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# SMS QUARTERLY

AN INSIDE LOOK AT YOUR LAW FIRM AND
WHAT ITS LAWYERS ARE DOING TO SERVE YOU

Attorneys at Law

Shuman, McCuskey & Slicer PLLC



## SMS Attorneys Achieve Preeminent® Rating

SMS is proud to announce that SMS members Lou Ann S. Cyrus, Karen T. McElhinny and Natalie C. Schaefer obtained the AV® Preeminent® rating from Martindale-Hubbell for ethical standards and legal ability. The AV® Preeminent® rating is a significant rating accomplishment - a testament to the fact that their professional peers rank them at the highest level of professional excellence.



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# SMS News

## SMS Attorneys Achieve AV® Preeminent® rating.

SMS Members Lou Ann S. Cyrus, Karen T. McElhinny and Natalie C. Schaefer achieved the highest peer-reviewed AV® Preeminent® rating. Martindale-Hubbell® Peer Review Ratings® are an objective indicator of a lawyer's high ethical standards and professional ability, generated from evaluations by other members of the bar and the judiciary in the United States.

Martindale-Hubbell® Peer Review Ratings® reflect a combination of achieving a very high general Ethical Standards rating and a Legal Ability numerical rating. A threshold number of responses is required to achieve this rating.

Ms. Cyrus joined the firm in June, 1998 and became a member in January, 2002. Ms. Cyrus's practice is concentrated in general insurance defense, and includes public entity litigation, with special focus on defense of state agencies and local entities in cases involving civil rights violations, insurance coverage/bad faith and auto negligence.

Ms. Cyrus has nearly 20 years' experience in handling insurance defense cases at both the trial and appellate levels. She has tried numerous cases to defense verdict, including a week-long civil rights case of alleged sexual assault, and has lectured on the topic of avoiding sexual harassment in the workplace. She also frequently counsels insurers on how to evaluate and handle claims in all aspects of the claims-handling process. She is a 1990 graduate of Concord University with a B.S. degree in Education, cum laude, where she received the David S. Roth Memorial Outstanding English Major Award as the graduating English major with the highest G.P.A. She is certified to teach English-Language Arts 5-12. She is a 1994 graduate of the WVU College of Law, where she was elected Governor of the 4th Circuit of the American Bar Association Law Student Division and awarded the American Bar Association Law Student Division's Bronze Key. Ms. McElhinny became associated with the firm in 1997, and she was elected as a member in January of 2003. Ms. McElhinny defends and advises healthcare providers, public entities, and businesses. Her areas of interest include the defense of medical malpractice claims and the defense of cities, towns, counties, state agencies and private employers in litigation. Ms. McElhinny attended the University of Virginia, where she pursued a double major in English and Sociology and received her Bachelor of Arts degree with distinction in 1994. Ms. McElhinny continued her education at the Washington & Lee University School of Law in Lexington, Virginia, where she

participated in Moot Court and the Alderson Legal Assistance Clinic.

Ms. Schaefer focuses primarily on defense litigation, including catastrophic loss and wrongful death, as well as construction, mining and industrial accidents. Ms. Schaefer also defends energy clients in accident investigation and litigation, as well as defense of companies in suit under the worker's compensation immunity exception ("deliberate intention exception"), among others. She also defends liability claims involving civil rights, public entities and government agencies. An Order of the Coif and Order of Barristers graduate of the West Virginia College of Law, she was the 2002 Lugar Trial Association Invitational Competition winner and also served as Executive Board Member for the West Virginia University Law Review.

## SMS Attorney Callie E. Waers Speaks on Litigation Trial Strategy

On February 28, 2014, Ms. Waers will be presenting a seminar on "Tips to Enhance Your Mastery of the Verbal and Non-Verbal Communication in the Courtroom." Callie E. Waers joined the firm in August 2013 as an Associate in the Charleston office, after serving as a Summer Associate in 2012. Ms. Waers's practice areas focus primarily on insurance defense, specifically professional malpractice and personal injury. Ms. Waers is from Orlando, Florida, and she earned her Bachelor of Science in Hospitality Management from the University of Central Florida. Before law school, Ms. Waers worked in the hospitality industry with hotels, theme parks, and restaurants. Ms. Waers then attended Washington and Lee University School of Law.

## SMS Attorney Presents on Prison Standards.

On January 24, 2014, managing member Lou Ann S. Cyrus was one of the presenters at a training session for correctional staff at Lakin Correctional Center in West Columbia, West Virginia on the Prison Rape Elimination Act of 2003 ("PREA.") This training assisted the facility in implementing PREA Final Standards that became effective on June 20, 2012 and training officers on the potential consequences of violating PREA. Also presenting were John Boothroyd, Assistant Attorney General assigned to the West Virginia Division of Corrections, Darlene Carnochan, on behalf of AIG Insurance Company, Jeremy Wolfe on behalf of the West Virginia Board of Risk and Insurance Management and Craig Tatterson, Mason County Prosecutor.

## SMS Attorney Speaks to LAPSWV

SMS attorney Natalie C. Schaefer gave a presentation to the ***Legal Assistants/Paralegals of Southern West Virginia*** on the use of social media in litigation. For more information, please visit: http://www.lapswv.org/meetingsevents/2013/nov.aspx.

## Legal Developments

In *Ritchey v. Mountain State Brewing Co.*, 13-0365 (filed November 22, 2013), the West Virginia Supreme Court of Appeals affirmed summary judgment on the issue of foreseeability:

"Failure to take precautionary measures to prevent an injury which if taken would have prevented the injury is not negligence if the injury could not reasonably have been anticipated and would not have happened if unusual circumstances had not occurred. Where a course of conduct is not prescribed by a mandate of law, foreseeability of injury to one to whom duty is owed is the very essence of negligence. A person is not liable for damages which result from an event which was not expected and could not have been anticipated by an ordinarily prudent person. If an occurrence is one that could not reasonably have been expected[,] the defendant is not liable. Foreseeableness or reasonable anticipation of the consequences of an act is determinative of defendant's negligence." (citations omitted).

In *Corra v. Conley*, 13-0430 (filed November 22, 2013), the West Virginia Supreme Court of Appeal addressed prosecutorial immunity. The Court noted that,

"[p]rosecutors enjoy absolute immunity from civil liability for prosecutorial functions such as, initiating and pursuing a criminal prosecution, presenting a case at trial, and other conduct that is intricately associated with the judicial process. . . . It has been said that absolute prosecutorial immunity cannot be defeated by showing that the prosecutor acted wrongfully or even maliciously, or because the criminal defendant ultimately prevailed on appeal or in a habeas corpus proceeding. The absolute immunity afforded to prosecutors attaches to the functions they perform, and not merely to the office. Therefore, it has been recognized that a prosecutor is entitled only to qualified immunity when performing actions in an investigatory or administrative capacity."

The Court continued, holding that,

"Under our law, '[a] public official, in the performance of official duties imposed upon him by law, is presumed to have done his duty and to have acted in good faith and from proper motives until the contrary is shown.'" (citations omitted). Indeed, "[t]he legal presumption is that every prosecution for crime is founded upon probable cause and is instituted for the purpose of justice."

In *Longanacre v. Farmers' Mutual*, 12-0993 (filed November 8, 2013), the West Virginia Supreme Court addressed the sufficiency of the record on appeal, and ultimately affirmed the lower court's dismissal of the Complaint regarding insurance coverage because the insurance policy was not made part of the record below or included in the Appendix on appeal (by either party). "Accordingly, in the absence of a record on appeal that contains those portions of the trial record important to a full understanding of the issues, we affirm the circuit court's order dismissing petitioner's case against respondent."

In *Winland v. West Virginia Regional Jail and Correctional Authority*, 13-0231 (filed November 8, 2013), the West Virginia Supreme Court of Appeals held that a circuit

court's dismissal of a matter for inactivity/failure to prosecute under Rule of Civil Procedure 41 is to be analyzed under an "abuse of discretion" standard.

In *SER U-Haul v. Zakaib*, 13-0181 (filed November 26, 2013), the West Virginia Supreme Court of Appeals analyzed the applicability of the Federal Arbitration Act and its breadth in the context of writings that are "incorporated by reference." The Court reemphasized that "[u]nder the Federal Arbitration Act, 9 U.S.C. § 2, parties are only bound to arbitrate those issues that by clear and unmistakable writing they have agreed to arbitrate. An agreement to arbitrate will not be extended by construction or implication."

In Syllabus 2, the Court held:

2. In the law of contracts, parties may incorporate by reference separate writings together into one agreement. However, a general reference in one writing to another document is not sufficient to incorporate that other document into a final agreement. To uphold the validity of terms in a document incorporated by reference, (1) the writing must make a clear reference to the other document so that the parties' assent to the reference is unmistakable; (2) the writing must describe the other document in such terms that its identity may be ascertained beyond doubt; and (3) it must be certain that the parties to the agreement had knowledge of and assented to the incorporated document so that the incorporation will not result in surprise or hardship.

In *Heimeshoff v. Hartford Life & Accident Ins. Co.*, No. 12-729 (December 16, 2013), a unanimous United States Supreme Court found enforceable a contractual provision in an ERISA-covered plan, which provision allowed the plan participant to file a civil action for judicial review up to three years from when proof of loss is due. ERISA has no statute of limitations for bringing suit for review under sec. 502(a)(1)(B), but the terms of the petitioner's plan required action within three years after proof of loss was due. The Supreme Court noted that the courts of appeals have held that internal review must be exhausted before judicial review is available to a plan participant, which would begin the limitations period before judicial review was available. The petitioner argued that allowing the statute of limitations to start running before she could file suit was contrary to the general rule of law. The Supreme Court disagreed, finding that the parties had agreed by contract to start the limitations period at a certain time, and that such contractual statute of limitations provisions are enforceable so long as they are reasonable in length and not violative of any statute.

In *Atlantic Marine Constr. Co., Inc. v. U.S. District Court for the W.D. of Texas*, No. 12-929 (December 3, 2013), another unanimous United States Supreme Court held that a valid forum-selection clause in a construction contract was enforceable by a motion to transfer pursuant to 28 U.S.C. § 1404(a) and not by a motion to dismiss under § 1406(a) or FRCP 12(b)(3). The Court explained that dismissal is only proper through § 1406 and 12(b)(3) when venue is "wrong" or "improper," and "[w]hether the parties entered into a contract containing a forum-selection clause has no bearing on" that determination. If venue is proper, but a valid contractual provision requires the case to be litigated elsewhere, then the case should be analyzed for transfer.

To enforce the forum-selection clause, the federal court should consider transferring under § 1404(a) if the proper venue is another federal court, or dismissing under the doctrine of forum non conveniens if a foreign

or state tribunal is implicated as the proper forum. In determining whether a transfer is proper, if a defendant files a § 1404(a) motion pursuant to a valid forum-selection clause, the case should be transferred except in the most unusual circumstances. This differs from the standard, factor-based 1404(a) analysis where a forum-selection clause is not at issue. To oppose a 1404(a) transfer motion in the face of a valid forum-selection clause, the plaintiff bears the burden of proving that the transfer to the forum the parties contractually agreed upon is improper. If the transfer is granted, the transferor venue's choice-of-law rules will not apply in the new forum.

Quarterly Quote: "It only takes a single thought to move the world." -- *Anonymous*

*In a continuing effort to ensure strict compliance with all applicable ethical rules, SMS attorney victories will no longer be announced in the Newsletter until the current rules regarding attorney advertising are revised to permit such announcements.

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(Natalie C. Schaefer is responsible for this publication. This publication is an advertisement for Shuman, McCuskey & Slicer, PLLC).