients of class action residual funds for two basic reasons: civil legal aid programs commonly represent the “next best use” of unclaimed funds to indirectly benefit members of a class under the cy pres doctrine. The underlying mission of civil legal aid organizations for the poor is consistent with the purpose of class action lawsuits and Rule 23 of the Federal Rules of Civil Procedure. Rule 23 recognizes the need to protect the legal rights of those who, because of their economic position, would otherwise be unrepresented.

Threat to the Cy Pres Funding Stream

While the exact amount of funds going to civil legal aid organizations is unknown, according to the American Bar Association, about \$15.5 million is funneled annually to civil legal aid organizations nationwide via cy pres.

There is fear that this funding stream may be threatened. During oral argument in the *Frank v. Gaos* case, justices debated whether the indirect benefits of cy pres settlements ran afoul of Rule 23(e) of the Federal Rules of Civil Procedure, which required class action settlements be “fair, reasonable, and adequate.”

The National Legal Aid & Defender Association, together

with the Association of Pro Bono Counsel and six other legal aid groups filed an amicus brief in the case, arguing that federal courts have developed appropriate limits to the use of cy pres awards. Their brief also made the case that awarding cy pres sums to legal aid groups is in keeping with the very practice of class actions.

“Class actions exist to provide access to the courts for those who could not otherwise afford to litigate a legitimate claim; legal aid organizations serve the same purpose, because legal aid organizations exist to help those who would otherwise not be able to obtain the protections of the justice system,” the brief stated. ●

Intellectual Property CONTINUED FROM PAGE 10

Federal Circuit appeal) remained. Those respondents challenged the validity of Converse’s registration and mark.

All trademarks advance consumer protection by serving to indicate a product’s source. A mark can serve this function and thus be distinctive in one of two ways. First, a mark is inherently distinctive if its intrinsic nature serves to identify a particular source. Second, a mark can acquire distinctiveness if it develops “secondary meaning,” which occurs when the primary significance of the mark to the public is to identify the source of the product rather than the product itself. In *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 216 (2000), the U.S. Supreme Court held that product-design trade dress can never be inherently distinctive, but must acquire distinctiveness (or secondary meaning) through use. Thus, the validity of Converse’s trade dress turned on the issue of secondary meaning.

Converse’s common law rights and the ‘753 registration both cover the same mark in the form of its product-design trade dress. Federal registration affords a trademark owner additional rights not provided by common law. One such right is a presumption that a registered mark is valid, including that the mark has acquired secondary meaning (if not inherently distinctive). This presumption shifts the burden of persuasion and the initial burden of production to the party challenging the mark



(here the respondents), requiring the challenger to rebut the presumption. In the case of common law rights, however, the burdens rested on Converse because there was no such presumption.

Because each of the remaining respondents had started their alleged infringement before the 2013 issuance date of Converse’s ‘753 registration, they argued that the presumption of validity of the ‘753 registration (conferred at the time of registration) did not apply. The Federal Circuit agreed, and vacated and remanded the case to the ITC, with instructions that Converse be required to establish secondary meaning before the first infringing use by each of the remaining respondents, without the benefit of the presumption afforded by the ‘753 registration.

The Federal Circuit’s decision serves as a reminder of the importance of not only identifying a client’s intellectual property, but also moving quickly to secure

protection in it, whether that protection involves a federal trademark registration, a patent, or a copyright registration. One question that was not answered by the Federal Circuit’s opinion is why it took until 2012 to file a federal trademark application, given that Converse purported to have been using the underlying trade dress since 1932. Had Converse obtained its registration earlier, it may have benefitted from the presumption of validity, including secondary meaning, and likely would have achieved incontestable status and made any challenge to its registration more difficult. ●

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Arbitrate the Bastard CONTINUED FROM PAGE 9

The arbitration requirement may be modified, limited, waived or abandoned by the conduct of the parties. If one side to a contract with an arbitration clause elects to file a lawsuit, the other side, the defendant, has a choice. If it prefers to arbitrate, the defendant can file a motion in court to stay the litigation and to compel arbitration. These motions are generally granted as arbitration agreements are enforceable. However, a defendant has the option to file his preliminary motions in court, to answer the complaint, to make his counterclaim and to proceed with the court case as if the contractual arbitration clause did not exist.

Assume that the court proceeding is not progressing in the way one side wishes it had because of unfavorable court rulings. Can an unhappy side in court then change its mind and demand that the litigation be stayed pending arbitration? Probably not! When addressing waiver, courts consider the amount of litigation that has occurred, the length of time between the start of the litigation and the arbitration request, and whether prejudice has been established. Prejudice is the largest factor. The courts will determine if the opposing party is procedurally and substantially harmed by enforcing the arbitration clause and whether the opposing party will incur excessive costs and delay by shifting to arbitration. Obviously the party that filed the court action waived arbitration. Some courts have held that the mere filing by a defendant of a Fed. R. Civ. P. 12(b) or MD Rule Civ. 2-322 motion to dismiss on legal or procedural grounds might constitute its waiver of arbitration.

Waiver may also be used as a contract defense. A party argues that the court should not enforce that contractual provision against it. Under the Federal Arbitration Act, the rights and liabilities of the parties are controlled by the state law of contracts. Waiver occurs when a party takes actions inconsistent with an intention to enforce the arbitration clause. The arbitration clause can also be attacked using general contract defenses, such as fraud, coercion, or lack of capacity.

A general contractor seeking to collect its fee against its customer needs to be careful about who it uses as its debt collector. The Maryland Court

of Appeals in 2017 found that a debt collector waived the arbitration provision of a credit card contract by filing a small claims action in MD District Court. The debt buyer was unlicensed under the Maryland Collection Agency Licensing Act. The debtor collaterally attacked the District Court judgment against him. The debt purchaser’s judgment was therefore invalidated due to its lack of a state license. The filing of the lawsuit also precluded it from seeking arbitration as an alternative method to collect on the debt. Put another way, you can’t dip your foot in the pool without taking a swim.

In class action suits, the 11th Circuit found that the court has no jurisdiction over unnamed putative plaintiffs as to waiver. The defendant could not file a conditional arbitration motion against possible future adversaries as the court did not have jurisdiction over those potential members of the class.

Public policy or state law might permit a party to avoid an arbitration provision. For example, a proceeding which puts an unfairly high cost on a participant might not be enforceable. So might a clause which requires that arbitration take place out of state.

Home improvement contractors who sign construction agreements with elderly homeowners might find that a court will not enforce the arbitration provision in its agreement under the right set of circumstances. This can profoundly affect the cost of the litigation for a general contractor who might have otherwise planned on being self-represented in an arbitration forum. The company might then be compelled to engage an attorney to represent it in court. ●

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state or tribe has the resources and personnel to carry out the requirements of the hemp production plan.

A producer must comply first with the state's hemp production plan before legally growing hemp. Currently, these plans are expected to take a year to 18 months for states to finalize and USDA to approve. Note that Section 10113 does not allow anyone with a felony drug conviction within the past ten years to grow hemp under a hemp production plan.

If the state or tribal government does not have an approved production plan, then a producer may still be able to produce hemp under a hemp production plan developed by USDA. For example, if state law still classifies hemp as a controlled substance, then Section 10113 will not preempt this. Section 10113 allows states or tribal governments explicitly to prevent hemp production in their boundaries. If the state or tribal government does not criminalize hemp production, then the USDA hemp production plan will need to meet the same minimum criteria required for states and tribal governments.

Maryland's criminal law currently excludes hemp from the definition of marijuana. Section

5-101 excludes "the plant Cannabis sativa L. and any part of such plant, whether growing or not, with a delta-9-tetrahydrocannabinol concentration that does not exceed 0.3% on a dry weight basis." (Md. Code Ann., Crim. Law. § 5-101(r)(2)(vi)). Currently, the Maryland General Assembly would need to give MDA the authority to create a hemp production plan (Md. Code Ann., Agric. §§ 14-101 to 14-102). MDA only has the authority to create a hemp pilot research program and would need additional authority to develop the hemp production plan and any additional protections that the General Assembly may want to add beyond what the 2018 Farm Bill does. Until then, hemp remains illegal to produce in the state.

One important note about the 2018 Farm Bill, Section 10114 allows for hemp products to be transported freely through states. States can still ban hemp products, but the state would not be able to limit transportation through the state of hemp products bound for other states. But until USDA approves hemp production plans, hemp can only legally be grown under existing state research programs. ●

The committee acknowledged that social media has opened a broad platform on which people can place personal information, but that the ethics rules impose limits on how attorneys may obtain information shielded by privacy settings. They opined that an attorney is barred from making an ex parte "friend" request of a represented party but that they can "friend" an unrepresented party if they disclose the purpose of the request. Essentially, the opinion determined that no one – represented or not – should be misled into accepting an online "friendship."²

The New York City Bar Association's Committee on Professional and Judicial Ethics also considered this query. They agreed with the San Diego opinion that an attorney cannot "friend" a represented party. However, they made a distinction regarding communication with an unrepresented party. The New York opinion determined that if the attorney uses their real name and profile to send a "friend" request to an unrepresented person, they do not have to disclose the reasons for making the request.³ Which begs the question – is it ethical to engage a third party, whose name would not be familiar to the represented party, to make contact with a represented party?

In a recent personal injury case, two New Jersey defense attorneys were scanning the plaintiff's Facebook page, which was open to the public. They saved comments, pictures and videos that supported their client's case. Soon after, following the advice of his counsel, the plaintiff made his profile private. Undeterred, the defense attorneys engaged a female paralegal to send the plaintiff a "friend" request, which he accepted. The attorneys started collecting information on the plaintiff, including videos of him wrestling and partying, which they intended to use to impeach his claims of permanent injuries.⁴

Again, Model Rule 4.2 prevents attorneys and their staff from personally contacting

represented clients without consent from their counsel. In this case, the plaintiff's counsel argued that improper party contact occurred when the defense attorneys' paralegal sent a "friend" request without seeking permission from the plaintiff's attorney. After an investigation, the New Jersey ethics office filed a formal complaint against the defense attorneys for: (1) communicating with a represented party (2) failing to supervise a subordinate lawyer (3) failing to supervise a non-lawyer assistant (4) inducing another to violate the rules of professional conduct (5) conduct involving dishonesty, fraud, deceit and misrepresentation, and (6) conduct prejudicial to the administration of justice.

The Philadelphia Bar Association Professional Guidance Committee took this analysis a step further by considering whether a lawyer who wishes to access the restricted social networking pages of an adverse, unrepresented witness to obtain impeachment information, may enlist a third person. Like the New Jersey case, the third person would use their real name, which the witness would not recognize, and would not reveal that they are affiliated with the lawyer or the true purpose for seeking access. The intention would be to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. Ultimately, the committee opined that a lawyer cannot hire a third person, even if they use their real name, to

"friend" an unrepresented party to gain access to their restricted pages because they are merely working on the attorney's behalf.⁵

These cases and opinions reveal the challenge that judges and ethics experts are facing in determining the appropriate balance between allowing unfettered access to public information on the Internet and intruding on the attorney-client relationship. However, based on the case law and opinions that have addressed these scenarios, the consensus appears to be that lawyers should avoid communications with represented parties on social media. Consequently, a lawyer should not send "friend", "follow" or "connect" requests to opposing parties known to be represented by counsel in order to gain access to those parties' private social media content. On the other hand, viewing publicly accessible social media content, that does not trigger communication with a represented party, is generally considered fair game.

When it comes to communicating on social media with unrepresented third parties, a lawyer should err on the side of caution. As with represented parties, publicly viewable social media content is generally acceptable. However, if the information sought is filtered by privacy settings, ethical constraints may limit the lawyer's options for obtaining it.

Social media profiles could also provide lawyers with valu-

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² San Diego County Bar Association Legal Ethics Opinion 2011-2.

³ The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2010-02.

⁴ John J. Robertelli v. The New Jersey Office of Attorney Ethics (A-62-14) (075584) (New Jersey Supreme Court 4/19/16).

⁵ The Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02.

“When it comes to communicating on social media with unrepresented third parties, a lawyer should err on the side of caution.”

able insight into a prospective or sitting juror's mindset. Routinely monitoring the online accounts of jurors to access educational background, political affiliations and what they “follow” could prove useful during the course of a trial. This raises an interesting dilemma, however, for attorneys navigating the ambiguous line between diligently representing the client and complying with the ethical rules regarding communication.

In a formal opinion, the ABA opined that a lawyer may passively review a juror's public presence on the Internet, but may not communicate with a juror. Although the opinion acknowledged that an attorney's ability to conduct internet research on prospective jurors has become a fundamental component of effective client representation in many jurisdictions, requesting access to a private area on a juror's profile page is considered communication which may be constrained by the ethics rules.⁶

The New York City Bar also issued a formal opinion on this matter. The opinion maintains that attorneys may research jurors online, only if, as a result of the search, the juror does not receive a “communication.”⁷ The opinion specified that if an attorney views a juror's social media page and the juror receives an automated message that a potential contact has viewed their profile, even if the attorney is entirely unaware that the automated message was sent, the attorney has arguably “communicated” with the juror. This is in contrast to the ABA opinion which is indifferent to whether or not a juror becomes aware that the lawyer is reviewing their social media presence.

Although recent ethics opinions regarding permissible online jury research are not unanimous, most agree that lawyers are permitted to view public posts. However, attorneys should not use deception or conceal their identities by using pseudonyms

or other peoples' accounts to gain access to a juror's website or to obtain information. Third parties working for the benefit of or on behalf of an attorney should also comport with the same restrictions.

As previously discussed, perusing non-clients' online profiles can be useful but attorneys need to be cognizant of their own clients' social media posts as well. While no lawyer wants to discover embarrassing photos or comments on a client's profile page, the ethics rules prohibit an attorney from unlawfully altering or destroying evidence or assisting others in doing so. Model Rule 3.4 advises that a lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.⁸ While setting fire to a bin full of incriminating documents may be tempting, it would most likely land an attorney in front of the disciplinary board! In the world of social media, no matches are needed. With a click of a button, one can edit a post or delete a picture. The two situations, though, are analogous.

Spoliation of evidence is a serious offense and social media posts and profiles are no exception. There was a wrongful death case in Virginia in which the plaintiff's attorney instructed the client to delete content from his Facebook page that depicted him as something less than a grieving widower.⁹ The attorney also had his client sign sworn interrogatories stating he did not have a Facebook account. Following a large verdict for the plaintiff, defense counsel brought a motion for new trial based on spoliation of evidence. The trial judge cut the damages award in half and imposed sanctions, most of which were against the plaintiff's counsel, for an “extensive pattern of deceptive and obstructionist conduct.” The plaintiff's attorney had his license to practice law suspended for five years.

Although the ethics rules address spoliation of evidence, they are unclear as to whether a lawyer can advise a client to “clean up” their social media pages. A Florida attorney who handled personal injury and wrongful death cases, asked the ethics committee whether she was permitted to advise her client to remove embarrassing posts before filing litigation. The committee opined that a lawyer may advise a client pre-litigation to change privacy settings on the client's social media pages so that they are not publicly accessible. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, the lawyer also may advise that a client “take down” social media content relevant to the foreseeable proceeding as long as the information or data is preserved. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media profile that is subject to a duty to preserve.¹⁰

Although social media sites can provide many benefits, the instant and easy accessibility of them may not leave time for caution or reflection before diving into an online investigation. Much like using a photo-shopped image on a dating site, trickery and deception are not appreciated in the realm of legal ethics. Ethics committees disapprove when lawyers attempt to gain access to non-public social media content by using dishonesty, pretext, false pretenses, or an alias. Being aware of recent decisions and opinions while walking the fine line between minding the ethics rules and zealously defending a client, could make the difference between great trial strategy and a serious ethical violation. When in doubt, think about how a social media communication would translate as a traditional phone call or letter and conduct your actions accordingly. ●

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Disconnect CONTINUED FROM PAGE 14

- someone's life is exactly what you see on social media, and don't compare yourself to them. Comparing yourself to others can lower your self esteem, increase depression and anxiety.
6. Stay in the moment. Social media can keep us from enjoying our lives in the moment or help you avoid improving what might be causing your unhappiness. Constantly checking your device and looking for validation, attention, or affirmation from others, consciously or subconsciously, can increase your anxiety.
 7. Use devices with intent. Rather than living your life on autopilot, know why you are doing what you are doing. Make a choice to decide when, where and with whom you will be in contact. We lose out on life when we are not living with intent and making active

- decisions in our life.
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Lisa Caplan, LCSW-C has over 20 years experience in her field, and extensive experience working with lawyers and judges in the areas of mental health, substance abuse and trauma.

⁶ The ABA Standing Committee on Ethics and Professional Responsibility *Formal Opinion 466*.

⁷ The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics *Formal Opinion Formal Opinion 2012-2 (May 2011)*.

⁸ ABA Model Rule of Professional Conduct 3.4.

⁹ *Allied Concrete Co. v. Lester*, 736 S.E.2d 699 (Va. 2013).

¹⁰ Professional Ethics of the Florida Bar *Opinion 14-1*.

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