

Your Best Defense, Fall 2003, provides not only its usual informative and useful look at various areas of law handled by the firm, but also a unique look at the firm itself.

Wayman, Irvin & McAuley celebrates its 38th year in 2003, and our current managing partner, Mark Gesk, offers his look at how the firm has developed into what it is today and why it continues to be a leader in the area of defense litigation. Mr. Gesk discusses the firm's longevity, its stability and the myriad of reasons it is and remains a premier choice for those facing legal problems.

In addition to Mr. Gesk offering his interesting perspective on the firm, one of the firm's most experienced trucking law litigators examines the "all states" endorsement in a trucking auto policy issued outside of Pennsylvania and how it is applied to an accident occurring in Pennsylvania. Warren Siegfried successfully defended the underinsured motorist carrier in the case he discusses, avoiding an effort to have higher benefits invoked under the Pennsylvania Motor Vehicle Financial Responsibility Law.

A helpful look at the Dram Shop Act and its requirements is



offered by April Morgan Hincy. She examines how the "visibly intoxicated" standard under the Act is applied and offers some suggestions for establishments serving alcohol to enable them to avoid or, if need be, defend claims based upon service of alcohol to visibly intoxicated patrons in violation of the Act.

Finally, in a world increasingly dependent upon computers and electronic communication, Jeffrey Kubay examines the duty of businesses to preserve e-mails and other computer stored information. Under the spoliation doctrine, if a business, even innocently, destroys information or documents that are otherwise relevant to a claim or likely claim, it risks sanction by the court or even judgement against it in a lawsuit. Jeff examines the relevant case law and offers suggestions on how to avoid these problems.

We hope you enjoy this issue!

*As always, we hope you find the included items interesting and useful. If you know of anyone who might benefit from Your Best Defense and who is not currently on our mailing list, please contact me at [dforsythe@waymanlaw.com](mailto:dforsythe@waymanlaw.com).*

## MANAGING PARTNER'S PERSPECTIVE OF WAYMAN, IRVIN & MCAULEY, LLC

By: Mark J. Gesk

Wayman, Irvin & McAuley, LLC approaches its 38th anniversary this Fall. I am honored to be the managing partner at the time of this anniversary. Thus, I am addressing my perspective of the firm as it exists today. To understand though where we are today, it is helpful to me to look at our past.

### History of Wayman, Irvin & McAuley, LLC

The firm was founded in 1965 when Bob Wayman, Arch Irvin, Dave Truschel, and Ben McAuley left a

prestigious law firm to form Wayman, Irvin, Truschel & McAuley. All four of the founding partners were successful trial attorneys specializing in insurance defense litigation. The firm quickly grew from four to ten attorneys and established itself as a front-line insurance defense law firm in Western Pennsylvania. A significant moment in the firms history occurred when Bob Wayman tried and won a seminal anti-trust lawsuit on behalf of Route 22 Ford against Ford Motor Corporation. While damages were eventually reduced by the U.S. Supreme Court, Mr. Wayman established a national reputation for the law firm as a result of his efforts on behalf of the Ford dealership. See, *Rea v. Ford Motor Co.*, 355 F. Supp-842 (W.D. Pa, 1973).

In the meantime, Arch Irvin was establishing himself as the expert in construction litigation. He specifically represented architects and engineers in professional liability errors and omissions lawsuits. In the 1960's and 70's this was a relatively new area of defense law, and Mr. Irvin's aptitude for construction law quickly

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**TRUCKING ALL STATES ENDORSEMENT NOT APPLICABLE TO  
UNDERINSURED MOTORIST CLAIM**

*By: Warren L. Siegfried*

This claim for underinsured motorist benefits arose out of a truck-on-truck motor vehicle accident in which plaintiff-decedent, Terrence Broderick, was killed. A tractor trailer unit owned by Midwest Express Corporation collided with a truck operated by Mr. Broderick and owned by Dream Weaver Express.



The plaintiff brought a civil action against Midwest Express Corporation which was subsequently settled for the amount of \$900,000.00. The plaintiff then filed an underinsured motorist claim against Harco National Insurance Company which insured Dream Weaver Express who was the employer of the plaintiff at the time of the incident.

The insurance policy issued to Dream Weaver Express included underinsured motorist coverage in the amount of \$25,000.00. This policy was issued in Ohio which was the location of Dream Weaver Express and where Dream Weaver Express's trucks were principally garaged. It was the plaintiff's contention that the amount of underinsured motorist coverage should be increased to \$750,000.00 to equal the amount of liability coverage issued in the Harco policy pursuant to the provisions of the Motor Vehicle Financial Responsibility Law of Pennsylvania.

In support of their claim, the plaintiffs relied on a provision in the policy commonly known as the "all states" endorsement. The endorsement stated, among other things, "...the certification of the policy as proof of financial responsibility under the provisions of any state motor carrier law or regulations promulgated by any state commission having jurisdiction with respect thereto, amends the policy to provide insurance for automobile bodily injury and property damage liability in accordance with the provisions of such law or regulations to the extent of the coverage and limits of liability required thereby..." . It was our position in this case that the all states' endorsement only applied to amend the policy to reach minimum limits of liability coverage, if any, and/or medical benefits as required by each of the individual states. In the alternative, it was also argued that Ohio law would apply to the case and under Ohio law's "gap coverage" provisions, the plaintiff could not recover since the underinsured motorist coverage provided for in the policy were less than the liability limits of the tortfeasor.

After testimony and argument, an Opinion was issued holding that the "all states" endorsement is found in the liability insurance portion of the policy and that it only amends the policy to provide insurance for automobile

bodily injury, and property damage liability. Additionally, the tractor trailer was an Ohio registered vehicle and not registered in Pennsylvania. Therefore, under Pennsylvania case law, the Motor Vehicle Financial Responsibility Law requirements only apply to motor vehicles "registered and operated in this Commonwealth". *Boone v. Stonewall Insurance Company*, 554 A.2d 968 (Pa. Super. 1989). Pennsylvania law further has held that an "all states" endorsement does not provide for any coverage other than that which the MVFRL requires of vehicles registered outside the Commonwealth. The only coverage which is required is that non-resident owners give proof of financial responsibility in the form of liability coverage in the minimum amounts required by § 1702 for vehicles registered in Pennsylvania.

Additionally, the court in *The United States Automobile Association v. Randall Shears, Jr.*, 692 A.2d 161 (Pa. Super. 1997) held that nowhere in the MVFRL are there any provisions requiring a non-resident to have greater uninsured motorist benefits on his vehicle when he comes into the Commonwealth nor is there any provision requiring a non-resident to conform to the uninsured motorist provisions of the Commonwealth.

Accordingly, in the instant case, since Pennsylvania courts have consistently held that an "all states" endorsement does not require a vehicle registered in another state to have uninsured or underinsured motorist benefits equal to those required by the Pennsylvania statute, the plaintiff could not succeed in her argument that the underinsured motorist coverage limitation provided for in the policy had to be amended to equal the liability coverage limit.

Accordingly, the underinsured limits in the case remain at \$25,000.00. The Opinion went further and concluded that Ohio law did in fact apply to this set of circumstances. Accordingly, since the underinsured limits of \$25,000.00 were significantly less than the tortfeasor's liability limits of \$950,000.00, the plaintiff was precluded from recovering any underinsured motorist benefits as a result of the tractor trailer accident.

The plaintiff has appealed this decision to the Pennsylvania Superior Court.

*Please contact Warren L. Siegfried on any trucking industry issues that you may have at [wsiegfried@waymanlaw.com](mailto:wsiegfried@waymanlaw.com).*

**SPOILIATION OF EMAIL**

By: Jeffrey A. Kubay



What obligation does a company or individual have to preserve computer e-mail when litigation concerning that company or individual is likely to occur? Spoliation—the destruction or significant alteration of evidence—includes not only the intentional destruction of potential evidence, but also the failure to preserve such evidence. Although the Superior Court of Pennsylvania recently clarified the doctrine of spoliation in *Brotech Corporation v. Delmarva Chemicals, Inc.*, 2003 PA Super 281 (2003), Pennsylvania’s state appellate and federal courts have not yet had the occasion to specifically address the application of the doctrine to e-mail. However, existing state court precedent, case law from federal district courts within the Third Circuit, and case law of other federal jurisdictions strongly suggest that e-mail, including deleted e-mail that would otherwise automatically be purged from a computer by its operating system, must be preserved.

In an opinion filed on July 30, 2003, the Superior Court in *Brotech Corporation* reaffirmed the public policy considerations furthered by the spoliation doctrine. The *Brotech* Court, citing *Schroeder v. DOT*, 710 A.2d 23 (Pa. 1998), observed that the doctrine serves to protect defendants who may be unable to prepare a defense after the destruction or loss of critical evidence.

In *Schroeder*, the Supreme Court of Pennsylvania adopted the spoliation-of-evidence standard set forth by the Third Circuit Court of Appeals in the landmark decision of *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76 (3d Cir. 1994). The Court of Appeals in *Schmid* noted that courts have long admitted evidence tending to demonstrate that a party destroyed evidence relevant to the dispute being litigated. The existence of such evidence permitted a common sense inference—the “spoliation inference”—that the destroyed evidence would have been unfavorable to the position of the offending party.

In *Applied Telematics, Inc. v. Sprint Communications Company*, 1996 U.S. Dist. LEXIS 14053 (E.D. Pa. 1996), the court applied the spoliation doctrine to “electronically stored” information, including data automatically deleted from computer databases. In that case, the plaintiff brought a patent infringement action concerning a telephone system that was designed to connect a customer to a local supplier of goods via a central “800-type” number. Specifically, the plaintiff alleged that the defendant offered two services that infringed on the plaintiff’s patent. Through discovery, the plaintiff sought certain computerized routing plans that, in accordance with the defendant’s normal operating procedures, had been automatically deleted on a weekly basis from the computer system. Based upon this automatic deletion, the plaintiff filed a motion for a “spoliation

inference” and sanctions based upon spoliation of evidence. *Id.*

The federal district court in *Applied Telematics* recognized that there is no duty to preserve evidence unless the party possessing the evidence has notice of its relevance. Moreover, a party is deemed to have notice once it has received a discovery request for the production of such evidence. *Id.*

The *Applied Telematics* court noted that, for an unfavorable inference to arise, there must be an actual suppression or withholding of evidence. In that case, the court held that the defendant had an affirmative duty to save or preserve data that would have otherwise been automatically deleted, notwithstanding the fact that the plaintiff had not asked the defendant to save said data. Accordingly, the court ruled that a spoliation inference was warranted as well as the imposition of reasonable fees and costs. *Id.*

With respect to e-mails generally, other jurisdictions have held that e-mails are “documents” for purposes of disclosure and discovery under the Federal Rules of Civil Procedure. *Playboy Enterprises v. Welles*, 60 F.Supp. 2d 1050 (S.D. Cal. 1999). Moreover, deleted e-mails are also “documents” under the procedural rules. *Id.* Further, it has been observed that “deletion” of an e-mail or other document does not mean that it has in fact been deleted from the system entirely. *The Antioch Co. v. Scrapbook Borders, Inc.* 2002 U.S. Dist. LEXIS 20811 (D.Minn. 2002).

A party’s obligation to produce electronically stored data under the *Applied Telematics* decision is critical given the nearly universal use of computers to communicate within business entities and among individuals, particularly through the use of e-mails. This obligation is complicated by the fact that almost every computer operating system or network utilizes an automatic purge function that systematically and periodically deletes documents.

No Pennsylvania state or federal court has ruled on the precise issues of whether there is an obligation to preserve e-mail, and more specifically, whether the automatic purge function relative to deleted e-mail constitutes spoliation of evidence when litigation is reasonably foreseeable. However, the *Applied Telematics* case is a clear harbinger that these issues would be answered affirmatively. Accordingly, one should take steps to preserve all e-mail and modify or eliminate the automatic purge function of its computer system or otherwise have all e-mail electronically duplicated when it appears that litigation is likely to occur relative to a particular matter.

Where a court finds that spoliation of evidence has occurred, it is within the court’s discretion to determine the

## *Lawyers Solving Problems*

*Managing Partner's Perspective, continued from page 1*

established him as a pioneer nationwide.

David Truschel, a leading medical malpractice expert, established Wayman, Irvin & McAuley, LLC in this area of law which we continue to concentrate heavily in today.

Ben McAuley was a leading force in trucking litigation, toxic tort litigation and products liability law, until his retirement in 1999.

Over the next 38 years the firm has had remarkable stability. Of the founding members, only David Truschel left in 1976 to start his own firm. While Wayman, Irvin & McAuley, LLC has not grown to become one of the larger firms in Pittsburgh, this was purposely done in order to provide a small firm client service and working atmosphere for the attorneys and employees of the firm.

The remarkable stability of the firm is highlighted by the present members of the firm. Mike Magulick joined the firm upon his graduation from law school 1973 and his 30th anniversary is being celebrated this month. I began working here in September of 1974. Kate Fagan joined the firm after she graduated from law school in 1980. Dale Forsythe, Max McTiernan and Warren Siegfried all joined the firm as clerks and then lawyers upon graduation in 1985. Just these six lawyers combine for 133 years in legal experience at Wayman, Irvin & McAuley. Longevity and stability is a mark of the firm's lawyers.

### **Why Retain Us As Your Lawyers?**

We celebrate 38 years of legal service provided to professionals and the insurance industry. But more important than longevity and stability is the quality of legal services that Wayman, Irvin & McAuley, LLC provides to its clients. Although we began as an insurance defense firm, we have grown over the years to a firm representing directly corporations in cases including products liability, toxic torts and trucking industry claims, to name a few areas of concentration. Likewise, beginning with Arch Irvin, our construction law practice has dramatically expanded to include representation of construction managers, owners and contractors.

So why retain Wayman, Irvin & McAuley, LLC if your company or you personally are threatened with a lawsuit? I would first submit that you look at our experience in litigation. Because we have been a small firm for 38 years, the attorneys at Wayman, Irvin & McAuley, LLC have prepared and tried thousands of jury trials, non-jury trials, arbitrations, and administrative hearings. As any trial lawyer will relate, experience in the court room is invaluable in litigation. Experience in the court room is what drives favorable settlements for our clients. The lawyers of Wayman, Irvin & McAuley, LLC have a

reputation for trying cases, and this translates into the best possible results for our clients. Judges recognize this, mediators recognize this, and opposing counsel recognize the skill and experience of Wayman, Irvin & McAuley, LLC attorneys.

The other facet is that because we are a small law firm, we can give personal attention to our clients. We are here to answer questions. We are here to meet with you, counsel you and partner with you in a successful defense of claims asserted against you. Wayman, Irvin & McAuley, LLC does not have a legion of young associates or paralegals working on your cases. To the contrary, we efficiently use the personnel of our small firm to arrive at a cost efficient defense.

Why choose our firm? I would respectfully ask you to review the Wayman, Irvin & McAuley, LLC pledge to our clients. I would also ask you to look at our credentials on our Website. Ask Western Pennsylvania judges, attorneys, claims representatives, investigators and third-party administrators about the quality of our litigation skills. After 38 years, Wayman, Irvin & McAuley, LLC still stands on its reputation, and with your help, we will proudly continue serving the legal defense profession.

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**“VISIBLY INTOXICATED” PATONS IN DRAM SHOP CASES**

*By: April Morgan Hincy*

The PA Dram Shop Act purports to curb the irresponsible sale and service of alcohol by protecting innocent individuals from those intoxicated persons and intoxicated persons from themselves. *Zygmuntowicz v. Hospitality Investments, Inc.*, 828 F. Supp. 346 (ED. Pa. 1993). The legal intent behind the Dram Shop Act was to place legal responsibility upon those serving alcohol to the public. *Corn v. Benson*, 31 Leh L.J. 26 (1964).



This increased responsibility is also an increased source of liability for restaurants, taverns, and bars who serve alcohol to the public. The most cited portion of the Dram Shop Act is 4-493(l) which makes it illegal to sell or furnish alcohol to anyone falling within five classes of persons: the visibly intoxicated, minors, the insane, habitual drunkards and those with intemperate habits. The Dram Shop Act provides a cause of action for patrons within these classes who suffer injuries as a result of service and consumption of alcohol in violation of the statute. From a practical perspective, service to the visibly intoxicated and minors present the most litigated cases.

The Superior Court has held that the violation of 47 P.S. § 4-493(l) is negligence per se. In negligence per se, the duty is created by a statute and the breach of that duty is not for the jury to decide, but rather, for the judge. Once a violation of the Dram Shop Act is established, the only question for the jury is whether the illegal service of alcohol was the proximate cause of the patron's damages.

Service to “visibly intoxicated” persons creates the most problems for alcohol serving establishments. Generally, for third parties who are injured by persons served alcohol in violation of the statute, the serving establishment is not liable. However, establishments who provide alcohol to customers who are “visibly intoxicated” may be sued and held liable by third parties injured. Section 4-497 provides:

**No licensee shall be liable to third persons on account of damages inflicted upon them off of the premises by customers of the licensee unless that customer who inflicts the damages was...furnished...alcohol by the said licensee or his agent, servant or employee when the said customer was visibly intoxicated.**

In instances where an intoxicated patron does not have sufficient means to satisfy a judgment in favor an injured third party, Dram Shop suits against serving establishments provide an additional source of recovery.

The Superior Court has defined visibly intoxicated in

terms of a patron's outward appearances. The Dram Shop Act does not place liability on establishments on the basis of blood-alcohol content, which would not be observable. Rather, the stress is placed upon outward appearances and conduct. Thus, even if a patron's blood alcohol content exceeded the legal limits, an establishment would not be liable for violation of the Dram Shop Act unless there is sufficient evidence that the patron exhibited signs of intoxication recognizable to the average person.

Given the increased liability for service of visibly intoxicated patrons, establishments should make considerable efforts to educate their staff as to both the signs of visible intoxication and the consequences of service to such individuals. Employees serving patrons are the best, and most often, the only decision makers with regard to service of alcohol.

Thus, all employees should be conscious of the signs indicating at what point a patron should no longer be served, including wait staff, bartenders, doormen, hosts/hostesses and bus persons. Without the proper understanding of the law, employees may be reluctant to refuse service to visibly intoxicated persons for fear of angering the customer and/or possibly losing out on tip money. However, an understanding of the law and an established protocol for handling such individuals can prevent such situations. The Pennsylvania Liquor Control Board offers various classes on the responsible service of alcohol by employees which are a valuable tool in preventing and, if necessary, defending Dram Shop cases.

*Please feel free to contact any of our Attorneys with any questions or concerns in this area of law.*



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## Wayman Watch

- Dale Forsythe recently represented the firm at the Risk and Insurance Management Society's Regional conference in Dearborn, Michigan.
- Warren Siegfried attended the Trucking and Insurance Industry Association meeting in Denver on behalf of the firm.
- Congratulations to April Morgan Hincy on her recent marriage.
- Congratulations to Matthew S. Ward and Marla N. Presley on their recent passage of the Pennsylvania Bar Exam and employment as attorneys with the firm. Good luck in your new career. (Learn more about them at our Website: [www.waymanlaw.com](http://www.waymanlaw.com))

*Spoliation, continued from page 3*

appropriate sanction to impose upon the offending party. *Applied Telematics, supra*. In fashioning an appropriate sanction, the court may consider the offending party's degree of fault, prejudice to the aggrieved party, the availability of other sources to obtain the altered or lost evidence, and whether the aggrieved party has pursued those sources. *Id.*; *Schmid v. Milwaukee Electric Tool Corp., supra*. Further, the Third Circuit Court of Appeals in *Schmid* held that, in determining whether "severe" spoliation sanctions such as a judgment against the offending party or a spoliation inference jury instruction are appropriate, the court must consider "whether there is a lesser sanction that will avoid substantial unfairness to the opposing party and, where the offending party is seriously at fault, will serve to deter such conduct by other in the future." *Id.* In addition to a judgment against the offending party and spoliation inference, preclusion of evidence, dismissal of specific claims or defenses, and

monetary sanctions have been awarded to deter future spoliation and compensate the aggrieved party for additional costs incurred because of the spoliation. These costs may include those related to the identification of alternative sources of the information or to the investigation and litigation of the spoliation itself. *Applied Telematics, supra*.

In light of the foregoing, a party would likely be sanctioned to some degree for even an innocent failure to preserve e-mail that is relevant to a litigated matter. The duty to preserve arises not simply upon the filing of a lawsuit but rather when litigation is reasonably foreseeable. Accordingly, a potential party to a lawsuit should be advised to review its computer system to ensure that potentially relevant e-mail, including deleted e-mail, is preserved or duplicated.

*Jeffrey A. Kubay, or any of our Attorneys, would be happy to assist you with any computer or internet law related issues.*