Res Ipsa Loquitur

Newsletter of the Wicomico County Bar Association

Vol. I, Issue 3 - June 2011

President's Message

by Heather Konyar

The month of May brought much activity for the Bar Association. In May, we awarded three separate scholarships to deserving local high school students. Tom Maloney, Sharon Donahue and Susan Land, were able to attend the banquets to personally present those awards.

Our second Bar Association meeting of 2011 was held on May 20 at the Salisbury Chamber of Commerce. Steve Hearne, Sharon Donahue and Ann Shaw generously shared practice pointers on the intersection of bankruptcy and other areas of law. We hope to be able to offer more lunch time opportunities in the future. If you have an idea for a "lunchtime CLE", or wish to be a presenter, feel free to contact me directly. It is my hope to continue to showcase members of our own bar in this manner.

Next month, look for announcements about big changes to the Bar Library. The wheels are in motion: the Library Committee is motivated to find ways to update the library. Check out the *Committee Notes* inside for more info.

Finally, a note of congratulations to Leah Seaton on her appointment as the newest Judge to the Circuit Court for Wicomico County. Judge Seaton, we recognize your longstanding (and ongoing) contributions to our legal community, and wish you the best as you assume this esteemed position.

Have a great summer, folks. ❖

WCBA Calendar

- ❖ **June 29, 2011: Newsletter Committee Meeting @ 3:45pm; 212 W. Main Street, Ste. 208**
- ❖ **July 6, 2011: Library Committee Meeting @ 3pm; Bar Library**
- ❖ **July 9, 2011: Habitat for Humanity, sponsored by the Legal Aid Bureau**
- ❖ **August 12, 2011: Brown Bag Lunch @ Noon; Location: TBA; Topic: TBA**
- ❖ **October 7, 2011: Marital Property Workshop; The Cambridge Hyatt**
- ❖ **November 4, 2011: Wine or Beer Tasting @ 4:30 pm; Location: TBA**
- ❖ **December 10, 2011: Holiday Party! Details Coming Soon.**

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Master Seaton Elevated to the Bench

Special Congratulations to the Honorable Leah Seaton for her appointment to the Circuit Court for Wicomico County. The Wicomico County Bar Association wishes Judge Seaton the best as she joins the other distinguished members of the Bench, and we look forward to continuing to work with her in the Courtroom and within the Association.

Advertising Information and Rates

Res Ipsa Loquitur is published bimonthly and contains substantive legal articles, announcements and Association News. Advertisements are subject to approval by the Res Ipsa Loquitur staff and the Executive Board of the Wicomico County Bar Association. Advertisements can be accepted in PDF, Word, or WordPerfect format.

Rates (Full color or black/white). Limited advertising space is available in the next four issues at these rates: 1/2 page $75.00 each; 1/4 page $40.00 each; 1/8 page $20.00 each.

Deadlines: *August*-July 25; October-*September* 23; *December*-November 23

WCBA 2011 Officers

President: Heather Konyar
konyar@cbmlawfirm.com
Vice-President: Angie DiPietro
angie@angiedipietrolaw.com
Secretary: Susan J. Land
sjland@akmanpc.com
Treasurer: D. Nicole Green
attygrl@aol.com

Res Ipsa Loquitur Staff

Editor: The Honorable Leah J. Seaton
Leah.Seaton@courts.state.md.us
Co-Editor: Susan J. Land
sjland@akmanpc.com
Art Director: Gregory C. Pickett
gregory.c.pickett@gmail.com
Committee Members:

Barbara Trader	Elizabeth Ireland
James Respess	Kimberly Dumpson
Mark Tyler	Melissa Kilmer
Patricia Harvey	

To contact Res Ipsa Loquitur**,** please e-mail the Editor or Co-Editor. Res Ipsa Loquitur is a bi-monthly publication of the Wicomico County Bar Association informing its members about current events related to law and the community. Articles do not necessarily reflect the official position of the Association, and publication does not demonstrate an endorsement of views expressed herein.

The contents of advertisements and articles are the responsibility of the advertisers and writers, and do not represent any recommendation or endorsement by Res Ipsa Loquitur or the Wicomico County Bar Association.

Member News

Kudos to ***Eduardo Gonzalez***, of Hearne and Bailey, P.A. Eduardo was recognized by The Daily Record and named one of their "Twenty in Their Twenties." Check out http://thedailyrecord.com/20-in-their-twenties/current-winners for more details.

Congratulations to ***Stephen Hearne*** on the birth of his first granddaughter, Jane Carolyn Thayer born on May 12, 2011.

Congratulations also to ***Bruce Anderson*** on the birth of his first grandson, Duncan Finley Holt born on May 31, 2011.

Quite the grandfather, ***Bruce Anderson*** also completed the Columbia Triathlon in 2 hours 33 minutes 54 seconds, placing 3rd in his age group. Never stopping, Bruce also completed a half Ironman in 5:32:28, placing 13th in his age group.

Not to be outdone, ***Andrew McDonald*** also completed the Columbia Triathlon, finishing in 2 hours 50 minutes, 7 seconds.

Do you have news you would like to share with your colleagues? Personal or professional, let Res Ipsa Loquitur spread the word. Send news and announcements to sjland@akmanpc.com.

Speakers Bureau

To celebrate the 100th Anniversary of the Legal Aid Bureau, Inc., the Wicomico County Bar Association is joining with the Bureau to create a Speakers Bureau for the Lower Easter Shore**.** If you are interested in joining the Speakers Bureau, please send your name, contact information and areas of law that you are qualified to speak on to Susan Land at sjland@akmanpc.com. This is a wonderful opportunity for members of the Association to help the community and get in those Pro Bono hours as well.

Practice Tips: Basics of Preparing a DUI

by Leonard R. Stamm, Esquire

What I have tried to do in the following article is touch on the basics of preparing to represent a person charged with Driving Under the Influence ("DUI"). It is not possible in this space to give more than a basic outline of what is required. What follows therefore, should be understood to just represent the tip of the iceberg. More detailed information can be found online, in relevant treatises, and at CLE seminars.

The lawyer's preparation for a DUI begins with the first phone call or e-mail by the prospective client. Counsel must find out the arrest date in order to advise the client to request a hearing with the Office of Administrative Hearings before the thirty (30) day deadline expires if the client failed or refused a breath or blood test for alcohol or drugs. The client must be reminded to send in the hearing fee of $125 payable to the Maryland State Treasurer. I recommend the hearing request be mailed certified return receipt requested in order to protect against the hearing request being lost.

The initial consultation involves obtaining as much information as possible about the client and the case with the goal of obtaining the best possible result for the client in court and at the MVA administrative hearing. The lawyer must get from the client a brief life history and background, including education, military service, immigration status, marital and parental status, and employment. Counsel should also learn a client's need for a driver's license, the affect of license suspension or jail or probation on the client, prior record, prior efforts at alcohol education or treatment, a complete medical history, and a detailed recollection of the events leading up to and including the arrest and submission to any test, including drinking history. The lawyer must obtain and review all documents received by the client. I like to put the officer's dates and times into a timeline in order to better understand the officer's claimed sequence of events.

The lawyer should then explain to the client the range of possible administrative and judicial consequences faced, possible defenses, and likely outcomes. I always recommend an alcohol assessment, followed by alcohol education or treatment. Many judges expect defendants to have enrolled in an appropriate level of education and/or treatment soon after an arrest, and may consider it in mitigation. The lawyer should quote the defendant a fee and explain and present a written fee agreement. I also like to give the client a written list of things to do, which often include requesting the MVA hearing, taking pictures of the scene of the stop, obtaining a complete driving record and a Probation Before Judgment ("PBJ") driving record from the MVA or any other state where the client has recently held a driver's license, and obtaining relevant medical records accompanied by a custodian's certificate.

The lawyer should file an appearance with the District Court or Circuit Court within five (5) days of being retained. Along with the appearance line, counsel should consider filing discovery motions and a demand for the breath test operator, or with a blood test the phlebotomist and chemist to come to court and testify. In Circuit Court, counsel should also timely file mandatory motions. When discovery is received this should be sent to the client and reviewed carefully. If the State has requested discovery it must be provided any documents intended to be used at trial prior to the court date. Additionally, the State should be provided an opportunity to inspect and copy any documents sought to be introduced under the business records exception ten (10) days before trial.

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1. How does a party authenticate what purports to be a message posted on a social networking site such as FaceBook or MySpace? For the complex and interesting answer, pointing out the ease with which one may use a computer to assume another's identity, see Griffin v. State, summarized under "EVIDENCE."

2. The Court of Special Appeals has reiterated that a detective's promise of confidentiality to a suspect in custody ("Everything you say will stay in here," "This conversation is just between us," etc.) negates the warning that anything said can be used against the suspect in court. An ensuing confession therefore violates the rule of Miranda. Argulo-Gil v. State, summarized under "CONFESSIONS."

3. Bet you didn't know that a lane marker painted onto a street is a "traffic control device," and that swerving from lane to lane, whatever else it violates, also contravenes a driver's obligation to obey the directives of such devices. Stephens v. State, summarized under "DRIVING OFFENSES."

4. For a useful discussion of the concept of constructive possession of a gun, see Herring v. State, under "DEADLY WEAPON OFFENSES."

Appellate Procedure

Smith v. State, 196 Md. App. 494, 10 A.3d 798 (2010) (Thieme)

Where a judge takes action that defense counsel does not specifically object to, and counsel agrees to "move on" or the like, counsel has acquiesced in the court's action. Accordingly, nothing has been preserved for appellate review.

Arrest

In re Jeremy P., 197 Md. App. 1, 11 A.3d 830 (2011) (Davis)

A plainclothes detective was patrolling an area known for high gang/crime related activities at 1:00 a.m. He observed Jeremy and a companion walking off of a McDonald's parking lot. Jeremy was "playing around" with his "waistband area," adjusting his clothing in that area two to three times over a period of one to two minutes. The detective found this to be "indicative of somebody constantly carrying a weapon on them." The detective "stopped" the two, had them sit on the ground, and patted them down. During the process of standing from the seated position, defendant revealed that he was partially sitting on a gun that had apparently fallen from his clothing. Defendant was cuffed, the pat-down continued, and bullets were seized from his pants pocket. Jeremy (whom the officer had previously spoken to in the context of other investigations, but never arrested) was taken to a police station, where he admitted to possessing the gun and obtaining it from his uncle.

The trial court denied a motion to suppress. Reversing, the Court wrote:

1. In order to justify a brief investigative "stop" under Terry, the police must possess reasonable suspicion that a particular individual has committed, is committing, or is about to commit a crime.

2. Under Ransome v. State, 373 Md. 99 (2003), a bulge at the waist area plus nervous behavior does not confer reasonable suspicion that the subject is armed. Ransome emphasized the failure of the officer to articulate why what he was seeing amounted to criminal activity, and the innocent explanations for a bulge in a pocket. It also provided a list of suspicious circumstances which were not present.

3. Standing alone, a waistband adjustment does not confer reasonable suspicion. The Court also cited cases, slip op. at 13-14, indicating that

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adjustment plus bulge does not suffice unless the bulge matches the outline of a gun.The Court further emphasized the importance of the officer articulating specific facts so as to enable a judge to determine whether his suspicion was reasonable under the totality of the circumstances. For example, the officer could testify that he had frequently observed suspects or fellow-officers adjust a gun in the manner observed, or conduct an in-court demonstration of the suspect's actions. The Court was emphatic that in order to pass muster, the officer's testimony must be specific and contain factual detail, and not be conclusory. It is not enough for the officer to report "adjustment" of the "high risk area" of the waistband.

4. A conclusory, non-fact-specific finding by a suppression hearing judge that reasonable suspicion existed, even if based upon an in-court demonstration, will no more salvage a stop and seizure than similar conclusory testimony from the officer.

Confessions

Angulo-Gil v. State, #1204 COSA 2009, 3/31/11 (Davis)

Suspected in a murder, the defendant was read Miranda warnings. He initially stated that he was willing to speak to a detective with no attorney present. The detective then asked a series of questions designed to establish that the waiver was voluntary, and that defendant understood the officer's Spanish. The detective then re-asked whether defendant wished to make a statement with no lawyer present; this time, the answer was "No." The detective pointed out the contradiction and asked if defendant understood the question. Defendant responded, "Uh-huh. To make a…a…a… ."

The officer asked the question a third time, received an affirmative answer, and continued the interrogation, eventually obtaining incriminating responses. In the midst of the session, the detective stated that "Everything we talk about is going to stay here in this room," and later that the "Gringos" outside the room would not be able to understand what the defendant told the detective. Finding error in denying a motion to suppress based upon the promise of confidentiality, but not the invocation of the right to counsel, the Court wrote:

1. Where a suspect in custody unequivocally invokes the right to counsel, interrogation must cease, and may only be reinitiated under the rules set forth in Maryland v. Shatzer. An equivocal request, on the other hand, allows the officer to follow up with "clarifying" questions.

Held: Where the defendant gave contradictory answers, there was some question as to his ability to understand the detective's Spanish, and the discussion was still focused upon the waiver of rights and not the merits, the detective was permitted to ask the question a third time so as to clarify the response. See Davis v. United States, 50 U.S. 452 (1994).

2. A detective's assurance that a suspect's statement is confidential (e.g., "between you and me" or the like) contradicts the warning that statements may be used against the defendant, and is thus improper at any stage of the interrogation. Admissions subsequent to such an assurance are inadmissible as violative of Miranda.

Lee v. State, 418 Md. 136, 12 A.3d 1238 (2011) (Barbera; Murphy dissenting; 7-0 on Miranda compliance; 5-2 on voluntariness)

Suspected in a murder, Lee was read proper Miranda warnings and waived his rights. He proceeded to provide partially exculpatory and partially inculpatory versions of the relevant events. Later, Lee stated to the interrogating detective that the session was being recorded. The detective replied, "This is between you and me, bud. Only me and you are here, all right?" Lee

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then confessed to shooting one victim and assaulting a second, and provided additional details.

Finding error in the denial of a motion to suppress, the Court wrote:

1. A promise of confidentiality ("This is between you and me.") improperly undermines the required warning that anything the suspect says may be used against him in court.

2. The Miranda rights exist throughout the interrogation. Therefore, an invocation of the right either to counsel or to remain silent at any point in the session requires that interrogation cease.

3. A proper Miranda waiver requires both that it be voluntary, in the sense of uncoerced, and knowing, i.e., that the suspect possessed "the requisite level of comprehension." Slip op. at 11. While trickery on the part of the police will not always render a statement involuntary in the traditional sense, it is absolutely prohibited in the context of the explanation of Miranda rights.

4. The motivation of the interrogating officer is irrelevant. The inquiry is whether his words undermined the knowing and/or voluntary nature of the suspect's waiver. Even where proper warnings are given, they may be "subverted" by the officer's subsequent words or conduct. Slip op. at 13. Such subversion occurs if the officer agrees that the statement will be "confidential," "between you and me," "off the record," or like implications that making a statement will not be damaging. That is the opposite of the warning that a statement can be used against the suspect in court.

5. Because the officer's words violated Miranda, it is not necessary to determine whether Lee subjectively relied upon them. All statements made after the misadvisement are inadmissible.

6. A Miranda violation renders a statement inadmissible in the State's case in chief, but potentially admissible to impeach if the defendant testifies at trial and contradicts it. An involuntary statement on the other hand is not admissible for any purpose. Involuntariness under the federal and state due process guarantees (which are construed in pari material) is established in the rare case in which police threats, promises, or inducements overbear the will of the suspect and coerce a confession. Deception, such as lying about the strength of the State's evidence or displaying feigned sympathy, is generally insufficient to render a statement involuntary. The overall test is freedom of will under the totality of the circumstances.

7. While the State bears the burden of proof of voluntariness, the Court found it noteworthy that Lee did not take the stand at the suppression hearing and claim that his will had been overborne. A "mere promise" of leniency or confidentiality, even if followed swiftly by a statement, is not sufficient to render the statement involuntary.

8. Under Maryland's common law voluntariness rule, see Hillard v. State, 286 Md. 145 (1979), a statement is involuntary if the police promise special consideration or other assistance, and the defendant relies on the promise in confessing. Such a promise, however, must take the form of one for "leniency before, during, or after trial." Slip op. at 24. Held: A promise of confidentiality does not rise to the level of a promise of leniency. There was thus no violation of the Maryland common law voluntariness rule.

Deadly Weapons Offenses

Herring v. State, #460 COSA 2009, 3/3/11 (Sharer)

1. In useful dicta, the Court provided the following discussion of constructive possession. "See Price v. State, 111 Md. App. 487, 498-99 (1996) ("In a possessory crime or one in which control or dominion over contraband…constitutes, or is an element of, the actus reus, the law engages in the legal fiction of constructive possession to

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Committee Notes

Library Committee

The Library Committee has already had one meeting, and another is scheduled for Wednesday, July 6 at 3pm in the Bar Library. The Committee is preparing a list of books in order to determine what needs to be updated and what needs to be removed. This list will be shared with the membership to insure that we don't get rid of anything that is needed. The Committee is also re-negotiating the Internet research contract, and is getting proposals from both LexisNexis and Westlaw. If you have a specific request, please let a member of the Committee know. Volunteers to help inventory the library at the next Committee meeting are also appreciated.

Pro Bono / Scholarship Committee

We are pleased to announce the winners of the 2011 WCBA Scholarships: Katelynn Defiore, James M. Bennett High School; Keushal Desai, Parkside High School; and, Joseph Bowen, Wicomico High School.

We will be partnering with the Legal Aid Bureau to work with Habitat for Humanity on Saturday, July 9, 2011. Volunteers are needed - please contact Robert McCaig or Heather Konyar for more information.

Social Committee

The Social Committee is in the process of planning some exciting events for the upcoming year! We partnered with the Worcester County Bar Association to sponsor a happy hour during the annual meeting of the Maryland State Bar Association. Thanks to all who joined us on June 9th at Seacrets Bar and Grille. We are also in the process of scheduling this year's holiday party, as well as several other happy hour type events. Please keep a lookout for additional details in the near future!

Spotlight on Member Benefits

Each issue of Res Ipsa Loquitur will spotlight one of the many benefits offered to members of the Wicomico County Bar Association.

Did you know that if you or a family member needs blood or blood product due to a medical crisis, you may be required to pay for that life-saving product? But if you are a member of the Delmarva Blood Bank, the Blood Bankwill replace it or pay the cost of replacing it. Other benefit includes knowing that you are helping to protect our entire community by ensuring the continued availibility of blood.

The Wicomico County Bar Association is pleased to cover your annual membership in the Delmarva Blood Bank. If you would like to participate in this member benefit, contact Susan Land, sjland@akmanpc.com, to request inclusion in this important program.

Minutes in a Minute

The second full membership meeting was held on May 20, 2011 at the Chamber of Commerce. Committee reports were presented, and are summarized elsewhere in this issue. Under old business, President Heather Konyar discussed the letter that was sent on behalf of the Association to Delegate Norm Conway, requesting a fourth Judge on the Circuit Court for Wicomico County. A full copy of that letter is also included in this newsletter. Members Stephen Hearne, Sharon Donahue and Ann Shaw provided us with a great deal of information on how bankruptcy relates to all areas of law. We thank them for sharing their expertise with us.

The 2010 Tax Relief Act Did More Than Revise the Federal Estate Tax System

President Obama signed the 2010 Tax Relief Act into law in December, 2010. When the majority of attorneys think about the 2010 Tax Relief Act, they focus on the changes to the federal estate tax system. However, the 2010 Tax Relief Act did more than just change the federal estate tax system.

For instance, the preferred tax rates for long term capital gains and qualifying dividends were extended through December 31, 2012. Recently, the maximum federal tax rate for long term capital gains and qualifying dividends has been 15 percent. This preferred tax rate for long term capital gains and qualifying dividends was scheduled to increase in 2011, requiring long term capital gains and qualifying dividends to be taxed at the taxpayer's ordinary income tax rates. Under the 2010 Tax Relief Act, the preferred long term capital gains and qualifying dividends tax rates have been extended through December 31, 2012.

Since 2003, the individual federal income tax brackets have been 10 percent, 15 percent, 25 percent, 28 percent, 33 percent, and 35 percent based upon taxable income. These income tax brackets were scheduled to increase to 15 percent, 28 percent, 31 percent, 36 percent, and 39.6 percent after December 31, 2010. The 2010 Tax Relief Act has extending the lower brackets through December 31, 2012.

The 2010 Tax Relief Act extends the Child Tax Credit, the Dependant and Child Care Tax Credit, the American Opportunities Credit (credits for college students or taxpayers who have college student dependents), the Adoption Tax Credit, and the student loan interest deduction through 2012.

The Alternative Minimum Tax exemptions have been temporarily increased for 2010 and 2011. The phase-out of personal exemptions and itemized deductions for higher income taxpayers has been suspended through 2012. Thus, for 2011 and 2012, a taxpayer's itemized deductions and personal exemptions will not be phased-out due to the taxpayer's income.

The 2010 Tax Relief Act also reduces an employee's Social Security Tax rates for 2011. Specifically, the employee-portion of the Social Security taxes (commonly referred to as FICA taxes) that are withheld from an employee's pay has been reduced from 6.2 percent to 4.2 percent. However, the employer still must match at the 6.2 percent rate.

Beginning in 2010, the income limits for conversions from a Traditional IRA to a Roth IRA was eliminated. In other words, any taxpayer regardless of income can now convert their Traditional IRA to a Roth IRA. A conversion from a Traditional IRA to a Roth IRA is a taxable event, but the taxpayer is paying the tax at today's rates, rather then expected higher future rates.

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Not a member?

Not a member of the Wicomico County Bar Association? Dues slipped your mind? Contact Nicole at attygrl@aol.com for information.

Personal Injury Money Now Available For Child Support Arrears

by Mark Tyler, Esquire

In 2010, the Maryland Court of Appeals issued its decision Rosemann v. Salsbury, 412 Md 308, in which the Court held that the General Assembly did not specifically authorize the collection of child support arrearages from personal injury settlements/judgments among the listed exemptions from execution on a judgment in Courts and Judicial Proceedings Article Section 11-504 of the Annotated Code of Maryland. Consequently, the Court concluded that child support arrears could not be collected from the support obligor's recovery in a personal injury case.

On May 19, 2011, Governor O'Malley signed House Bill (HB) 837, which was the General Assembly's response to the Rosemann opinion. Now, under the provisions of HB 837, twenty-five percent (25%) of the net settlement or judgment a party receives in a personal injury case can be collected for child support arrearages. Net recovery is defined as "the sum of money to be distributed to the debtor after deduction of attorney's fees, expenses, medical bills and satisfaction of any liens or subrogation claims arising out of the claims for personal injury."

Consequently, parties to actions involving child support should be attentive to any pending personal injury or tort claims that the child support obligor has pending because the law now specifically provides for the collection of arrears from any settlement or judgment.❖

Wicomico County Bar Association Committee Lists

Are you on a committee? Would you like to be included? Join your fellow members on these committees:

Library Committee: John C. Seipp, Kennetth Gaudreau, Melvin J. Caldwell, Jr.

Newsletter Committee: The Honorable Leah Seaton(Co-Chair), Susan J. Land (Co-Chair), Barbara R. Trader, James W. Respess, Mark Tyler, Melissa Kilmer, Patricia Harvey

Social Committee: Laura Borowsky (Chair), Amy Sevigny, Ashley Bosche, Kimberly C. Dumpson, Michael Crowson, Robert Lee Marvel

Memorial Committee: Sharon Donahue, Amy Sevigny, The Honorable David B. Mitchell, Elizabeth Ireland

Please Join Us As We Honor Legal Aid's 100th Anniversary

We are teaming up with Habitat for Humanity for a volunteer service day. Help us as we "build" a stronger community. We are looking for volunteers for the following shifts: **Saturday, July 9th, 2011** (8:15 a.m. - 12:15 p.m.) and **Saturday, July 9th, 2011** (1:00 p.m. - 3:30 p.m.) Please RSVP to Heather Konyar at konyar@cbmlawfirm.com.

Practice Tips: DSS, You and the Courts

by Ray Jarvis, Esquire

I have been asked to advise the members of the Wicomico County Bar how the Local Department of Social Services works with respect to obtaining Local Department records, as well as with regard to court procedures and administrative hearings concerning the alleged abuse and/or neglect of children. The Local Department, due to the nature of its work, does things differently than most agencies when it comes to confidentiality. Pursuant to Section 1-201 et seq. of the Human Services Article everything, absolutely everything, from food stamps to foster children is confidential and we cannot disclose anything without a court order. Many of the attorneys with practices in Wicomico County still have the Clerk issue a subpoena to the Local Department for records. This will not work for records. We cannot release a record without an Order of Court. If a request for a subpoena for records is received by the Local Department, a Motion to Quash, or in the Alternative, for a Protective Order is filed. The records are then reviewed in camera by the Court and, if released at all, a Protective Order is issued. Counsel can also file a Motion for Production of Documents and show a nexus between what the attorney is asking for and the necessity of it to prove his or her position. Then, if the Court signs the Order, we will retrieve the record, redact same and file it with the Court within eleven (11) business days, together with a Motion to Quash or in the Alternative a Protective Order. The Court again will review and determine if records can be released under a Protective Order. In the Order, the Court will place such restrictions on the dissemination as it feels necessary to protect the parties, their children, or anyone's mental and medical health condition.

I would like to add a few words about Child in Need of Assistance Proceedings so that you have a better understanding of the process before you take on a parent who needs your help in getting his/her child(ren) back (we call it reunification). The Local Department policy is that children should be raised by their parents and we try our best in all cases to maintain families intact or to effectuate reunification of families if removal becomes necessary. If this is not possible, then we try to get the parent to work with us in locating relatives for placement. It is only after the parents and relatives have been ruled out that the Local Department looks to outside resources for permanency for the child.

First rule – well, we all know what the first one is unless you're Jean Laws who has more pro bono hours with us than Saint Peter. Second rule, enter your appearance and file a Motion to allow you access to our records for your representation of the parent, child, or whoever you have been appointed or retained to represent. Third rule, call the worker who is working with this family. By the time you do this, the worker should know who you are and that they have permission to talk to you. Fourth rule, listen to the worker and find out where your client stands with the local department.

Your client(s) will have entered into the famous "live or die by" service agreement whereby they agree to do certain things and we agree to help them do it. If they are successful, the child(ren) will be returned and all is well. If they don't then after about 120 days, the Department will change the plan to get this child permanency,

Remember that all federal, state, case and statutory laws and regulations (read "funding") are about the children and only collaterally about your client. The statute governing Child In Need of Assistance proceedings is found in the Courts and Judicial Proceedings Article at §3-801 et seq. The proceeding is held in Juvenile Court, and the

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DSS, You and the Courts
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Maryland Rules found in Title 11 also apply. The regulations governing the Local Department are found in Title 7 of COMAR.

In any CINA case, the Local Department case worker becomes your conduit for a successful case. Pleasing them equals pleasing their supervisors equals pleasing legal which pleases the Court and you're a winner. Though the ranting of your client at times about us may be true (most especially about the legal department), don't always believe your client. Verify it with the worker. If you are having trouble with the worker's availability to you, contact their supervisor and put it in writing. That kills me in the court room.

Now, time frames are all important to us because we are bound by policy dictates of the Federal and State government, which equals money for the child. A CINA case begins in one of two ways. Sometimes, to protect the child, the Local Department places the child in Shelter Care. When this occurs, the statute requires the Local Department to file a Petition for Continuation of Shelter Care that is heard the next Court day, unless continued to a later date, not more than seven days. Usually, all CINA matters are heard on Wednesday afternoons. If you want to enter your appearance before the Shelter Care hearing, call the me or the Clerk of the Court to get a case number to file in. In addition to filing a Petition for Shelter Care, the local Department also files a Petition alleging that the child is a Child In Need of Assistance. This hearing is held within thirty (30) days of Shelter and will be held on a Wednesday at 1:00 pm in Court Room Four. If the child is found to be abused, neglected, or has mental injury and the parents (if known and locatable) are not able to provide ordinary proper care and attention, then the child is declared CINA.

If the child is not taken into Shelter Care, but the Local Department has concluded that Court intervention is necessary to protect the child, the Local Department can also commence a CINA case by filing a CINA Petition. A hearing on this Petition will be held within thirty days and will also be held on a Wednesday. When the Local Department proceeds in this fashion, the first hearing before the Court is the Adjudication hearing. It is often the case that parents are unable to obtain counsel prior to the Adjudication hearing. In fact, the most common reason for postponing one of these hearings is because the parent wishes to obtain counsel.As a general rule, postponements to allow parents to retain counsel are liberally granted, in light of the multiple appellate decisions making clear that the right to parent one's own child is a fundamental constitutional right. At any rate, the procedures and purpose of the Adjudication hearing are the same, regardless of whether the action commenced with a Shelter Care proceeding or not.

After the facts are adjudicated, the Court is required to hold a Disposition hearing. Unless good cause is shown, this hearing will be held on the same day as the Disposition. At the Disposition hearing, the Court will determine whether the child is a CINA. Possible dispositions include, but are not limited to, placement in foster care, with a relative, or in the home with an Order of Protective Supervision.

Once a child has been found to be a CINA, the Local Department is required to create a permanency plan, and to make reasonable efforts to finalize and achieve that plan. Under the statute, the plans to be considered in order of preference are: a) reunification with either parent; b) relative placement; c) care custody and guardianship to a third party; d) adoption; e) another planned permanent living arrangement (used primarily for children who have been in long-term care). Under the statute, a Court hearing is held at least every six months to monitor the progress in achieving permanency for the child. If the parent is working

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Legislative Update 2011

by Melissa Kilmer, Esquire, Legal Aid Bureau

The Maryland General Assembly adjourned its 2011 Regular Session on April 11, 2011. Legislators introduced a total of 2,353 bills and seventeen joint resolutions for consideration by the body. Of the more than 2,000 bills that were introduced, 707 bills passed both chambers of the legislature. Only one joint resolution, HJ 7, creating a commission to study Campaign Finance Law, was passed by both chambers. As it does annually, the Department of Legislative Services published The 90 Day Report and The Legislative Wrap Up shortly after the close of the session. Here are some highlights from those publications. To read The 90 Day Report – A Review of the 2011 Legislative Session and The Legislative Wrap Up, Issue 11-14, go to http://mlis.state.md.us/2011rs/90-Day-report/The90DayReport.pdf and http://mlis.state.md.us/2011rs/Wrap_up/current_issue.pdf.

Courts and Civil Proceedings

Domestic Violence and Peace Orders

SB 747 and HB 407, Chapter 283 and Chapter 284, allow an interim, temporary, or final protective order to award temporary possession of any pet of a person eligible for relief or a respondent.

SB 342 and HB 667, Chapters 57 and 58, allows a Judge to extend a final Peace Order for up to six months after notice and hearing requirements are met.

SB 480 and HB 666, Chapters 68 and 69, increase the penalties for second or subsequent violation of a peace order to a fine not to exceed $2,500 or imprisonment not to exceed one year or both.

Divorce

SB 139 and HB 402, Chapters 423 and 424, require parties in a divorce action to have lived separate and apart without cohabitation and without interruption for twelve (12) months, rather than the current two years, before filing for absolute divorce. This repeals existing law concerning divorce on the grounds of voluntary separation after twelve months.

Special Admission of an Out-of-state Attorney – Fee

HB 523, Chapter 129, requires the State Court Administrator to assess a $100 fee for the special admission of an out-of-state attorney and to pay $75 of the fee to the Janet L. Hoffman Loan Assistance Repayment Program (LARP). The Janet L. Hoffman Loan Assistance Repayment Program provides loan repayment assistance in exchange for service commitments to Maryland residents who provide public service in Maryland State or local government or nonprofit agencies in Maryland to low-income or underserved residents.

Personal Injury Exemption – Exception for Child Support Arrearage

HB 837, Chapter 603, establishes that 25% of the net recovery by a person on a claim for personal injury is subject to execution on a judgment for a child support arrearage. "Net recovery" is defined as the sum of money to be distributed to the debtor after deduction of attorney's fees, expenses, medical bills, and satisfaction of any liens or subrogation claims arising out of the claims for personal injury.

Bankruptcy – Homestead Exemption

SB 169, Chapter 32, clarifies that under the homestead exemption: (1) "owner-occupied residential real property" includes a condominium unit; and (2) a debtor may claim his or her aggregate interest in a cooperative housing corporation

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that owns property that the debtor occupies as a residence. The Act applies to cases filed on or after October 1, 2011.

Bar Admission – Exception for Rent Escrow Proceedings

SB 457 and HB 653, Chapter 66 and 67, authorize any individual to represent a landlord, or specified law students or employees of nonprofit organizations to represent a tenant in a rent escrow proceeding in the District Court without having been admitted to the Maryland Bar as an attorney.

Crimes, Corrections, and Public Safety

Child Abuse and Neglect

SB 178 and HB 162, Chapters 398 and 399, establish the misdemeanor of child neglect, with a maximum penalty of five years in jail and a $5,000 fine.

SB 196 and HB 724, Chapters 192 and 193, increase the statute of limitations from one year to three years for the fourth degree sexual offense of nonconsensual sexual contact with a minor.

Sexual Offenses

SB 204 and HB 1128, Chapters 195 and 196, alter the definition of "sexual act" to include certain actions that under current law are included in the definition of "sexual contact." Generally, offenses involving a "sexual act" carry more severe penalties than offenses involving "sexual contact."

Drug Crimes

HB 1327, Chapter 392, increases the maximum penalties for distribution of Salvia to an individual under the age of 21 from (1) $300 to $1,000 for a first violation; (2) $1,000 to $2,000 for a second violation within two years of the first violation; and (3) $3,000 to $6,000 for a third or subsequent violation occurring within two years of the preceding violation.

Gun Control

SB 174 and HB 241, Chapters 164 and 165, expand the misdemeanor of using a handgun or concealable antique firearm in the commission of a crime of violence or felony to apply to any "firearm," without regard to its capability of being concealed, and expand the felony prohibition against gun possession by certain ex-offenders to include rifles and shotguns. These laws also extend the maximum sentence to fifteen years for a person previously convicted of a crime of violence or a specified controlled dangerous substance offense who later is apprehended in possession of a rifle or shotgun.

Parole and Probation

HB 302 has changed the parole process in Maryland. If the Patuxent Institution Board of Review or the Maryland Parole Commission decides to grant parole to an eligible prisoner sentenced to life imprisonment who has served twenty-five years without application of diminution credits and the Governor does not transmit a written disapproval of the decision within 180 days, the grant of parole becomes effective. This bill became law without Governor O'Malley's signature.

SB 801 and HB 919, Chapters 554 and 555, require the Department of Public Safety and Correctional Services to develop by October 1, 2012, a pilot program in two counties that creates a system of graduated administrative sanctions for violations of conditions of parole by those released from the Division of Correction.

HB 1174, Chapter 381, authorizes the parole commissioner who hears an inmate's parole revocation to require the inmate to serve any unserved portion of the original sentence and

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requires a report on the number of inmates whose sentences were reduced following parole revocation and the recidivism rate of those released early as a result of the bill.

Public Health

Medical Marijuana

SB 308, Chapter 215, creates a medical marijuana model program workgroup to develop a model program for facilitating patient access to marijuana for medical purposes and propose legislation to that end. By December 1, 2011, the workgroup's findings must be reported to the appropriate legislative committees. This law provides that in a prosecution for the use or possession of marijuana or for the use or possession of drug paraphernalia related to marijuana, it is an affirmative defense that the defendant used or possessed the marijuana or marijuana paraphernalia because: (1) the defendant has a debilitating medical condition that has been diagnosed by a physician with whom the defendant has a bona fide physician-patient relationship; (2) the debilitating medical condition is severe and resistant to conventional medicine; and (3) marijuana is likely to provide the defendant with therapeutic or palliative relief from the debilitating medical condition. The affirmative defense may not be used if the defendant was using marijuana in a public place or was in possession of more than one ounce of marijuana.

Real Property, Estates, and Trusts

SB 205 and HB 366, Chapters 36 and 37, require that an affidavit accompanying an order to docket or a complaint to foreclose a mortgage or deed of trust on residential property state, if applicable, that the contents of the notice of intent (NOI) to foreclose were accurate at the time the NOI was sent.

SB 450 and HB 412, Chapters 477 and 478, prohibit a court from accepting a lost note affidavit in lieu of a copy of the debt instrument in a foreclosure action, unless: 1) the affidavit identifies the owner of the debt instrument and states from whom and the date on which the owner acquired ownership; 2) states why a copy of the debt instrument cannot be produced; and 3) describes the good faith efforts made to produce a copy of the debt instrument.

State Government

Access to Public Records – Electronic Records

SB 740, Chapter 536, expands access to public records by requiring a custodian to provide a copy in a searchable and analyzable electronic format under specified circumstances and allowing for a reasonable fee. The Maryland Public Information Act grants the public a broad right of access without unnecessary cost or delay to records that are in the possession of State and local government agencies. Custodians have a responsibility to provide access to copies, printouts, or photographs unless the requested records fall within one of the exceptions in the law.

Transparency and Open Government

SB 644 and HB 766, Chapters 508 and 509, establishes the Joint Committee on Transparency and Open Government. They require the Committee to make recommendations on State transparency goals and policies, review laws, programs, services, and policies, and consult with specified State entities. The Committee must submit an annual report to the General Assembly on or before a specified date. Additionally, a public body does not have to prepare written minutes of an open session, if live and archived video or audio streaming of the open session is available or if the public body votes on legislation and the votes are posted promptly on the Internet.

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Transportation

Drunk and Drugged Driving

SB 803 and HB 1276, Chapters 556 and 557, the Drunk Driving Reduction Act, successfully emerged with amendments incorporating elements of other drunk driving bills. The bills expand the existing Ignition Interlock System Program by requiring a drunk driver to participate in the program if a blood or breath test shows an alcohol concentration of .15 or more. Violators who fail to complete the program will lose their license, but may apply to reenter. The laws, effective October 1, 2011, authorize individuals to participate in the program if they seek to regain a license that has been revoked or suspended due to drunken or drugged driving, if they have had a similar conviction within five years, or if they were under age 21 at the date of a drunken driving violation. Previously, the MVA was authorized to offer the program to drivers who wanted to regain a suspended license, but participation for drunk drivers was not required.

Texting and Distracted Driving

SB 424 and HB 196, Chapters 471 and 472, prohibit a driver from writing, reading, or sending any text message while in the travel lane of a roadway, whether or not the car is in motion. ❖

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with the Local Department to address the child's needs and achieve the Plan, the Local Department will provide assistance and support and continue to recommend reunification as the preferred plan. If they aren't, then the Local Department will ask the Court to change the plan. If the Court finds that the parent is not making adequate progress in spite of the fact that the Local Department has made reasonable efforts, the Court may change the plan, which could well mean the beginning of the draconian termination of parental rights.

If the Court changes the plan to adoption, then the Local Department is ordered to file a Guardianship (read TPR) to be filed within thirty (30) days; at the Guardianship hearing, the standard is clear and convincing evidence. I feel it only fair to share that most of my workers are extremely professional and know how to handle themselves on the stand. They don't cry. They don't come down off the stand and slap you. They wait for cross examination. They know that is where we win most of our cases, so just a word of caution. That worker is waiting for you and the old saying "if you don't know the answer, don't ask the question"should be uppermost in your mind. You have a right to appeal both the change of plan and the guardianship.

Finally, a quick word about administrative hearings. The statute governing administrative hearings regarding abuse and neglect findings is found in the Family Law Article at §5-706.1. An individual who has received notice that he or she is responsible for Indicated, or Unsubstantiated neglect or abuse is entitled to request an administrative hearing. An Indicated finding means we believe that it happened and the caretaker did it. An Unsubstantiated finding means it happened and we are not absolutely sure who did it. The third finding, generally not appealed, is Ruled Out, which means that the Local Department has determined that the abuse or neglect did not occur. For any finding of Unsubstantiated finding, the individual and/or his or her counsel will be afforded a meeting with the Child Protective Services Supervisor and myself so we can hear, once again, your side of the story. You will have received our discovery by then. If the finding is Ruled Out, then we expunge the record and there will be no need for the hearing. If not satisfied with the "unsub" conference, you will get a hearing before an Administrative Law Judge. At the

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hearing, hearsay is allowed.

The Local Department usually just has the social worker testify unless the child is over fourteen (14) and mentally capable of handling a hearing. You may call witnesses (remember to send me the list 10 days before the hearing) but I would keep the list short. We have a lot of these hearings and they don't usually go more than an hour to an hour and a half. If we are unsuccessful, and the finding is indicated, then your client will go on the Central Registry forever. This is not the Sex Offender Registry. This is an interdepartmental registry used to screen pre-adoptive parents, foster care families, day care centers and the like. If the finding is unsubstantiated, then your client is on the registry for five years unless he/she commits another offense in the interim.

Unfortunately, many individuals in need of representation in the proceedings described above are unable to afford an attorney and may not qualify for services through low income providers. However, for those of you who need to get your pro bono hours in, this type of work will certainly qualify. Finally, I want to say thank you to the members of the Bar who work with me regularly. You have been more than kind in putting up with my little "requests" from time to time and it has been a real pleasure now for over ten years. ❖

Call for Articles

Come one, come all! Submit your articles, or ideas for article, for inclusion in future newsletters. If you would like to do a regular column or be a regular contributor, we welcome you! Articles should be relevant to law or our community. We are also looking for information regarding our members, such as moves, new hires, new jobs, etc. This newsletter will be only as great as the contributions you make to it.

2010 Tax Relief Act
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Taxpayers who made such conversions during 2010 could elect to pay the tax one-half in 2011 and one-half in 2012. Taxpayers who convert their Tradition IRA to a Roth IRA in 2011 will have to pay all of the tax on said conversion in 2011.

CIRCULAR 230 DISCLOSURE: The following statement is provided pursuant to U.S. Treasury Department regulations and IRS Circular 230. This communication is not intended to or written to be used, and cannot be used, by the taxpayer for the purpose of avoiding penalties that the Internal Revenue Service or applicable state or local law may impose on the taxpayer.

Douglas W. McCabe, CPA, Esq. is a Certified Public Accountant and an attorney at PKS & Co., P.A. PKS & Co., P.A. has offices in Salisbury and Ocean City providing estate and tax planning, audit, accounting, tax, computer, retirement plan administration and personal and business financial planning services. Visit www.pkscpa.co or call 410-546-5600. ❖

Preparing a DUI
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The lawyer should fully examine the officer's report and/or video looking for possible defenses. In addition, the attorney should research any legal issues to be presented and prepare memoranda of law or at least provide copies of the relevant cases. In the event the defense fails, before going to the court or MVA, the lawyer must collect all relevant documents from the client including alcohol education or treatment letters, as well as letters from the employer, if relevant. When appearing in court and the MVA counsel must be fully prepared to both defend on any legal issues and to offer mitigation if necessary. Finally, in the event of a result the client feels should be challenged, the lawyer must be ready to advise the client of appellate options, and if the client is jailed, to request and post an appeal bond.❖

impute inferentially criminal responsibility….'; several factors are relevant to establishing that 'nexus' such as 'the proximity between the defen dant and the fact that the contraband was within the view…of the defendant"); Handy v. State, 175 Md. App. 538, 564, 570-71 (2007) (applying the factors in Folk v. State, 11 Md. App. 508, 518 (1971), '1) proximity between the defendant and the contraband, 2) the fact that the contraband was within the view or otherwise within the knowledge of the defendant, 3) ownership or some possessory right in the premises or the automobile in which the contraband is found, or 4) the presence of circumstances from which a reasonable inference could be drawn that the defendant was participating with others in the mutual use and enjoyment of the contraband' to determine that the evidence established that defendant had constructive possession of the contraband)." Slip op. at 19.

2. In closing argument, the prosecutor repeatedly argued that the four defendants in a car with a gun would be guilty if they "could" have exercised dominion or control. Defense counsel did not object. Held: While the law requires that the defendant "did in fact" exercise dominion or control, slip op. at 24, and the State's argument was therefore erroneous, reversal on the basis of plain error was not required. The trial court's instruction on constructive possession was correct, the jury was told that arguments are not evidence, the State's case was "overwhelming," and there is no need to clarify the law.

Williams v. State, 417 Md. 479, 10 A.3d 1167 (2011) (Battaglia).

1. Maryland's prohibition upon wearing, carrying, or transporting a handgun, §4-203 of the Crim. Law Art., does not offend the Second Amendment right to bear arms. Reviewing recent Supreme Court cases on the subject, the Court found it critical that the statute (a) does not proscribe the possession of a handgun in one's residence, and (b) allows for the application for a permit to carry a handgun outside of the home.

2. The Second Amendment is applicable to the States. McDonald v. Chicago, 130 S.Ct. 3020 (2010).

3. A person who has never applied for a wear/carry permit lacks standing to complain that the permit procedure impermissibly burdens the right to bear arms.

4. A blanket prohibition upon possessing a handgun in one's home violates the Second Amendment under D.C. v. Heller, 554 U.S. 570 (2008). Nor may a legislature mandate that all firearms that are permitted in the home be kept in an inoperable condition, as through the use of a trigger lock. Otherwise, however, handgun possession may be regulated, e.g., it is permissible to prohibit felons and the mentally ill from possessing firearms. Recent lower court decisions have construed Heller and McDonald to protect an individual right of law-abiding citizens to maintain an operable handgun in the home for self-defense. Thus, such courts have upheld safe storage requirements, proscriptions upon carrying concealed weapons, prohibitions upon childrens' possession of weapons, and licensing schemes. Held: The General Assembly did not run afoul of the Second Amendment in proscribing the wearing, carrying, or transporting of a handgun in a public place without a permit. Dispositively, the statute excludes possession in the home from its proscription. See §4-203(b)(6).

Driving Offenses

Stephens v. State, #2982 COSA 2009, 4/28/11 (Woodward)

Observed by a police officer swerving repeatedly from lane to lane, defendant was convicted, inter alia, of failure to obey a "traffic control device" under §21-201(a) of the Transportation Art. Under §11-167, a traffic control device

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includes any "marking…placed by authority…to regulate, warn, or guide traffic." Held: A lane designation mark qualifies as a "marking," and thus a "traffic control device." Failure to obey such markings, by swerving, violates §21201(a). The fact that §21-309 independently proscribes swerving from lane to lane does not alter this outcome. Where two statutes govern the same conduct, where as here there is no irreconcilable conflict they are construed in pari materia and "harmoniously." (Such a conflict, had it existed, might require implied repeal of the earlier, but here the two are consistent and it is up to the State to decide which to invoke.)

Evidence

Griffin v. State, #74 COA 2010, 4/28/11 (Battaglia; Harrell dissenting; 5-2 decision)

When a State's witness changed his testimony, the State offered, over objection, what it purported to be a printout from Griffin's girlfriend's MySpace profile, which posted a threat to potential witnesses which the State argued explained the change in testimony. In holding that the printout was not properly authenticated under MD Rule 5-901, and thus inadmissible, the Court wrote:

1. Lack of proper authentication renders evidence inadmissible, regardless of probative value or prejudice.

2. Found insufficient to authenticate was the following information in the profile: a photo which appeared to be the girlfriend (who testified but was not asked to authenticate the evidence) in an embrace with Griffin; the girlfriend's date of birth; and references to "Boozy," which was Griffin's nickname.

3. It is not always possible to determine who posted to a profile. Individuals may set up a fictitious account under a false name or that of another person, and a "friend" may freely post on a "friend's" profile without revealing his or her identity. The "friending" process is much the same on Facebook as it is on MySpace.

4. MD Rule 5-901(b) permits authentication through direct evidence (Griffin's girlfriend could have, but was not, asked to authenticate "her" profile), or through circumstantial evidence. Here, the State failed to adduce sufficient evidence to negate the possibility that a person other than the girlfriend either generated the profile or posted the threat. Careful scrutiny is required because of the ease of creating a fictitious identity or posting on someone else's site.

5. E-mails and text messages are less prone than social networking profiles to authentication problems because the large community involved with the latter does not have the same capacity to send an email or text message from a specified account as it does to post on a social networking site.

6. In addition to asking the apparent profile-owner, the Court suggested as possible means of authentication 1) searching the hard drive of that person's computer, and 2) making inquiries of the person's operating the networking site itself.

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Wicomico Bar Association
P. O. Box 4394
Salisbury, MD 21803-4394