

# PENNSYLVANIA Law Weekly

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## Legal Profession

### PAJ President Focusing on Elections, 'Merit Selection' Stance

BY LEO STRUPCZEWSKI  
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If you hear Tim Conboy tell it, everybody figured he would follow in his father's footsteps. He never did.

Though Jerry Conboy was the head coach of the Point Park College men's basketball team for 20 years, his son saw such a career as inherently risky.

"In watching my dad, I thought relying on 18-year-old to 22-year-old kids for your livelihood was not a great way to earn a living," Conboy said.

So, he went to law school and found himself drawn to being a trial lawyer — "the closest thing to playing sports in suits," he said — during a three-year stint with the Allegheny County District Attorney's Office.

Since then, he has developed a personal injury practice at Caroselli Beachler McTiernan & Conboy in Pittsburgh and steadily increased his participation in the Pennsylvania Association for Justice.



Conboy

That involvement culminated this June when Conboy began a term as the organization's president.

He set goals to support "pro-civil justice candidates" in the November elections, study an appointment-based system for appellate court judges and the organization's stance on the issue along with continuing efforts to lobby for the rights of individuals involved in

civil proceedings.

Nearly four months in, Conboy said, he's been able to stay true to the goals he laid out at the beginning of his presidency.

The only hiccup so far, he said, is a surprisingly intense lobbying effort against legislation that would allow for non-economic damages in automobile accidents.

PAJ has heard from some legislators that none of their constituents are worried about certain issues the organization is pushing, Conboy said, and that the organization's two lobbyists are working on those issues.

"The problem with that logic is that when we're fighting to protect rights, we're fighting to protect the rights of clients whose injury or harm hasn't even occurred yet," Conboy said. "There is no way for people to lobby for protection

they don't even need yet. That's the role of our organization — protect the rights of future clients."

Still, Conboy said, the time devotion hasn't been a surprise.

"If you choose to become president, you know what you're getting into," he said. "When you accept this position, because of the number of years you spend in leadership, you understand the commitment it takes to perform the job."

Conboy said the organization's short-term goal, right now, is to focus on the November elections and support its preferred candidates in several different ways.

PAJ, he said, has been raising money through its political action committees and working with its members on

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## Criminal Practice

### Fraud Case Highlights Judicial Use Immunity Question

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Writing that a defendant's due process rights and a would-be witnesses' Fifth Amendment privilege against self incrimination must be balanced against each other, a federal court judge has granted immunity to a defendant's alleged co-conspirator so that person can testify at trial.

The decision, reached by U.S. District Judge for the Middle District of Pennsylvania Sylvia H. Rambo in a memorandum opinion, held that such a ruling was the "only way" to ensure a fair trial for defendant Joseph W. Nagle, who has argued that he did not enter a conspiracy to defraud the U.S. Department of Transportation along with a business partner, Ernest G. Fink Jr., and several

other members of a company in which he was involved.

"It is unclear whether Nagle intends to testify at trial, but if he chooses not to do so, as is his constitutional right, the best source of this evidence comes from Fink," Rambo wrote. "The government's contention that the information is readily available from other sources does not hold water. No other source — save Nagle himself — could testify to the interactions between Nagle and Fink to which others were not privy. Moreover, the court does not believe that Nagle's availability to testify, which would require him to waive his own Fifth Amendment privilege, means that Fink's testimony is not essential. A jury very likely would give greater credence to the testimony of a codefendant who has already plead guilty, and has nothing to gain by misleading the jury, than

it would to the individual who is on trial."

According to Rambo, Nagle and Fink were indicted on 32 counts of fraud, conspiracy to commit fraud and related charges. Federal prosecutors alleged the two men, along with others in the company, planned to defraud the U.S. Department of Transportation "in the implementation, execution and administration of its disadvantaged business enterprise."

Fink subsequently pleaded guilty to one count of conspiracy found in the indictment, but Nagle continued to argue he was not guilty of the crimes alleged, according to Rambo.

Nagle, in his defense, argued that Fink and other high-level managers excluded him from the day-to-day decision making at Schuylkill Products, a family

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## ERISA

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plan as required by Section 1144 of Title 29 of the United States Code, which governs ERISA pre-emption.

The court in *Greenblatt* said the employee's claim alleged deception on the part of the employer but the fact that the subject of the deception was pension benefits "is only incidental and not essential to the plaintiff's cause of action," Panella said.

Like the *Greenblatt* court, Panella found that the plaintiffs' claim in *Barnett* also failed to "relate to" an employee benefit plan because the oral promise was made by one of the plaintiffs' superiors, as their employer rather than as a plan fiduciary.

"Similarly, the oral contract at issue was made to the [plaintiffs] in the ordinary course of business and not in the course of administering an SKF pension plan," Panella said.

SKF, however, argued on appeal that the 3rd Circuit's 2006 ruling in *Hooven v. Exxon Mobil Corp* was controlling in

*Barnett*.

But Panella said the breach of fiduciary duty claims in *Hooven* were specifically brought under ERISA, equitable estoppel, procedural and reporting violations, along with an ancillary federal breach of contract claim alleging the plaintiff had detrimentally relied on a severance document promising enhanced benefits.

Panella said *Barnett* was distinguishable because the plaintiffs "have not asserted any claim under ERISA, nor have they brought their oral breach of contract cause of action as an ancillary

action to an ERISA claim as done in *Hooven*."

Judge Jacqueline O. Shogan dissented but did not file an opinion.

"We're very pleased that the Supreme Court has decided to hear the case, which we believe has significant import for Pennsylvania businesses and obviously for our client," said SKF's attorney, Kevin D. Kent of Conrad O'Brien in Philadelphia.

The plaintiffs' attorney, Lansdale, Pa., solo practitioner Edmund J. Brokans, could not be reached for comment at press time. •

## Settlement

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and Drug Administration had approved Trileptal only for the treatment of epilepsy patients. But according to the criminal charges, NPC's management created marketing materials promoting Trileptal for off-label uses, including neuropathic pain and bipolar disease, which were not FDA approved.

NPC allegedly targeted psychiatrists and pain specialists, who were known to use anti-epileptic drugs like Trileptal off-label. The company also allegedly funded continuing medical education programs, using other medical professionals to promote off-label uses of Trileptal.

Memeger said in a statement that such off-label marketing "can undermine

the doctor-patient relationship and adversely influence the clear judgment that a doctor's patients have come to rely on and trust."

Pharmaceutical companies, Memeger said, "have a legal obligation to promote the drugs they manufacture only for uses that the FDA has deemed are safe and effective. That legal obligation takes priority over a company's bottom line."

Andy Wyss, president of NPC and head of Novartis Pharma North America, said in a statement that the company is "pleased to have reached resolution on this matter" and that it "will continue to work with the government and other organizations to improve health care for all Americans."

In the civil settlement, NPC agreed to pay \$237.5 million to the United States and participating states, plus interest, to settle allegations that it caused invalid

claims for payment for its drugs to be submitted to government programs such as Medicare, Medicaid, TRICARE and the Federal Employees Health Benefits Program.

The state Medicaid programs and the District of Columbia will share more than \$88 million of the settlement.

The whistle blowers — Jim Austin, Darryl Copeland, Jeremy Garrity, Steve McKee and John Montgomery — are all former NPC employees. They alleged in their suits that NPC knowingly promoted the sale of Trileptal for off-label uses including bipolar disorder and neuropathic pain, and paid kickbacks to health care professionals through mechanisms such as speaker programs, advisory boards, entertainment, travel and meals.

Attorney Kenneth J. Nolan of Nolan & Auerbach in Philadelphia and Ft. Lauderdale, Fla., said his office repre-

sented three of the five whistleblowers. In a brief interview, Nolan said that he would not disclose how the reward money will be shared among the five.

As a term of its settlement with the Justice Department, NPC also signed a corporate integrity agreement that says the company faces possible exclusion from federal health care programs, including Medicare and Medicaid.

The integrity agreement requires the Novartis board to annually review the company's compliance program with the help of an outside expert and certify its effectiveness. It also mandates that NPC send doctors a letter notifying them about the settlement; and that the company posts on its website information about payments to doctors, such as honoraria, travel or lodging.

— Shannon P. Duffy, of the Law Weekly •

## IRE

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I.A. Construction argued that the language of the statute supported an interpretation that an earnings assessment was not needed for a status change.

According to the company, that was only one of two ways in which it could petition for a change in Diehl's disability status. The other was by showing an impairment rating of less than 50 percent.

Had the legislature blanketly required evidence of a change in earning power, it would have used the same language

in subsection (5) of Section 306(a.2), which discusses the length of a total disability status, that is found in subsection (3) of Section 306(a.2), which states that the amount of compensation cannot change without an agreement or adjudication, the construction company continued.

Castille, in writing for the court, wrote that *Gardner* held total disability continues "until it is adjudicated or agreed that either total disability has ceased or the impairment rating is less than 50 percent."

Given that ruling, Castille wrote, an employer outside the normal 60-day window must go through an adjudica-

tion or agreement to change a claimant's disability status.

There are, however, no further requirements during that process, Castille continued, because requiring an employer who produces an IRE showing an impairment rating of less than 50 percent to also produce evidence of earning power or job availability would render the IRE process "a nullity."

"If the employer must also prove earning power and job availability, there is simply no reason to avail itself of the streamlined, more efficient IRE process," Castille wrote.

"This holding is consistent with our decision in *Gardner* that an untimely

IRE does not result in a self-executing change in disability status but rather such a change must be achieved through the traditional administrative process," he also wrote. "The holding also comports with the legislative intent behind Section 306(a.2), which is to ensure efficiency within the workers' compensation system."

(Copies of the 25-page opinion in *Diehl v. WCAB* (I.A. Construction and Liberty Mutual Insurance), *PICS No. 10-3225*, are available from Pennsylvania Law Weekly. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m. Tuesday.) •

## Precedent

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the MCARE Act may not apply to every situation.

In his concurring opinion, Castille said *Freed* "has made clear that engrafting the definitions included in the Professional Nursing Law— a statute

first enacted in 1951— onto our rules of evidence concerning expert testimony was ill-advised."

In his dissenting opinion, Saylor said the majority's approach to *Freed* was "troubling" because the legislature has shown "in no uncertain terms" that its intentions "are entirely consistent with *Flanagan* and contrary to *Freed*."

Eakin, in his own dissenting opinion,

said, "To allow one to opine in court about things one is explicitly prohibited from opining about in the real professional world is illogical at best."

*Freed*'s attorney, York Haven, Pa. solo practitioner Jan Barnett, could not be reached at press time, nor could Geisinger's attorney, Kim Kocher of White & Williams in Philadelphia.

Counsel for co-defendant Healthsouth

Corporation, John J. Hare of Marshall Dennehey Warner Coleman & Goggin in Philadelphia, was also unavailable.

(Copies of the 33-page opinion in *Freed v. Geisinger*, *PICS No. 10-3261*, are available from Pennsylvania Law Weekly. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m. Tuesday.) •

## Election

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grassroots campaigns to spread the word to clients and others.

Conboy said he's also in the process of appointing a panel to study the issue of "merit selection" for appellate court judges and reevaluating the organization's stance against the movement.

Several members of the organization have been "urging" such a study, Conboy said.

That, along with the topic being considered elsewhere, helped propel the idea to study the issue.

Conboy said he's unsure what will happen in terms of the organization's position on the issue.

Any change, he said, would have to be voted on by PAJ's board of governors.

"There's no question that if we would change our position it would be a major

shift," Conboy said. "It's something that people are discussing across the country right now and there have been several editorials. We thought it was time to at least look at our position and figure out what the majority of our members support and clarify our position on the issue."

Conboy said his decision to run for PAJ president was born from a desire to ensure a continued geographic diversity in the organization's leadership.

In the past, Conboy said, there were issues stemming from the differences between the practices of Philadelphia lawyers and those located in other parts of the state. That is gone, though, and Conboy said he hoped his presidency could continue to make improvements in that area.

"Over the last few years, there's been a real effort to have transparency and open cooperation," he said. "Diversity from a geographic standpoint is better than it's ever been." •