
# DCBA
# MEMBER BENEFIT
# COMPLIANCE SESSION
# HANDOUTS

## WEDNESDAY
## APRIL 6, 2022

WIDENER COMMONWEALTH LAW SCHOOL (3737 Vartan Way, Harrisburg)

## CAMPUS MAP LEGEND

Numbers on map indicate Building Name & Offices.

**1** Classroom and Law Library Building, Classrooms, Faculty Offices, I.T.S., Library

**2** Basketball/Tennis Courts

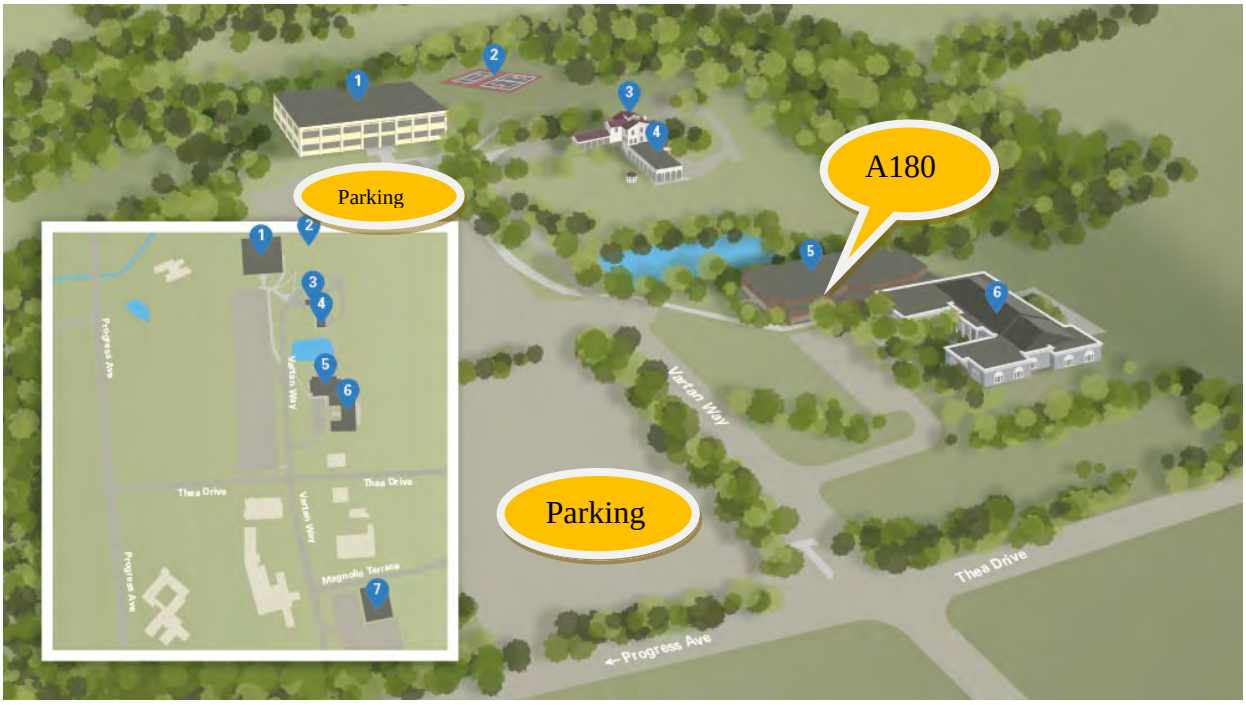
**3** Student Activities Offices, Bookstore

**4** Cafeteria

**5** Courtroom Annex/A180, Classroom, Nursing School, Moot Courtrooms

**6** Administration Building, Deans, Admissions, Career Development, Business Office, Registrar, Financial Aid, Social Work Program

**7** Central Pennsylvania Law Clinics



# SESSION AGENDA

**8:30 – 8:55am – Pick up your registration form at registration table**

**9:00 - 10:00am | Session # 1 | Basics of Register of Wills & Orphans' Court Litigation | Thomas P. Gacki, Esquire & Jean Marfizo King, Dauphin County Register of Wills**

**10:15 - 11:15am | Session # 2 | Cryptocurrency and Bankruptcy | Tracy L. Updike, Esquire & Nicholas G. Platt, Esquire**

**11:30am - 12:30pm | Session # 3 | PBA Malpractice Avoid (ethics) | Robert H. Davis, Jr. | Gina Sage**

## LUNCH BREAK – BRING YOUR OWN

**1:30 - 2:30pm | Session # 4 | Matrimony and Mental Health | Natalie Burston, Esquire and Howard S. Rosen, PhD**

**2:45 - 3:45pm | Session # 5 | The Historic Development of Administrative Agency Appeals in PA, and Judicial Deference to Agency Legal Interpretation | Dennis Whitaker, Esquire & Melissa Chapaska**

**4:00 - 5:00pm | Session # 6 | Workers Compensation Case Law Update | Victoria P. Edwards, Esquire & Adam Crosier, Esquire**

**Important Info:**

- **It is your choice if you were your mask or not. It is no longer required by Widener Commonwealth Law School.**
- **The Wi-Fi password and log in information will be at the TOP of your CLE confirmation form that you will pick up at the registration table.**
- **Sessions are come and go for as many as you would like – BUT, you must be in attendance for the complete HOUR of the program to receive credit.**
- **Please bring your own coffee for the morning and lunch during the lunch break if you would like as lunch is bring your own.**
- **I will have bottled water and snacks at the registration desk.**
- **After completion of your last session, please drop off your SIGNED CLE form that you picked up at the registration table in the morning and RETURN it to the registration table as well.**
- **PLEASE KEEP ALL CELL PHONE CALLS TO BETWEEN SESSIONS!**

# Dauphin County Bar Foundation's

# Raffle to attend Bench Bar at Skytop

## to Benefit the *We Care About Children* Campaign

Here is your chance to attend the June 2022 Bench Bar Weekend (June 10 -12, 2022) for as little as $10! Buy a chance to win a DCBA Registration **AND** two nights' accommodations at Skytop Lodge. Tickets on sale NOW! (**$10 each; $50 for six**). **Live drawing to be held at the conclusion of our Law Day Membership Breakfast meeting, Wednesday, May 4 at the Hilton Harrisburg**. **Need not be present to win.**

**Name:**_____ **Email:**_____

☐ Please charge $_____ for _____ the tickets to my DCBA Account.

☐ I enclose my payment of $_____ for _____ tickets.

**Checks may be made payable to the "Dauphin County Bar Foundation"**

Please mail, fax or email this form to: Dauphin County Bar Foundation, 213 North Front Street, Harrisburg, PA 17101; fax: 717-234-4582 or email bridgette@dcba-pa.org to receive your raffle tickets. Tickets will be issued in the order that the order forms are received at DCBA.

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**Bench Bar Information**

**Registration Cost:**

- All-inclusive DCBA Member $295/member
- *All-inclusive DCBA Young Lawyer
  (In practice **LESS THAN** five years) $175/member

- À la Carte Options also available

**Hotel Cost:**

- Skytop Lodge – Skytop PA | $199++/night)
  To make your room reservations, please call Skytop directly at 855-345-7759 and use reservation code 545297

*Young Lawyers, please consider applying for a Young Lawyer Scholarship of $500 to help offset your costs. For more information, please go to https://www.dcba-pa.org/userfiles/files/events/brochures/1019_2.pdf

# SESSION #1

## Estate Planning & Probate

# Basics of Register of Wills & Orphans' Court Litigation

Thomas P. Gacki & Jean Marfizo King

**BASICS OF REGISTER OF WILLS AND ORPHANS' COURT LITIGATION**

*By: Thomas P. Gacki*

I. Register of Wills and Clerk of the Orphans' Court

A. Distinction between the Register of Wills and Clerk of the Orphans' Court

1. Register of Wills has judicial powers

2. Clerk of the Orphan's Court is filing office for the Orphans' Court—in some Counties it is not connected with the Register of Wills

3. Clerk of the Orphans' Court also processes marriage license applications

B. Register of Wills Judicial Powers

1. Whether to admit a document to probate as a valid will

2. Caveat Procedure—preventing probate or grant of letters in advance

a. Governed by 20 Pa. C. S. Section 906. An informal caveat can be as simple as a letter to the Register saying "Don't issue letters on this estate without notice to the undersigned"

b. Petition for probate or grant of letters triggers a ten day clock for filing of the "Formal Caveat" and posting of a bond

3. Caveat Challenges for lack of testamentary capacity or undue influence—Certification to the Orphans' Court

4. Register of Wills Hearings in Dauphin County

1. Copies

2. Who is entitled to act as Administrator

5. Appeals to the Orphans' Court from the Register of Wills—20 Pa. C. S. Section 908

1. One year from the entry of the decree appealed from

2. De Novo

II. Orphans' Court

A. What is it? Created by 20 Pa. C. S. Section 701 and 42 Pa. C. S. 951

1. 42 Pa. C. S. 951 (c) lists counties that must have separate Orphans' Court divisions—includes bigger counties like Philadelphia and Allegheny. Dauphin, Lancaster, York are also included

2. Under 42 Pa. C. S. 951 (d) other counties, including Cumberland and Lebanon, have Orphans' Court divisions composed of the entire Court of Common Pleas

3. Judges appointed to a division of the court is under control of the "governing authority"

B. Jurisdiction

1. Mandatory—20 Pa. C. S. Section 711

a. Administration and distribution of estates/control of decedent's burial

b. Matters involving testamentary trusts

c. Matters involving inter vivos trusts

d. Minor's estates

e. Custodianships for minor's property

f. Guardianship of persons of minors

g. Adoptions (exception for Philadelphia County—20 Pa. C. S. Section 713

h. Custody of minors in connection with adoption or guardianship proceedings

i. Issues regarding birth records

j. Incapacitated persons' estates

k. Absentees and presumed decedent's estates

l. Issues involving fiduciaries

m. Specific performance of a decedent's contract

n. Legacies, annuities and charges

o. Construction of administrative power in a will or trust

p. Disposition of title to real estate of an estate or trust

q. Appeals from the Register of Wills

r. Marriage licenses

s. Certain matters involving Inheritance and Estate taxes

t. Nonprofit/charitable entity issues

u. Matters involving agents under powers of attorney

v. Matters involving digital assets

2. Nonmandatory—20 Pa. C. S. Section 712. Jurisdiction can be exercised by the Orphans' Court division or other appropriate division of the Court of Common Pleas

a. Actions to quiet title of real estate owned by an estate or trust

b. Actions involving guardianship of the person (usually end up in Orphans' Court)

c. Matters mixing mandatory Orphans' Court matters and other matters

C. In Dauphin County—No single Judge

III. Orphans' Court Rules

A. Recent History—New Register of Wills Rules

1. Substantially re-written in 2006

2. Includes rules for Register of Wills matters for the first time—Chapter X, Rules 10.1 through 10.6

a. Petition Practice conforms to Orphans' Court

b. Stenographer required for hearings

c. Rules of evidence apply

B. Structure of Rules

1. Stand alone

a. With some exceptions, no longer defaults to Rules of Civil Procedure

b. Wiped out all local rules—new local rules have to be approved by the statewide Orphans' Court Rules Committee

2. Petition practice—Chapter III, Rules 3.1 through 3.15

a. Actions always initiated by petition rather than complaint

b. Specific rules for different types of petitions

c. Court issues citations to obtain personal jurisdiction—service procedures incorporated from Rules of Civil Procedure—See Rule 3.5

d. Detailed rules for responsive pleadings

3. Discovery—Rule 7.1. Other main area where rules default to Rules of Civil Procedure

4. Accounts and objections, Chapter II, Rules 2.1 through 2.11

a. How complaints about administration of an estate or trust, actions by an agent under power of attorney, or guardian of the estate get adjudicated

b. Any party in interest can ask the Orphans' Court to compel a fiduciary to file an accounting

c. Very specific forms of account—Model accounts promulgated by the Committee on National Fiduciary Accounting Standards

d. Parties dissatisfied with account can file objections

e. Objections are like a complaint against the fiduciary are and adjudicated by the Orphans' Court, often with the aid of a master or auditor

C. Dauphin County Local Rules/E-filing

1. Available on the County's website—pretty basic

2. E-filing—Rule 4.7

IV. Tips, Observations and War Stories

# SESSION #2

## Bankruptcy Law

# Cryptocurrency and Bankruptcy

## No Handout

Tracy L. Updike & Nicholas G. Platt

# SESSION #3

# PBA Malpractice Avoidance

Robert H. Davis, Jr., Gina Sage &
Susan Etter

Avoiding Legal Malpractice Program

# How To Get Sued in 10 Easy Steps

*and*

# What *not* to do if (when) you get sued?

Top 15 mistakes that can cause more trouble

Presented April 6, 2022

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## Presenters

- Susan Etter, Pennsylvania Bar Association
- Gina Sage, USI Affinity
- Robert H. Davis, Jr., Davis Law Offices

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## PBA – Your Other Partner

What we do to help you avoid, or at least minimize, your risk of legal malpractice and make management of your practice easier, so you can spend more time on your clients and their cases.

- Guidance on Ethical Issues
- Answers to Law Practice Management
- High-quality CLE programs that keep you up-to-date in substantive law, competence (*be sure to check-out ProPass!*)
- Legislative Department working on your behalf
- Opportunities to engage with statewide network of attorneys and judges – more than 50 committees/18 sections
- Excellent Lawyers Professional Liability insurance coverage and discounts through USI Affinity
- Avoiding Legal Malpractice CLE programs
- …many other benefits

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## PBA member benefits that can help you manage your risks

- Law Practice Management, Ellen Freedman, CLM
  - 800-932-0311, x. 2228 or Ellen.Freedman@pabar.org
- Ethics Hotline/Ethics Counsel, Victoria White
  - 800-932-0311, x. 2214 or Victoria.White@pabar.org
- PBA Legislative Department, Fred Cabell
  - 800-932-0311, Ext. 2232 or Fredrick.Cabell@pabar.org
- Avoiding Liability column in the Bar News

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## Manage your risks…

- Make sure you have a succession plan and that it is up-to-date
- Rules of Professional Conduct Rule 1.3. Diligence.
- A lawyer shall act with reasonable diligence and promptness in representing a client.
- Comment (5) To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan, in conformity with applicable rules, that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action.

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## A message from the D-Board…

- Commencing with the 2019-2020 annual attorney registration, an additional section regarding succession planning will be on the registration form. The section will require you to indicate whether you have or have not designated a successor. Although you are required to provide a response in this section, failure to have a designated successor is NOT a violation of the Rules of Professional Conduct or the Pennsylvania Rules of Disciplinary Enforcement.
- Succession planning is essential to every attorney's practice. Recognizing that the future is unpredictable, attorneys should strive to lessen the impact of unexpected interruption in their relationships with clients by taking protective measures. We believe by asking the question and sparking dialogue in the profession, perhaps we can address the concern that exists nationwide.

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## Succession Planning Data

released on October 27, 2021 and available on the D-Board website

Succession Planning Responses from Active Pennsylvania Attorneys

| Response | Total | Percent |
|---|---|---|
| I have a successor attorney. My successor is an individual. | 3,714 | 5.76% |
| I have a successor attorney. My successor is a law firm. | 14,422 | 22.36% |
| I do not have a successor because I do not have PA clients. | 29,155 | 45.21% |
| I do not have a successor and I do have PA clients. | 17,200 | 26.67% |
| Total | 64,491 | 100% |

In 2021, the "prefer not to answer" option was removed.

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## Succession Planning - PBA member benefits

- There are numerous resources to help you develop succession plans available through our Law Practice Management page and the Solo and Small Firm Section.
- At least 10 documents are provided in the ALM materials web page which you received as part of your materials today - pabar.org/site/ALM
- Exclusive to PBA members, the Solo and Small Firm Section has developed a "Succession Planning Toolkit." It is available on the PBA website.

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## Avoiding Legal Malpractice Website

- All of the materials covered today and many more valuable resources related to the featured professional liability and responsibility topics are available online.

pabar.org/site/ALM

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## Most requested resource after the ALM program

- CNA Lawyers' Toolkit is by far the most requested resource in follow-up to the program
- About 80 pages of sample engagement letters, disengagement letters, termination or withdrawal, conflict of interest, and more
- All of this is provided for you to reference, to edit, copy and use to strengthen your letters and help protect you from misunderstandings with clients and clarify your relationship with them.

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CNA has developed the Lawyers' Toolkit to assist attorneys in creating documents that will enable them to better manage their interactions with potential and actual clients.

These sample documents are provided as a convenience for use in the practice of law and include language that attorneys may wish to consider using in their own agreements, letters, and waivers. Certainly, each sample document should be customized for every engagement and prepared in accordance with applicable professional and regulatory requirements in your particular area of law.

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## PBA member benefit …
## Professional Liability Insurance

- Lawyers Professional Liability insurance program administered by USI Affinity
- As a PBA member you can qualify for a 5% discount on your premium and for attending today's program you may qualify for an additional 7.5% discount.
- The PBA and USI work hard on your behalf to find the most comprehensive and stable LPL coverage available.

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The New Graduate Lawyers Professional Liability Program from the PBA, USI Affinity and CNA provides up to two years of complimentary professional liability insurance to PBA member attorneys who have been admitted to practice in Pennsylvania within the past three years!

There are two ways to save through this program (restrictions and qualifications do apply)
1. If a new attorney, who is a PBA member, decides to open their own firm or join a small firm with up to four attorneys, the new attorney can receive up to two years of complimentary professional liability insurance.


2. Larger firms, who are existing CNA policyholders, that hire new Pennsylvania attorneys who are PBA members, can receive a discount on their per-attorney rate.

The new attorney is required to participate in a special risk management webinar.

To learn more, call 1.855.USI.0100
www.mybarinsurance.com/pba/

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## Know your policy, what coverage do you have?

CNA Policy Highlights

- Coverage for disciplinary proceedings up to $50,000
- Assistance in responding to a subpoena
- Coverage for discrimination complaints up to $25,000
- Optional extended reporting period - tail
- 50% reduction of deductible for quick (364 days) claim settlement
- Broad settlement clause – no "hammer" clause

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## Know your policy, what coverage do you have?

Extended Reporting Period - also called a Tail.

- Tail coverage addresses the continuing possibility of claims after:
  - Law firm dissolves
  - Attorney retires or leaves private practice, death, disability
  - Generally provides coverage for claims arising from conduct within the policy period, which would otherwise be covered by the policy but the claim is first made during the extended reporting period.
- If an insured ceases, permanently and totally, the private practice of law during the policy period due to:
  - Death or disability; or any other reason
  - Some carriers provide an Unlimited ERP at no additional charge if insured for 3 consecutive years
  - Deductible is sometimes waived

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## Engagement Letters – an invaluable best practice in managing your risk

- Engagement letters are designed to establish client expectations, reduce client misunderstandings, improve client communications, and provide opportunities for additional services.
- An engagement letter may not prevent legal malpractice claims, but if you ask any defense attorney in a lawyer malpractice claim, they will tell you how helpful the documentation can be if a claim arises and that a good letter/agreement can support a stronger defense.

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## Engagement Letters – an invaluable best practice in managing your risk

- 50% reduction of deductible up to $25,000, if insured used an engagement letter (as defined by the CNA policy) in connection with the legal services that are the subject of the claim
- What is required for the CNA discount?
- And, even if you are not insured through CNA, these are best practices for you to consider in avoiding legal malpractice and in establishing clear communication with your client and setting the tone for the future attorney-client relationship.

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## Engagement Letters – an invaluable best practice in managing your risk

CNA requires, at a minimum, inclusion of the following information:

- Scope of representation
  - Documentation of the scope of the representation and the mutual responsibilities of the attorneys and their clients can often be a deciding factor in determining the responsibilities of both parties.
- Identity of client
- Fee arrangement
- File retention and destruction procedure
- Signed by the client.

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## What is "File Retention and Destruction language" ???

You can find sample language on the bottom of page 7 in the CNA Lawyers' Toolkit

- File Retention and Destruction: At the conclusion of your matter, this matter will be closed, and we will retain a client file of your matter for a period of _____ years. We may store some or all client file materials in a digital format. In the process of digitizing such documents, any original paper documents provided by you will be returned to you. Any copies of paper documents provided by you will not be returned to you unless you request such copies in writing. After any or all paper documents are digitized, we will destroy all paper documents in the client file, subject to the exceptions noted above. At the expiration of the _____-year period, we will destroy all client file materials unless you notify us in writing that you wish to take possession of them. This clause applies to any client file materials being held or stored by a third-party vendor. [Before including the following language, law firms should research whether their jurisdiction permits the following types of expenses to be charged to clients.] We reserve the right to charge administrative fees and costs associated with researching, retrieving, copying and delivering such files, as delineated in the Expenses section of the Engagement Agreement.

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## Call … sooner rather than later

- PBA-Endorsed (CNA) Claims Assistance Hotline is the only state-run hotline in the nation
- Tremendous benefit if you have concerns or questions about a potential claim
- It is **Confidential** – the carrier does not know
- With an **Attorney** who practices in LPL
- Conversation may help head off or mitigate a potential malpractice claim.
- Your early call to the **Claims Assistance Hotline** may make all the difference!

**888-200-5212**

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## How To Get Sued in 10 Easy Steps

ETHICS AND MALPRACTICE AVOIDANCE IN THESE UNUSUAL TIMES

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*How To Get Sued in 10 Easy Steps*

## Step One

- Procrastinate / Miss Deadlines

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*How To Get Sued in 10 Easy Steps*

## Step Two

- Avoid Communicating With Your Clients

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*How To Get Sued in 10 Easy Steps*

## Step Three

- Don't Document Your Work Adequately

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*How To Get Sued in 10 Easy Steps*

## Step Four

- Fail to Recognize a Conflict of Interest

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*How To Get Sued in 10 Easy Steps*

## Step Five

- Fail to Research or Investigate

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*How To Get Sued in 10 Easy Steps*

## Step Six

- Sue for Fees

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*How To Get Sued in 10 Easy Steps*

## Step Seven

- Refuse to Believe You May Be Sued for Malpractice

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*How To Get Sued in 10 Easy Steps*

## Step Eight

- Choose the Wrong Client

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*How To Get Sued in 10 Easy Steps*

## Step Nine

- Ignore Obligations as Successor Counsel

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*How To Get Sued in 10 Easy Steps*

## Step Ten

- Dabble

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*How To Get Sued in 10 Easy Steps*

## Extra Credit Step

- Resist Technology Obligations

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## Claims Assistance Hotline

- Free, confidential call with an attorney
- Objective advice from experienced attorneys who practice in lawyer liability
- Can help with claims repair or avoidance
- Call has no impact to premium because it is not reported to carrier

**888-200-5212**

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# What *not* to do if (when) you get sued?

TOP 15 MISTAKES THAT CAN CAUSE MORE TROUBLE

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## #1

Refuse to turn over the file

(You aren't getting your file until …)


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## #2

Don't keep a copy of your file

(I never want to see this client or this file again)

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What *not* to do if (when) you get sued?

## #3

Give testimony without counsel

(I have nothing to hide. What could go wrong?)


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What *not* to do if (when) you get sued?

## #4

Don't report claims and/or potential claims

(This will pass; I'm not getting sued. I don't want my premiums to increase)


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What *not* to do if (when) you get sued?

## #5

Lack of professionalism

(your former client is going to see those emails and memos)

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What *not* to do if (when) you get sued?

# #6

Explain to the client what a terrible case it was

(…after a problem develops)

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What *not* to do if (when) you get sued?

# #7

Fail to inform your client of the facts

(Enter the Spin Zone)


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What *not* to do if (when) you get sued?

# #8

Continue representation

(Without first assessing conflicts and obtaining written waivers.)

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What *not* to do if (when) you get sued?

## #9

Don't be actively involved in your defense

(Or, letting the claim consume you and impact your judgment.)


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What *not* to do if (when) you get sued?

## #10

File a counterclaim

(That no good, unappreciative, former client, who never paid me.)

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What *not* to do if (when) you get sued?

## #11

Blame the client

(But, my client knew the statute of limitations was approaching…)


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What *not* to do if (when) you get sued?

# #12

Don't take a disciplinary complaint seriously


(and/or not getting counsel involved)

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What *not* to do if (when) you get sued?

# #13

Refuse to consider a settlement

(Talk of settling shows weakness. I will never consent.)

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What *not* to do if (when) you get sued?

# #14

Assume that your reputation is tarnished

(The entire legal community will talk about me. I can't be sued.)


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What *not* to do if (when) you get sued?

## #15

Refuse to consider the benefit of personal counsel

(Why do I need another lawyer?
How much will that cost?)


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## Final Thoughts…

- Even good lawyers make mistakes
- Even good lawyers get sued
- Report claims and potential claims
- Get counsel involved early
- Work closely with counsel
- The claim will come to an end
- Call the Claims Assistance Hotline – 888.200.5212

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Seminar on Avoiding Legal Malpractice

# *I Will Never Be Sued …*
## and Other Lies Lawyers Tell Themselves

We value your membership and are here to help.
**www.pabar.org**

To access the information provided in today's Avoiding Legal Malpractice program and more valuable law practice resources, please visit:

**pabar.org/site/ALM**

The PBA Professional Liability Committee is charged with conducting legal malpractice avoidance and loss-prevention programs. The Avoiding Legal Malpractice seminars are a benefit provided to all counties each year. With the Pennsylvania Bar Association Insurance Program, advised and administered by USI Affinity, you have the ability to gain valuable malpractice avoidance information, receive up to a 7.5% discount* on your malpractice insurance and earn up to 1.5 hours of ethics, professionalism or substance abuse CLE credit.

PBA Endorsed (CNA) Claims Repair Hotline.
A confidential call that can make a difference. **888-200-5212**

PBA members with questions related to ethics, professionalism or the business side of practicing law, have access to our full-time ethics counsel and law practice management resources as an included member benefit. Call us.

**Ethics Hotline**: 800.932.0311 ext. 2214

**Law Practice Management**: 800.932.0311 ext. 2228

Members also have unlimited access to **Casemaker,** a powerful tool for online legal research, with a full Pennsylvania library, federal-level materials, and resources from all 50 states.

**We value your membership and are here to help.**
Not already a member, join today!
**Join. Connect. Succeed.**
**www.pabar.org**

*The 7.5% credit will be pro-rated on the number of attorneys in the firm who attend the seminar. The discount does not apply to part-time policies.

The PBA strives to be "your other partner" and is always looking for ways to be a responsible steward of resources while still providing you with the highest quality member benefits and services. One of the measures we have taken to preserve our environment and to reduce operating costs, is to provide resources and materials online, allowing you to choose whether you want to print, and if so, which materials are most relevant to your practice. This also allows us to provide a greater variety of useful materials and resources to you. All of the resources (and many more ) are available for your use on the PBA web site at **www.pabar.org/site/alm**. *Please note,* you will need to use this address as the materials are only available to people who registered for the Avoiding Legal Malpractice (ALM) seminar.

**Examples of the information available to you on the ALM web page...**

- The Pennsylvania Bar Insurance Program with USI Affinity
- CNA Lawyers Professional Liability Program Policy Highlights
- CNA Lawyer's Toolkit 4.0

This year's vignettes - I Will Never Be Sued

**Supporting Materials for this year's vignettes**

- Anti-Harassment and Anti-Discrimination, Proposed Amendments to the Pennsylvania Rules of Professional Conduct Relating to Misconduct PA RPC 8.4(g)
- Client Intake Best Practices, PBA Law Practice Management article by Ellen Freedman
- Client Sex: Usually Unethical, Never a Good Idea, ABA Special Report, ABA/BNA Lawyers' Manual on Professional Conduct
- Declining and Firing Clients, PBA Law Practice Management article by Ellen Freedman
- Fee Division with Client's Prior Counsel, ABA Formal Opinion 487
- Ten Tips to Assist in Avoiding a Malpractice Claim, CNA

**Client Files**

- Client Files – Rights of Access, Possession and Copying, Along with Retention Consideration, PBA Formal Opinion 2007-100
- Creating a File Retention and Destruction Policy, CNA
- It's Not Your File Actually It Is Your Client's File -The Legal Intelligencer 092217
- Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information, ABA Formal Opinion 473

**Communication with Clients**

- A Lawyer's Duty to Inform a Current or Former Client of the Lawyer's Material Error, ABA Formal Opinion 481
- Lawyer Error - Communication with Clients - ABA Special Report, ABA/BNA Lawyers' Manual on Professional Conduct –09-21-16

**Conflict**

- Maintaining your Conflict of Interest System, PBA Law Practice Management article by Ellen Freedman

**Duty to Supervise**

- Ethical Consideration in the Use of Nonlawyer Assistants, PBA Formal Opinion 98-75
- Law Firm Support Staff : Recognizing Their Role in Avoiding Legal Malpractice Claims, CNA

**Engagement Agreement**

- Better with a Letter: Why Attorneys Should Use Engagement Letters, CNA
- Lawyers Toolkit 4.0: A Guide to Managing the Attorney-Client Relationship, CNA
- Start the Attorney-Client Relationship Right (Engagement Agreement), Voices and Views 2015

**Succession Planning**

- Closing a Firm: Problems that Many Don't Anticipate, PBA Law Practice Management
- Closing your Practice, PBA Law Practice Management article by Ellen Freedman
- Expect the Unexpected: Succession Planning for Lawyers, CNA
- Life Is Too Short, PBA Law Practice Management article by Ellen Freedman
- Musical Chairs and Retirement Policies, PBA Law Practice Management article by Ellen Freedman
- Protecting your Practice: Preparing for Disability, Death or Retirement, PBA Law Practice Management article by Ellen Freedman
- Responsible Succession Planning: Ethically Planning for Death & Disability, The Philadelphia Lawyer, Daniel J. Siegel
- Retiring from Practice: Understanding your Options, CNA
- Succession Planning – Is It Mandatory for Lawyers in Pennsylvania, PA Disciplinary Board 02-11-19
- What's your Exit Strategy? , PBA Law Practice Management article by Ellen Freedman

**Wills, Trusts and Estates**

- Lawyer Serving as Fiduciary for an Estate or Trust, ABA Formal Opinion 02-426
- Wills, Trusts and Estates - Professional Liability Fact Sheet, CNA

# SESSION #4

## Family Law

## **Matrimony and Mental Health**

## No Handout

Natalie Burston, Esquire and
Howard S. Rosen, Ph.D.

# SESSION #5

## Government Law

# The Historic Development of Administrative Agency Appeals in PA, and Judicial Deference to Agency Legal Interpretation

Dennis Whitaker & Melissa Chapaska

# The Historic Development of Administrative Agency Appeals and Judicial Deference to Agency Legal Interpretation

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## "Administrative tribunals are likely here to stay."

Pennsylvania Bar Association Special Committee on Administrative Law 1941

## Federal

The administrative agency regime never has been universally popular, particularly among conservatives. As discussed by Professor Michael Gerhardt in *The Forgotten Presidents*, President Coolidge used his power to make agency appointments to maintain control over federal regulatory agencies. Indeed, he appointed agency heads who were opposed or skeptical of the core mission of the agencies they were appointed to administer. William F. Buckley, in the first issue of National Review, bemoaned "a gigantic, parasitic bureaucracy".

# Federal

**Owen Josephus Roberts**

Roberts was a swing vote between those, led by Justices Louis Brandeis, Benjamin Cardozo, and Harlan Fiske Stone, as well as Chief Justice Charles Evans Hughes, who would allow a broader interpretation of the Commerce Clause to allow Congress to pass New Deal legislation that would provide for a more active federal role in the national economy, and the Four Horsemen (Justices James Clark McReynolds, Pierce Butler, George Sutherland, and Willis Van Devanter) who favored a narrower interpretation of the Commerce Clause and believed that the Fourteenth Amendment Due Process Clause protected a strong "liberty of contract." In 1936's *United States v. Butler*, 297 U.S. 1 (1936), Roberts sided with the Four Horsemen and wrote an opinion striking down the Agricultural Adjustment Act as beyond Congress's taxing and spending powers.

# Federal

**"Switch in Time that Saved Nine"**

Roberts switched his position on the constitutionality of the New Deal in late 1936, and the Supreme Court handed down *West Coast Hotel v. Parrish,* 300 U.S. 379 (1937), upholding the constitutionality of minimum wage laws. Subsequently, the Court would vote to uphold all New Deal programs.

# Federal Administrative Procedure Act

Congress established the basic framework by which rulemaking occurs by enacting the Administrative Procedure Act (APA) in 1946. It remains the basic legislative standard even though its processes have been affected by more recent statutes.

## Historic Development of Administrative Appeals in Pennsylvania

In the last quarter of a century, independent regulatory administrative agencies, boards and commissions have mushroomed in ever increasing numbers at all levels of government-federal, state and local. Many of them have been given by Congress or a Legislature broad general powers to consider and dispose of matters of great public of private importance, although their precise duties and functions and in particular their limitations are often loosely or ill defined, and the law with respect thereto is not well settled.

Regardless of the admirable purpose for which these agencies are usually established, it is a matter of frequent complaint and common knowledge that the agencies at times act arbitrarily, or capriciously, and unintentionally ignore or violate rights which are ordained or guaranteed by the Federal or State Constitution, or established by law. For these reasons it is imperative that a checkrein be kept upon them.

*Keystone Raceway Corp. v. State Harness Racing Commission*, 173 A.2d 97, 99 (Pa. 1961), per Mr. Justice Bell.

## Historic Development of Administrative Appeals in Pennsylvania

**The AALs**

**Administrative Agency Law of 1945**

Act of June 4, 1945, P.L. 1388.

**Administrative Agency Law**

Act of April 28, 1978, P.L. 202, as amended, 2 Pa. C.S. §§101-754.

## Pa. Const. Article 5, Section 9

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

## Art. 5, Sec. 9 – Not Self Executing

- The right of appeal established in Article 5, Section 9 is not self-executing. *Manheim Township School District v. State Board of Education*, 276 A.2d 561, 563-65 (Pa. Cmwlth. 1971).
- The right of appeal from a state agency action is further provided by Section 702 of the AAL, 2 Pa. C.S. § 702. The right exists "notwithstanding prohibition on appeals set forth in other statutes . . . ." *Maritime Management, Inc. v. Pennsylvania Liquor Control Bd.*, 611 A.2d 202, 203 (Pa. 1992).

## Pennsylvania: Deference

- Section 1921(c)(8) of the Statutory Construction Act, 1 Pa. C.S. § 1921(c)(8), allows courts to consider administrative interpretations where the statute is ambiguous.
- Section 704 of the AAL, 2 Pa. C.S. § 704, also provides for deference to administrative agency adjudications under the familiar rubric that Commonwealth Court must affirm the agency unless necessary findings of fact are not supported by substantial evidence, or the decision violates applicable law or the constitution. *See, e.g., Popowsky v. Pennsylvania Public Utility Commission*, 706 A.2d 1197 (Pa. 1997) (Commonwealth Court "exceeded its scope of review" when it failed to give PUC deference in interpreting provisions of the Public Utility Code).

## Pennsylvania: Degrees of Deference?

- **Great deference:** *Tool Sales & Service*; *Popowsky*; *Nationwide Insurance Co. v. Schneider*, 960 A.2d 442 (Pa. 2008) (such deference is only appropriate where agency expertise implicated).
- **Deference or some deference:** *Street Road Bar & Grille, Inc. v. Liquor Control Bd.*, 876 A.2d 346, 354 n.8 (Pa. 2005) (agency interpretation entitled to deference or some deference only where consistent with legislative intent or not unwise.); *Corman v. Acting Sec'y of Pennsylvania Dep't of Health,* 266 A.3d 452 (Pa. 2021) ("where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute … But that does not mean that the courts must defer to an agency on questions of statutory and regulatory construction for deference's sake.").

## Pennsylvania: Degrees of Deference?

- **Substantial deference:** *Schuylkill Twp. v. Pennsylvania Builders Ass'n,* 7 A.3d 249, 253 (Pa. 2010) (agency's interpretation of a statute the agency "is charged with implementing and enforcing."); *but see, Marcellus Shale Coal. v. Dep't of Envtl. Prot. of Commonwealth*, 185 A.3d 985 (Pa. 2018) (preliminary injunction implicates a "less deferential standard relative to the agency's interpretation of the governing statute than would be applicable to a trial court's final merits determination.").
- **Considerable weight and deference:** *Rubino v. Pennsylvania Gaming Control Bd.*, 1 A.3d 976 (Pa. Cmwlth. 2010) (agency's interpretation of its own regulations).
- **No deference.** *Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665 (Pa. 2020) (an agency's interpretation of a clear and unambiguous statute is not entitled to deference); *McCloskey v. Pennsylvania Pub. Util. Comm'n*, 255 A.3d 416 (Pa. 2021) (same).

## Federal Deference Doctrines

**Skidmore**. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Deference based on the persuasiveness of the agency's position.

An agency interpretation may merit some deference whatever the form that it is expressed, given the specialized experience and broader investigations and information available to the agency and the value of uniformity in its administrative and judicial understandings of what national law requires. The fair measure of deference to an agency administering its own statutes has been understood to vary with the circumstances and the courts have looked to the degree of the agency's care, its consistency, formality and relative to the persuasiveness of the agency's position. The *Skidmore* Court did not articulate a specific test expecting that subsequent cases would be resolved based on their specific facts. Subsequently, in *Chevron,* established a test to determine whether deference does or does not apply.

## Federal Deference Doctrines

**Auer/Seminole Rock Doctrine:** Deference is given to the agency's interpretation when the (1) agency's interpretation is consistent with the regulation and (2) the regulation is consistent with the statute under which it is promulgated. *Auer v. Robbins,* 519 U.S. 452 (1997) (Labor Secretary's interpretation of Department regulations is controlling unless plainly erroneous or inconsistent with the regulation); *Bowles v. Seminole Rock Co.,* 325 U.S. 410 (1945) (if meaning of [an administrative regulation] is in doubt, a court must necessarily look to the administrative construction of the regulation-- administrative interpretation becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation).

## Federal Deference Doctrines

**The *Mead* Doctrine**: In *United States v. Mead Corporation*, 533 U.S. 218 (2001), the Court held that courts can apply two levels of deference to an agency's interpretation of a statute it is charged with enforcing: *Chevron* deference which requires an agency's interpretation must be followed and *Skidmore* deference where the agency's interpretation must be given some deference depending on its power to persuade the court of the correctness of its interpretation. Under *Mead*, *Chevron* deference was limited to situations where courts conclude that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority. This delegation may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent.

## Justice Scalia's Dissent in Mead

…What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference. *Skidmore v. Swift & Co*., 323 U.S. 134 (1944). We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for years to come. I would adhere to our established jurisprudence, defer to the reasonable interpretation the Customs Service has given to the statute it is charged with enforcing, and reverse the judgment of the Court of Appeals.

## *Chevron* Deference

Under *Chevron*, a court must determine if the statute has a plain meaning. If it does and the agency's interpretation differs from that meaning, the court must reverse and substitute the correct interpretation. If the statute has no plain meaning, courts defer to reasonable agency interpretation of its enabling statute. *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

An agency's initial interpretation of a statute that it is charged with administering is not "carved in stone," and agencies must be given ample latitude to adapt their rules and policies to the demands of changing circumstances. *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

## Challenges to Auer Deference

Justice Scalia's criticism of Auer deference:

> **"[i]t seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well."**

*Talk America, Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011)(Scalia, J., concurring)(quoting CHARLES DE SECONDAT, BARON DE MONTESQUIEU, SPIRIT OF THE LAWS bk. XI, ch. 6, 151-52 (Oskar Piest ed., Thomas Nugent transl. 1949)) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty . . . .")

## Challenges to Auer Deference

*Kisor v. Wilkie*, 139 S.Ct. 2400 (2019)

- **Reaffirmed Auer**: "Auer deference retains an important role in construing agency regulations" but while "potent in its place," it is "cabined in its scope." *Id.* at 2408.
- **There is no "exhaustive test" but there are limits**: Even where Auer deference is triggered "the agency's reading must fall within the bounds of reasonable interpretation. And let there be no mistake: That is a requirement an agency can fail." *Id.* at 2416 (cleaned up).

## Challenges to Auer Deference

*Kisor v. Wilkie*, 139 S.Ct. 2400 (2019)

**Justice Gorsuch's Concurrence**: Justice Gorsuch echoed Justice Scalia's objection to Auer deference, deeming the majority opinion provided "more of a stay of execution than a pardon"

> What are the markers? We are told that courts should often—but not always—withhold deference from an interpretation offered by mid-level agency staff; often—but not always—withhold deference from a nontechnical, "prosaic-seeming" interpretation; often—but not always— withhold deference from an interpretation advanced for the first time in an amicus brief; and often—but not always—withhold deference from an interpretation that conflicts with an earlier one.

*Id.* at 2443 (citations omitted).

## Federal Deference Doctrines in PA

*Seeton v. Pa. Game Comm.*, 937 A.2d 1028, 1037 n.12 (Pa. 2007) (while not expressly adopted, the "*Chevron* approach to such cases at the federal level, however, is indistinguishable from our own approach to agency interpretations of Commonwealth statutes.")

*Crown Castle NG E. LLC v. Pennsylvania Pub. Util. Comm'n*, 234 A.3d 665, 686–87 (Pa. 2020) (Wecht, J) (concurring):

> In matters of agency deference, this Court historically has chosen (by volition rather than by command) to take its cues from federal law … Over time, this Court has developed a simplified dichotomy that distinguishes simply between "substantive" and "interpretative" rulemaking. To the former, we have applied something resembling Chevron deference. For the latter, we have employed an approach akin to Skidmore's.

## SCOPA Recent Decisions

*Marcellus Shale Coal. v. Dep't of Envtl. Prot. of Commonwealth*, 185 A.3d 985 (Pa. 2018)

Pa Supreme Court affirmed in part and reversed in part a preliminary injunction issued by Commonwealth Court with respect to newly promulgated regulations regarding unconventional well drilling.

> In the context of a motion for a preliminary injunction, only a substantial legal issue need be apparent for the moving party to prevail on the clear-right-to-relief prong […] **This implicates a less deferential standard relative to the agency's interpretation of the governing statute than would be applicable to a trial court's final merits determination.**

*Id.* at 995 (emphasis added).

## SCOPA Recent Decisions

*Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, 234 A.3d 665 (Pa. 2020) (an agency's interpretation of a clear and unambiguous statute is not entitled to deference)

> Although this Court has held that a measure of deference "approximating that afforded to legislative rules" applies to an agency's interpretation of its own ambiguous regulation, our court has cited Auer only once, and not on the subject of agency deference. *See Goldman v. SEPTA*, 57 A.3d 1154, 1177 (Pa. 2012) (citing Auer for its substantive holding). Conversely, our intermediate courts have applied Auer uncritically. *See, e.g., Yorty v. PJM Interconnection, LLC*, 79 A.3d 655, 664-65, 664 n.5 (Pa. Super. 2013) (applying Auer deference and rejecting the argument that the Christopher Court "limited or cast doubt" upon that doctrine); *Bayada Nurses, Inc. v. Commonwealth, Dep't of Labor & Indus.*, 958 A.2d 1050, 1058 n.7 (Pa. Cmwlth. 2008) (en banc).

*Id.* at n. 9 (Wecht, J) (concurring).

## SCOPA Recent Decisions

*McCloskey v. Pennsylvania Pub. Util. Comm'n*, 255 A.3d 416 (Pa. 2021) (refusing to defer to PUC's interpretation of Public Utility Code)

We reiterate that "[a] court does not defer to an administrative agency's interpretation of the plain meaning of an unambiguous statute because statutory interpretation is a question of law for the court." *Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n*, —— Pa. ——, 234 A.3d 665, 677 (2020).

## SCOPA Recent Decisions

*Corman v. Acting Sec'y of Pennsylvania Dep't of Health,* 266 A.3d 452 (Pa. 2021)

To be clear, **where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute** … Questions of efficiency and practicality in "dynamic and fact-intensive" matters of public health and disease control are policy judgments; they should be left to the policymakers and their designees. … **But that does not mean that the courts must defer to an agency on questions of statutory and regulatory construction for deference's sake.** "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803). By keeping clear the line dividing the judiciary's domain from the executive's, we maintain fidelity to the separation of powers.

## SCOPA Pending Cases

*Synthes USA HQ, Inc. v. Commonwealth,* 236 A.3d 1190 (Pa. Cmwlth. 2020) (en banc), appeal docket 11 MAP 2021 (argued March 2022)

Original jurisdiction appeal challenging Commonwealth Court's deference to the Pennsylvania Department of Revenue's interpretation of the Tax Code to apply a benefits-received method to sales of services to out-of-state customers

## Takeaways

- Deference to an agency's interpretation is only an issue if the regulation is ambiguous-tools of construction are not applicable otherwise
- Deference is presaged on the agency's expertise
- Interpreting statutes and regulations are questions of law to which courts apply a de novo standard of review and a plenary scope of review-regardless of how the deference is characterized, substantial or otherwise, the courts have the last word.

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# ADMINISTRATIVE AGENCY APPEALS—WHERE WE ARE AND HOW WE GOT HERE, SCOPE AND STANDARD OF REVIEW AND AGENCY DEFERENCE

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**Introduction.** As with most things, we tend to assume that the present status quo or something very similar has always been in place. We rarely look beyond our immediate experience to understand how we arrived at the presence circumstance. Most practitioners have practiced under the rubric of the 1968 constitution and the advent of Commonwealth Court in 1970. Perhaps a few remember when the Dauphin County Court of Common Pleas was possessed of what we refer to as Commonwealth Court jurisdiction, i.e. direct appeals from state agency decisions. However, before 1945 there was no consistently effective mechanism to ensure adequate review of those decisions. Even with the enactment of the Administrative Agency Law in 1945 judicial review of agency decisions often did not address the merits of those decisions. It was only after 1968 that the process we know today was established.

## I. History and Development of Administrative Agency Appeals.

**Summary:** As administrative agencies were established and their number began to multiply, the ability to challenge agency determinations and procedures lagged. At both the federal levels and in this Commonwealth the bar recognized the issue and the Administrative Procedure Act and the Administrative Agency Law of 1945[2] were the legislative responses at the federal and Commonwealth levels respectively. The procedures established by these enactments in large measure remain in effect today.[3]

**A. Genesis of Modern Administrative Appeals:** As the establishment of administrative agencies with the incumbent promulgation of regulations mushroomed, attempted challenges to those agencies' actions likewise grew. However, the challengers quickly discovered that the "great writs", principally equity, were difficult to use and not always an effective mechanism, and that a uniform method to challenge administrative procedures was lacking. This circumstance led in the late 1930's and 1940's to study commissions that led to the development of federal and state administrative agency laws by which administrative agencies actions could be challenged.

**B. Legislative Response:**

1. **Federal Administrative Procedure Act**. Congress established the basic framework by which rulemaking occurs by enacting the Administrative Procedure

[1] These materials are adapted and updated from materials prepared by the Honorable Dan Pellegrini and Dennis A. Whitaker for previous PBI seminars.

[2] Act of June 4, 1945, P.L. 1388.

[3] Administrative Agency Law, Act of April 28, 1978, P.L. 202, as amended, 2 Pa. C.S. §§101-754.

Act (APA) in 1946. It remains the basic legislative standard even though its processes have been affected by more recent statutes.

2. **Administrative Agency Law of 1945**. The General Assembly enacted the Administrative Agency Law of 1945, the provisions of which largely remain in effect. The reform effort in Pennsylvania began in 1938 with the formation by the Pennsylvania Bar Association of a Special Committee on Administrative Law to "analyze the present practices and procedures before the various state agencies." The Committee issued several reports, including one in 1941 that opened with the statement that "Administrative tribunals are likely here to stay."[4] The administrative agency regime never has been universally popular. As discussed by Professor Michael Gerhardt in *The Forgotten Presidents,* President Coolidge used his power to make agency appointments to maintain control over federal regulatory agencies. Indeed, he appointed agency heads who were opposed or skeptical of the core mission of the agencies they were appointed to administer. William F. Buckley, in the first issue of *National Review*, bemoaned "a gigantic, parasitic bureaucracy".

3. **Other Efforts at Establishing Uniform Administrative Procedures:** Shortly following Congress' enactment of the APA, the National Conference of State Law Commissioners developed a Model State Administrative Procedure Act. A new Model Act introduced in 1961 was adopted by more than half of the states The Model Act has been the subject of several revisions since that time.

[4] In this vein, the Pennsylvania Supreme Court per Mr. Justice Bell stated the following in *Keystone Raceway Corp. v. State Harness Racing Commission*, 173 A.2d 97, 99 (Pa. 1961), which quote also serves to illuminate the purpose of the administrative acts:

> In the last quarter of a century, independent regulatory administrative agencies, boards and commissions have mushroomed in ever increasing numbers at all levels of government-federal, state and local. Many of them have been given by Congress or a Legislature broad general powers to consider and dispose of matters of great public of private importance, although their precise duties and functions and in particular their limitations are often loosely or ill defined, and the law with respect thereto is not well settled.
>
> Regardless of the admirable purpose for which these agencies are usually established, it is a matter of frequent complaint and common knowledge that the agencies at times act arbitrarily, or capriciously, and unintentionally ignore or violate rights which are ordained or guaranteed by the Federal or State Constitution, or established by law. For these reasons it is imperative that a checkrein be kept upon them.

## II. Provisions Governing the Appealability of Agency Decisions under the Administrative Agency Law.

**A.** The definitions section of Administrative Agency Law, 2 Pa. C.S. § 101 contains the following salient provisions.

"**Adjudication.**" Any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, privileges, immunities, duties, liabilities or obligations of any or all of the parties to the proceeding in which the adjudication is made. The term does not include any order based upon a proceeding before a court or which involves the seizure or forfeiture of property, paroles, pardons or releases from mental institutions.

**"Agency."** A government agency.

**"Government agency."** Any Commonwealth agency or any political subdivision or municipal or other local authority, or any officer or agency of any such political subdivision or local authority.

**"Commonwealth agency."** Any executive agency or independent agency.

**"Executive agency."** The Governor and the departments, boards, commissions, authorities and other officers and agencies of the Commonwealth government, but the term does not include any court or other officer or agency of the unified judicial system, the General Assembly and its officers and agencies, or any independent agency.

**"Independent agency."** Boards, commissions, authorities and other agencies and officers of the Commonwealth government which are not subject to the policy supervision and control of the Governor, but the term does not include any court or other officer or agency of the unified judicial system or the General Assembly and its officers and agencies.

**B**. **Appeals.**

1. **Appeals from State Agencies**. Section 702 of the Administrative Agency Law, 2 Pa. C.S. §702, provides:

> Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure).

2. **Statutory Standing.** 2 Pa. C.S. §702. "Any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal therefrom to the court vested with jurisdiction of such appeals by or pursuant to Title 42 (relating to judiciary and judicial procedure)." 2 Pa. C.S. § 752 Has the same language for an appeal of a local agency. To have standing to appeal an adjudication, one need not be a party but need only be an aggrieved person, who has a

direct interest, as opposed to a direct, immediate and substantial interest, in the adjudication. *Pennsylvania Department of Aging v. Lindberg*, 469 A.2d 1012 (Pa. 1983); *Pennsylvania Automotive Association v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 550 A.2d 1041 (Pa. Cmwlth. 1988).

3. **Adjudication.** If an agency action affects only the interest of the public in general, then the action will not be deemed an adjudication. *Xun Imaging Associates, Ltd. v. Department of Health,* 644 A.2d 255 (Pa. Cmwlth. 1994); *Insurance Department v. Pennsylvania Coal Mining Association*, 358 A.2d 745 (Pa. Cmwlth. 1976).

4. **Direct Interest.** To establish a direct interest in an adjudication one must show that the adjudication caused harm to one's interest, or that the harm alleged resulted in some demonstrable way from the adjudication. *Pennsylvania Automotive Association v. State Board of Vehicle Manufacturers, Dealers and Salespersons*, 550 A.2d 1041, 1043 (Pa. Cmwlth. 1988).

5. **Substantial Interest.** The requirement of a substantial interest in the subject matter of litigation simply means that there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law. *MEC Pennsylvania Racing v. Pennsylvania State Horse Racing Com'n*, 827 A.2d 580 (Pa. Cmwlth. 2003)

6. **Associational Standing.** "An association may have standing solely as the representative of its members and may initiate a cause of action if its members are suffering immediate or threatened injury as a result of the contested action." *ARIPPA v. Pennsylvania Public Utility Com'n*, 792 A.2d 636, 653 n. 30 (Pa. Cmwlth. 2002). Accord *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 922 (Pa. 2013)(noting inter alia that alleged injury to one member is sufficient).

## III. *Arsenal Coal* Exception to Exclusiveness of Remedy under Administrative Agency Law

**A. *Arsenal Coal Co., et al. v. Department of Environmental Resources, et al.*, 477 A.2d 1333 (Pa. 1984).** The Pennsylvania Supreme Court in *Arsenal* faced the broad question of whether the Pennsylvania Environmental Quality Board (EQB) in promulgating comprehensive regulations governing the anthracite coal industry violated limitations on its authority imposed by the General Assembly. Fifty-five anthracite coal operators filed an action in Commonwealth Court's original jurisdiction seeking pre-enforcement relief in the form of preliminary and permanent injunctions barring the Department of Environmental Resources (DER) from implementing and enforcing the regulations.

1. DER filed preliminary objections asserting that the petitioners had failed to exhaust their administrative remedies consisting of appeals to the Environmental Hearing Board (EHB) of DER permitting and enforcement actions. The Department posited that petitioners could press their claims regarding the EQB's alleged overstepping of its authority in the context of those EHB appeals because Section

703(a) of the Administrative Agency Law, 2 Pa. C.S. §703(a), contemplates that the EHB has ancillary authority to rule on the validity of regulations when adjudicating such appeals. *See, e.g. United States Steel Corp. v. Department of Environmental Resources,* 442 A.2d 7 (Pa. Cmwlth. 1982); *St. Joe Minerals Corp. v. Goddard,* 324 A.2d 800 (Pa. Cmwlth. 1974). Commonwealth Court sustained DER's preliminary objections, and petitioners took a direct appeal to the Supreme Court.

2. As noted above, the broad question before the Supreme Court was the EQB's alleged overstepping of its authority in promulgating the regulations at issue. However, the "immediate" issue presented to the Court by the appeal was the availability of pre-enforcement review as a remedy under the Administrative Agency Law. The issue, as stated by the Arsenal Court was:

> whether a court of equity may properly exercise its jurisdiction to resolve the pre-enforcement challenge to the validity of a regulatory scheme grounded in a claim that the regulations were promulgated in excess of the statutory authority by which the regulatory agency is empowered to enact such regulations.

*Arsenal*, 477 A.2d at 1338.

**B**. **Arsenal Holding.** The Court held that the pre-enforcement relief sought was preserved as a remedy by the Administrative Agency Law, citing Section 703, 2 Pa. C.S. § 703, Scope of Review.

1. Section 703 provides as follows:

> (a) General rule. -- A party who proceeded before a Commonwealth agency under the terms of a particular statute shall not be precluded from questioning the validity of the statute in the appeal, but such party may not raise upon appeal any other question not raised before the agency (notwithstanding the fact that the agency may not be competent to resolve such question) unless allowed by the court upon due cause shown.
>
> (b) Equitable relief. -- The remedy at law provided by subsection (a) shall not in any manner impair the right to equitable relief heretofore existing, and such right to equitable relief is hereby continued notwithstanding the provisions of subsection (a).

2. Prior to the codification of portions of the Purdon's Statutes, the language in Section 703 as cited above was found at 71 P.S. §1710.42, the Administrative Agency Law, Act of June 4, 1945, P.L. 1388, §42, as amended, repealed by the Act of April 28, 1978, P.L. 202, §2(a).

3. The *Arsenal* Court noted that the equitable relief available at the time of the original 1945 enactment of the Administrative Agency Law was preserved in subsection 703(b) above, citing *Western Pennsylvania Hospital v. Lichliter*, 17

A.2d 206 (Pa. 1941). In that case, the Supreme Court affirmed per curiam on the opinion of the Dauphin County Court of Common Pleas in which that court cited the established remedy in equity to prevent the pre-enforcement of a regulation.

**C**. ***Lichliter.*** The *Lichliter* Court stated as follows:

> The Courts of Common Pleas may still exercise the equitable powers conferred upon them by the Act of 1836, P.L. 784, 17 P.S. 281, and the Act of 1857, P.L. 39, 17 P.S. 285, unless these powers have been taken away from them by some statute. We have already reached the conclusion that, so far as this case is concerned, neither the Labor Anti-Injunction Act nor the Pennsylvania Labor Relations Act has divested this Court of its equitable powers to issue the injunction, nor have counsel referred us to any other statute having that effect. We know of no case where the Supreme Court of this State has held that equity may not restrain an administrative agency from exercising powers not conferred upon it by the Legislature. On the contrary, there are many cases where such action has been confirmed. In *York Railway Co. v. Driscoll et al.*, 331 Pa. 193, a situation was presented where this court had restrained the Public Utility Commission from exercising powers not delegated to it. The Railways had also appealed from the action of the Commission. Both matters finally came before the Supreme Court. In the course of its opinion it laid down the rule, at page 196, that: "We have no doubt about the right, indeed the duty of the Dauphin County Court, to entertain a bill to enjoin the Commission from acting in this case or in any other in which the powers and authority of the Commission to act are called in question: *Citizens Passenger Ry. Co. v. P.S.C.*, 271 Pa. 39; *Phila. Elec. Co. v. P.S.C.*, 314 Pa. 207."
>
> In *Rich Hill Coal Co. v. Bashore*, 334 Pa. 449, this court enjoined the Workmen's Compensation Board from exercising powers unlawfully delegated to it. The Supreme Court affirmed. Many other cases could be cited to the same effect, but we feel that these are sufficient to show that the Courts, in the exercise of their equitable powers, may enjoin an administrative agency of the State from exercising powers not conferred upon them or unconstitutionally conferred upon them.

*Lichliter*, 17 A.2d at 211-12.

**D**. ***Arsenal* Summary.** In *Arsenal* the Supreme Court reaffirmed that the equitable remedy found in Section 703(b) of the Administrative Agency Law was available to restrain a state agency's unlawful exercise of powers. The equitable relief codified in the current version of the AAL was found in the original version enacted in 1945. That provision in the original AAL itself preserved a remedy recognized in enactments from 1836 and 1857.

## IV. Changes in Administrative Practice since 1945 – Constitutional Amendment of 1968.

**A. No Appeal unless One of 48 Agencies.** Prior to the adoption of Article V, Section 9 of the Pennsylvania Constitution in 1968, the Administrative Agency Law at 71 P.S. §1710.51(a) provided that no appeal was allowed from a state agency unless it was one of the 48 agencies listed therein. Decisions of bodies not listed could not be appealed as of right unless the statute that had established the agency had created a supplementary right of appeal. *MEC Pennsylvania Racing v. Pennsylvania State Horse Racing Com'n,* 827 A.2d 580, 586 (Pa. Cmwlth. 2003) *See, e.g. Department* of *Labor and Industry v. Snelling & Snelling,* 89 Dauph 51 (1968) (holding that the AAL's appeal procedures did not apply to a labor department decision denying a partial refund of license fees because the department was not one of the listed agencies). 71 P.S. §1710.51(a) was repealed in 1978.

**B. Supreme Court Rule 68½. State Agencies Not Listed in 71 P.S. §1710.51(a) and all Local Agencies.** For those state agencies as well as all local agencies, appeal was only by permission via writ of certiorari to the Supreme Court. If granted, review was governed either by narrow or broad certiorari.

**1. Narrow Certiorari.** Applied where the statute forbade judicial review. The writ of certiorari initially was limited to inspection of the record for jurisdiction below and for correction of errors appearing on the face of the record; neither the opinion of the court below nor the evidence in the case formed any part of the record, and the merits could not be inquired into on certiorari. This became known as "narrow certiorari" and only looked at the fairness of the proceeding, not the outcome.

**2. Broad Certiorari.** Applied where the statute was silent regarding review. The Supreme Court later developed "broad certiorari" under which the appellate court looked beyond the jurisdiction of the court below and regularity of the proceedings to determine, by examining the testimony, whether the findings of the court below were supported by evidence or whether it was guilty of an abuse of discretion or an error of law. This practice was codified in Supreme Court Rule 68 1/2.[5]

[5] As explained by Commonwealth Court in *MEC*:

> Whether narrow or broad certiorari was employed was explained by our Supreme Court in *Official Court Reporters of Court of Common Pleas of Philadelphia County v. Pennsylvania Labor Relations Bd.,* 502 Pa. 518, 528, 467 A.2d 311, 316 (1983), stating:
>
> > [P]rior to the enactment of Article V, section 9 of the Pennsylvania Constitution which provides for a right of appeal from administrative agency decisions, the right to appeal from such agency decisions stemmed from either the agency's enabling legislation or the Administrative Agency Law. In the absence of a statutory right to appeal we reviewed agency decisions on broad certiorari, except when an appeal

was prohibited by statute, in which case we limited our review to narrow certiorari. (citation omitted.)

After the enactment of Article V, Section 9 of the Pennsylvania Constitution, the AAL was changed to govern the procedures of all appeals that were allowed from all state agencies unless there was a specific alternative procedure set forth in the authorizing statute.

* * *

The reason for the previous explanation is because once it decided that an appeal could be allowed, our Supreme Court in *Man O'War* went on to consider whether the order was one that could be appealed. It stated that in order "for an appeal by certiorari to lie the order or action of the agency, board or commission *must be judicial in nature*." *Man O'War,* 433 Pa. at 438, 250 A.2d at 175 (*quoting Keystone Raceway,* 405 Pa. at 6, 173 A.2d at 100). (Emphasis in original). In reviewing the Commission's Order, the Supreme Court determined that the approval of the horse racing license was judicial because: (1) the statute under which the Commission operated required it to judge the merits of each applicant in terms of statutory standards, and the Commission had quasi-judicial characteristics in that it had the power to administer oaths, examine witnesses, and subpoena witnesses and materials; (2) the decisions of the Commission "are so fraught with the public interest that an appeal must lie," *Man O'War,* 433 Pa. at 439, 250 A.2d at 176; and (3) a license is a valuable privilege which could be substantially affected by the Commission's decision.

Because we are now applying the AAL, our Supreme Court's terminology in addressing whether the agency's actions as "judicial" in nature to determine whether it is appealable has been supplanted by the term "adjudication;" however, its analysis is still applicable to determine whether the Commission's Order was an adjudication. Like the Commission's decision in *Man O'War,* in this case, the Commission's action: (1) required it to judge the merits of each applicant based on statutory standards, 4 P.S. § 325.209, and allowed the Commission to administer oaths, examine witnesses and subpoena witnesses and materials, 4 P.S. § 325.226; (2) was completely intertwined with the public interest, because the Commission's decision will result in the raising of large amounts of tax revenue; and (3) affects a license--a valuable privilege. Under the AAL, an administrative "adjudication" is defined as "any final order, decree, decision, determination or ruling by an agency affecting personal or property rights, . . . of any or all of the parties to the proceeding . . ." 2 Pa. C.S. § 101. A "party" is "[a]ny person who appears in a proceeding before an agency who has a direct interest in the subject matter of such proceeding." 2 Pa. C.S. § 101. Under that definition, there is no dispute that, at a minimum, Presque Isle, having a direct interest in the proceeding, could then appeal to this Court because the Commission's

**C. Constitutional Amendments of 1968**. Established a constitutional requirement of a right of appeal for all judicial and administrative decisions.

1. Pa. Con. Article 5, Section 9 provides:

> There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

## V. JUDICIAL REVIEW OF AGENCY ACTIONS

**A. Right to Appellate Review:** The constitutional right of appeal from all administrative or judicial determinations established in Article 5, Section 9 is not self-executing. *Manheim Township School District v. State Board of Education*, 276 A.2d 561, 563-65 (Pa. Cmwlth. 1971). The right of appeal from a state agency action is further provided by Section 702 of the Administrative Agency Law, 2 Pa. C.S. §702, *supra*. The right exists "notwithstanding prohibition on appeals set forth in other statutes . . . ." *Maritime Management, Inc. v. Pennsylvania Liquor Control Bd.*, 611 A.2d 202, 203 (Pa. 1992).

### 1. Appeals from Agency Decisions--Commonwealth Court:[6]

Under 42 Pa. C.S. §702, Commonwealth Court has jurisdiction over final orders and interlocutory appeals as of right and by permission. See also Pa. R.A.P. 341.[7] The court's jurisdiction over final orders of agency decisions is found in Section 763 of the Judicial Code, 42 Pa. C.S. §763, and includes all appeals from agencies including the Environmental Hearing Board.

**2. Supreme Court:** The Court's jurisdiction takes two forms relevant here: appeals as of right which consist of appeals from original jurisdiction matters in Commonwealth Court such as petitions for enforcement of administrative orders

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Order was an adjudication under the AAL. *See also Turner v. Pennsylvania Public Utility Commission,* 683 A.2d 942 (Pa. Cmwlth.1996).

*MEC,* 827 A.2d at 586-588 (footnotes omitted).

[6] All appeals from decisions of local agencies initially go to common pleas courts. In addition, appeals from some state agencies also go to common pleas, notably PennDot driver's license suspension appeals and appeals from the refusal to renew, the suspension or the revocation of liquor licenses.

[7] Relevant here, Section 762 of the Judicial Code, 42 Pa. C.S. §762, provides the court with jurisdiction over final orders of the courts of common pleas including second level review of appeals from agencies which are taken initially to the trial court, regulatory criminal proceedings and local government civil and criminal matters, eminent domain actions, not-for-profit proceedings, and waiver of immunity.

and *Arsenal*-type actions such as petitions for declaratory relief, see 42 Pa. C.S. §723[8]; and, petitions for allowance of appeal (allocator) seeking review of final Commonwealth Court orders involving appeals from agency adjudications, 42 Pa. C.S. §725.

**B. Obstacles to Obtaining Appellate Review.**

**1. Appellate Court Jurisdiction.** Stating the obvious, a court may be without jurisdiction to hear an appeal filed there. The appellate courts are required to raise *sua sponte* their jurisdiction to hear an appeal. *School District of the Borough of West Homestead v. Allegheny County Board of School Directors*, 269 A.2d 904, 906 (Pa. 1970). However, there are occasions where an appellate court may exercise its discretion to hear a matter where none of the parties object and where hearing the matter serves judicial economy. *See, e.g., Zikria v. Western Pennsylvania Hospital*, 668 A.2d 173, 173-74 (Pa. Super 1995). *But see, Dynamic Sports Fitness Corp. of America, Inc. t/a The Sports Club v. The Community YMCA of Eastern Delaware County*, 751 A.2d 670, 672-73 (Pa. Super. 2000) (long term interests support transfer to Commonwealth Court where that court has historically heard appeals of this nature and has expertise in area of law). Section 705 of the Judicial Code, 42 Pa. C.S. §705, provides that Superior Court and Commonwealth Court have the power to transfer a case to the other court.

**2. Adjudicating Tribunal Jurisdiction.** Obviously, an appellate court has jurisdiction over an appeal of a final order by a lower court, agency or administrative tribunal. However, it can vacate that order where it finds that the agency does not have jurisdiction. *See, e.g., HJH LLC v. Department of Environmental Protection*, 949 A.2d 350 (Pa. Cmwlth. 2008) (court *sua sponte* determined that DEP did not take final action, petitioner therefore was not aggrieved and EHB lacked jurisdiction over appeal; court therefore vacated EHB order on appeal and remanded with direction to quash the appeal); *Sullivan v. Commonwealth, Department of Transportation*, 682 A.2d 5 (Pa. Cmwlth. 1996) (PennDOT did not have jurisdiction to suspend a driver's license due to a conviction in another state under the Driver License Compact because, by its terms, the Compact requires the state to enact it and it was never enacted by the legislature).

**3. Reviewability.** There are several prerequisites that must be met before a court can conduct judicial review of an agency decision.

**a. Agency Decision Must be an Adjudication.** An adjudication implicates due process rights and other judicial concerns. See the definition of "Adjudication" at 2 Pa. C.S. §101.

**b. Appeal Must Be Timely.** The appeal must be filed within the time limit provided by statute or rule, generally 30 days, from the entry of the order. See Pa. R.A.P. 903 and 1512. *See, e.g., Philadelphia v. Tirrill*, 906 A.2d 663 (Pa. Cmwlth. 2006 (appeal periods are jurisdictional and may not be extended as a

[8] 42 Pa. C.S. §724 provides for additional appeals as of right not germane here.

matter of grace or mere indulgence--otherwise there would be no finality to judicial action; under extraordinary circumstances, however, a court may extend the appeal period by granting equitable relief in the form of a nunc pro tunc or "now for then" appeal.)

**c. Appellant Must Have Standing.** To have standing, the appellant must be aggrieved. *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). See part II. B. *supra*. A party who has prevailed in the proceeding below is not an aggrieved party and consequently has no standing to appeal. *Chicoine v. Workmen's Compensation Appeal Board (Transit Management Services)*, 633 A.2d 658 (Pa. Cmwlth. 1993). Statutory standing and representational standing are noted *supra*. Taxpayer(s) may have standing even when their interest may not be substantial, direct, and immediate if the governmental action will go unchallenged unless the taxpayer can intervene via the appeal process. *Sprague v. Casey*, 550 A.2d 184 (Pa. 1988).

**d. Record.** Judicial review cannot occur without a proper, complete record of the proceedings below. *Canonsburg General Hospital v. Department of Health*, 422 A.2d 141 (Pa. 1980). When the agency exercises discretion, the record must disclose some basis for that exercise. *Bell v. Commonwealth, Bureau of Vocational Rehabilitation*, 436 A.2d 1072 (Pa. Cmwlth. 1981).

**e. Exhaustion of Administrative Remedies.** In most instances, judicial review is not available until the aggrieved party has utilized review procedures provided within the agency, i.e., exhaustion of administrative remedies. See *Arsenal* discussion above. Another narrow exception exists for constitutional issues where the facts are uncontested. *St. Clair v. Pennsylvania Board of Probation and Parole*, 493 A.2d 146 (Pa. Cmwlth. 1985).

**f. Finality.** Per Pa. R.A.P. 341, appeals may be taken only from final orders.

**g. Serving the Attorney General.** If the appeal presents a facial challenge to a statute's constitutionality, Pa. R.A.P. 521 requires that the Attorney General immediately be given written notice.

**h. Ripeness.** If an appellant's alleged harm is prospective rather than current, the issue is not ripe for review. When assessing ripeness, a court will assess the fitness of the issue for immediate review and the hardship to the parties if review is denied.

**i. Primary Jurisdiction.** Commonwealth Court may invoke the judicially-created doctrine of primary jurisdiction in cases brought in its original jurisdiction that it wishes to defer to the agency. *See Elkin v. Bell Telephone Company v. Pennsylvania*, 420 A.2d 371 (Pa. 1980). The doctrine allows a court to refer cases to administrative agencies possessing greater subject matter expertise and experience; however, it does not allow a court to refer a case to an agency which lacks the express statutory jurisdiction to hear the matter in the first instance. *See Machipongo Land & Coal Company, Inc. v. Commonwealth, Department of Environmental Resources*, 648 A.2d 767 (Pa. 1994), *vacated and*

*remanded*, 676 A.2d 199 (Pa.1996). The doctrine permits courts to make a workable allocation of business between themselves and the agencies responsible for the regulation of certain conduct. Most, if not all, of the following are present when the doctrine is invoked: the activity involved is a heavily regulated one; requires special agency expertise; voluminous and conflicting testimony to resolve; the administrative agency was created to address the problem for which deferring primary jurisdiction is being advanced; the agency has jurisdiction to issue the relief requested; and, overriding all other factors, the regulatory system will work better if the agency hears the matter rather than the courts.

**C. Scope and Standard of Review**.

1. Scope and standard of review establish the extent to which appellate court can substitute its discretion for that of the fact finder. In *Morrison v. Dep't of Pub. Welfare, Office of Mental Health (Woodville State Hosp.)*, 646 A.2d 565, 570 (Pa. 1994), our Supreme Court explained the concepts as follows:

> "Scope of review" and "standard of review" are often--albeit erroneously--used interchangeably. The two terms carry distinct meanings and should not be substituted for one another. "Scope of review" refers to "the confines within which an appellate court must conduct its examination." *Coker v. S.M. Flickinger Company, Inc.*, 533 Pa. 441, 450, 625 A.2d 1181, 1186 (1993). In other words, it refers to the matters (or "what") the appellate court is permitted to examine. In contrast, "standard of review" refers to the manner in which (or "how") that examination is conducted. In *Coker* we also referred to the standard of review as the "degree of scrutiny" that is to be applied. Id., 625 A.2d at 1186.

*Morrison*, 646 A.2d at 570. See also See Pa. R.A.P. 1551.[9]

[9] Rule 1551. Scope of Review

(a) Appellate jurisdiction petitions for review. Review of quasijudicial orders shall be conducted by the court on the record made before the government unit. No question shall be heard or considered by the court which was not raised before the government unit except:
(1) Questions involving the validity of a statute.
(2) Questions involving the jurisdiction of the government unit over the subject matter of the adjudication.
(3) Questions which the court is satisfied that the petitioner could not by the exercise of due diligence have raised before the government unit. If, upon hearing before the court, the court is satisfied that any such additional question within the scope of this paragraph should be so raised it shall remand the record to the government unit for further consideration of the additional question. The court may in any case remand the record to the government unit for further proceedings if the court deems them necessary.

2. Section 703(a) of the Administrative Agency Law, 2 Pa. C.S. §703(a), provides that the court's scope of review includes matters raised by a party in the proceedings before the agency and the validity of the applicable statute. The standard of review is found in 2 Pa. C.S. §704:

> The court shall hear the appeal without a jury on the record certified by the Commonwealth agency. After hearing, the court shall affirm the adjudication unless it shall find that the adjudication is in violation of the constitutional rights of the appellant, or is not in accordance with law, or that the provisions of Subchapter A of Chapter 5 (relating to practice and procedure of Commonwealth agencies) have been violated in the proceedings before the agency, or that any finding of fact made by the agency and necessary to support its adjudication is not supported by substantial evidence. If the adjudication is not affirmed, the court may enter any order authorized by 42 Pa. C.S. § 706 (relating to disposition of appeals).

**D. Review of Questions of Fact.**

**1. Substantial Evidence.** "Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Feinberg v. Unemployment Compensation Board of Review*, 635 A.2d 682 (Pa. Cmwlth. 1993), *petition for allowance of appeal denied*, 652 A.2d 840 (Pa. 1994). Even if the court disagrees with the agency's findings, it must affirm if there is substantial evidence to support the finding. The weight of evidence and credibility are solely within the discretion of the factfinder to decide; however, the court reviews the sufficiency of that evidence.

**a. Findings.** An agency is not required to set forth findings specifically on every allegation, *Roth v. Workmen's Compensation Appeal Board (Armstrong World Industries)*, 562 A.2d 950 (Pa. Cmwlth. 1989); however, if crucial findings are not made, the case must be remanded to the agency. *Underkoffler v. State Employees' Retirement Board*, 432 A.2d 319 (Pa. Cmwlth. 1981). Only necessary findings of fact need be supported. *Peoples First National Bank v. Unemployment Compensation Board of Review*, 632 A.2d 1014 (Pa. Cmwlth. 1993). The court must examine the testimony in the light most favorable to the prevailing party, giving that party the benefit of any inferences which can logically and reasonably be drawn from the evidence. *Feinberg*.

**b. Evidence.** Agencies are not bound by technical rules of evidence and generally all relevant evidence of reasonably probative value is admitted. 2 Pa. C.S. §505. An agency has broad discretion in admitting or rejecting evidence. *Gwinn v.*

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(b) Original jurisdiction petitions for review. The court shall hear and decide original jurisdiction petitions for review in accordance with law. This chapter is not intended to modify, enlarge or abridge the rights of any party to an original jurisdiction petition for review.

*Pennsylvania State Police*, 668 A.2d 611 (Pa. Cmwlth. 1995), *petition for allowance of appeal denied*, 679 A.2d 231 (Pa. 1996).

**1. Hearsay.** Does not constitute substantial evidence. If properly objected to, it cannot support a finding.

2. **Unobjected to Hearsay. The Walker Rule aka the Legal Residiuum Rule.** Unobjected to hearsay is given its natural probative effect if it is corroborated by any competent evidence in the record. The residuum rule requires a reviewing court to set aside a finding unless it is supported by some evidence which would be admissible in a jury trial. Under this rule, the legal character of the evidence as hearsay is determinative; no consideration is given to the reliability of the evidence or the circumstantial setting in which it arises. *Walker v. Unemployment Compensation Board of Review*, 367 A.2d 366 (Pa. Cmwlth. 1976).

## E. Review of an Agency's Legal Interpretation.

**1. Plenary Scope of Review.** On pure questions of law, appellate scope of review is plenary. *Thornburgh v. Lewis*, 470 A.2d 952 (Pa. 1983). So long as the issue was preserved below, the Commonwealth Court may address whether the procedural rules in the AAL were followed, as well as whether the applicable regulations and statutes were properly applied. In general, agencies have ancillary jurisdiction to rule on the validity of regulations in a challenge to their application or enforcement, unless such authority is proscribed by its enabling statute. *Arsenal. But see, Pennsylvania Department of Health v. North Hills Passavant Hospital*, 674 A.2d 1141 (Pa. Cmwlth. 1996) (statute prohibits agency from addressing validity of regulations). An agency is bound by its regulations as though it is a statute. *Pennsylvania Human Relations Commission v. Norristown Area School District*, 342 A.2d 464 (Pa. Cmwlth. 1975), *aff'd,* 374 A.2d 671 (Pa. 1977).

**2. Deference to Legal Interpretation of Statutes.**

**a. Pennsylvania.**

1) **Great deference:** *Tool Sales & Service*; *Popowsky*; *Nationwide Insurance Co. v. Schneider*, 960 A.2d 442 (Pa. 2008) (such deference is only appropriate where agency expertise implicated).

2) **Deference or some deference:** *Street Road Bar & Grille, Inc. v. Liquor Control Bd.*, 876 A.2d 346, 354 n.8 (Pa. 2005) (agency interpretation entitled to deference or some deference only where consistent with legislative intent or not unwise.); *Corman v. Acting Sec'y of Pennsylvania Dep't of Health*, 266 A.3d 452 (Pa. 2021) ("where an agency is authorized to act, it is entitled to some latitude for discretionary matters committed to its expertise-based judgment by statute … But that does not mean that the courts must defer to an agency on questions of statutory and regulatory construction for deference's sake.").

3) **Substantial deference:** *Schuylkill Twp. v. Pennsylvania Builders Ass'n,* 7 A.3d 249, 253 (Pa. 2010) (agency's interpretation of a statute the agency "is charged with implementing and enforcing."); *but see, Marcellus Shale Coal. v. Dep't of Envtl. Prot. of Commonwealth,* 185 A.3d 985 (Pa. 2018) (preliminary injunction implicates a "less deferential standard relative to the agency's interpretation of the governing statute than would be applicable to a trial court's final merits determination.").

4) **Considerable weight and deference:** *Rubino v. Pennsylvania Gaming Control Bd.*, 1 A.3d 976 (Pa. Cmwlth. 2010) (agency's interpretation of its own regulations).

5) **No deference.** *Crown Castle NG East LLC v. Pa. Pub. Util. Comm'n,* 234 A.3d 665 (Pa. 2020) (an agency's interpretation of a clear and unambiguous statute is not entitled to deference); *McCloskey v. Pennsylvania Pub. Util. Comm'n,* 255 A.3d 416 (Pa. 2021) (same).

**b. Federal.** The *Mead* Doctrine. In *United States v. Mead Corporation,* 533 U.S. 218 (2001), the Court held that courts can apply two levels of deference to an agency's interpretation of a statute it is charged with enforcing: *Chevron* deference which requires an agency's interpretation must be followed and *Skidmore* deference where the agency's interpretation must be given some deference depending on its power to persuade the court of the correctness of its interpretation.[10]

[10] In his dissent, Justice Scalia stated that:

> Today's opinion makes an avulsive change in judicial review of federal administrative action. Whereas previously a reasonable agency application of an ambiguous statutory provision had to be sustained so long as it represented the agency's authoritative interpretation, henceforth such an application can be set aside unless "it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," as by giving an agency "power to engage in adjudication or notice-and-comment rulemaking, or . . . some other [procedure] indicati[ng] comparable congressional intent," and "the agency interpretation claiming deference was promulgated in the exercise of that authority." *Ante*, at 226-227. What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority, which must be overcome by affirmative legislative intent to the contrary. And whereas previously, when agency authority to resolve ambiguity did not exist the court was free to give the statute what it considered the best interpretation, henceforth the court must supposedly give the agency view some indeterminate amount of so-called *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). We will be sorting out the consequences of the *Mead* doctrine, which has today replaced the *Chevron* doctrine, *Chevron*

**1. Chevron.** *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Under *Chevron*, a court must determine if the statute has a plain meaning. If it does and the agency's interpretation differs from that meaning, the court must reverse and substitute the correct interpretation. If the statute has no plain meaning, courts defer to reasonable agency interpretation of its enabling statute. An agency's initial interpretation of a statute that it is charged with administering is not "carved in stone," and agencies must be given ample latitude to adapt their rules and policies to the demands of changing circumstances. *Food and Drug Administration v. Brown & Williamson Tobacco Corp. v. FDA*, 529 U.S. 120 (2000). Under *Mead*, 533 U.S. 218 (2001), *Chevron* deference was limited to situations where it courts conclude that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of such authority. This delegation may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of comparable congressional intent. :

**2. Skidmore**. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Deference based on the persuasiveness of the agency's position. If *Chevron* deference does not apply, an agency interpretation may merit some deference whatever the form that it is expressed, given the specialized experience and broader investigations and information available to the agency and the value of uniformity in its administrative and judicial understandings of what national law requires. The fair measure of deference to an agency administering its own statutes has been understood to vary with the circumstances and the courts have looked to the degree of the agency's care, its consistency, formality and relative to the persuasiveness of the agency's position.

**3. Deference to an Agency's Interpretation of its Own Regulations. Auer/Seminole Rock Doctrine.** Deference is given to the agency's interpretation when the (1) agency's interpretation is consistent with the regulation and (2) the regulation is consistent with the statute under which it is promulgated. *Auer v. Robbins*, 519 U.S. 452 (1997) (Labor Secretary's interpretation of Department regulations is controlling unless plainly erroneous or inconsistent with the regulation); *Bowles v. Seminole Rock Co.*, 325 U.S. 410 (1945). Recently, in *Kisor v. Wilkie*, 139 S.Ct. 2400 (2019), the Supreme Court reaffirmed Auer, concluding that "Auer deference retains an important role in construing agency regulations" but while "potent in its place," it is "cabined in its scope." *Id.* at 2408. The *Kisor* court observed that while Auer deference does not require any **"**exhaustive test," there are limits: even where Auer deference is triggered "the

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> *U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), for years to come. I would adhere to our established jurisprudence, defer to the reasonable interpretation the Customs Service has given to the statute it is charged with enforcing, and reverse the judgment of the Court of Appeals.

Mead, 533 U.S. at 239 (footnote omitted).

agency's reading must fall within the bounds of reasonable interpretation. And let there be no mistake: That is a requirement an agency can fail." *Id.* at 2416 (cleaned up).

# SESSION #6

## Workers Compensation Law

# Workers Compensation Case Law Update

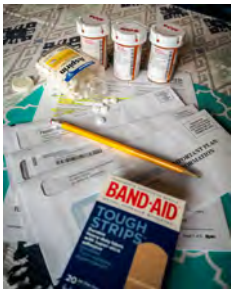
Victoria P. Edwards & Adam Crosier

# Workers' Compensation Case Law Update

**Victoria P. Edwards, Esq. of Mette, Evans & Woodside**
**Adam N. Crosier, Esq. of Marzzacco Niven & Associates**

## ATTORNEYS' FEES ON MEDICAL BENEFITS

- *Neves v. WCAB (American Airlines)*, 232 A.3d 996 (Pa. Cmwlth. 2020)
  - Holding: 20% attorney's fees per se reasonable on medical benefits




## UTILIZATION REVIEW

- *Omni Pharmacy, LLC v. Bureau of Workers' Compensation Fee Review Hearing Office (American Interstate Insurance Company)*, 241 A.3d 1273 (Pa. Cmmw. Ct.)
  - Holding at Commonwealth Court: "How an Employer's liability is established is irrelevant…What is relevant is that, here, Employer accepted liability for Claimant's work injury. As in Workers' First Pharmacy, Employer is challenging whether the compound cream prescribed to Claimant constituted reasonable and necessary treatment for the work injury". Holding requires that the insurance carrier first file a Utilization Review to challenge the reasonableness and necessity of the treatment"

## PROTZ – (IRE)

- *Weidenhammer v. WCAB (Albright College)*, 232 A.3d 986 (Pa. Cmwlth. 2020)
  - Holding: Protz not fully retroactive; retroactivity limited to 500 weeks, plus three years since date of transition from TTD to TPD
    - Supreme Court denied allowance of appeal as of December 2, 2020


## PROTZ – (IRE)

- *Pierson v. WCAB (Consol Pennsylvania Coal Company, LLC)*, 423 C.D. 2020 (Pa. Cmwlth. 2021)
  - Holding: IREs can modify benefits from TTD to TPD for injuries occurring prior to Act 111 passing as of October 24, 2018.
  - The Supreme Court, has denied Claimant's Petition for Allowance of Appeal.

## SUBROGATION

- Whitmoyer case
  - 2018 Supreme Court found that future medical benefits are not subject to a credit as a result of a Third Party Settlement Agreement
  - This would only occur when there is an active WC claim and there is a settlement of a third party matter which exceeds the amount of the WC lien.
  - The Supreme Court found that future (from the date of execution of the TPSA) potential medical benefits were not installment payments and therefore were not subject to the credit or offset (generally around 65% to 70%)

## Ingress/Egress

- *James L. Weaver dba Captain Clothing Co. v. Breinig (WCAB)*, 490 C.D. 2020, 2021 WL 1609413 (unreported, Pa. Cmmw. 2021) (soon to be reported)
  - Holding: Claimant who was injured while walking from the Employer-provided (though not owned) parking lot was found to be in the course and scope of her employment and her injury was found to be compensable.

## Ingress/Egress

- *Stewart v. WCAB (Bravo Group Services, Inc.)*, No. 812 C.D. 2020 (Pa. Cmmw. 2021).
  - Holding: Claimant who was getting off a public shuttle van on the doorstep of worksite was injured. Court found that this was not part of Claimant's commute but instead ingress/egress to the worksite and in the course and scope of Claimant's employment.

**Independent Contractor v. Employee**

- *Berkebile Towing & Recovery v. WCAB (Harr, SWIF, & UEGF)*, 220 C.D. 2021 WL 1846095 (Pa. Cmmw. 2021)
  - Holding: Despite a rudimentary written contract which identified Claimant as an independent contractor, he was found to be an Employee and therefore found to be eligible for workers' compensation benefits.
    - Significant weight, maybe above all other factors, given to the fact that the tow truck was owned by the Employer.

## SUSPENSION OF BENEFITS

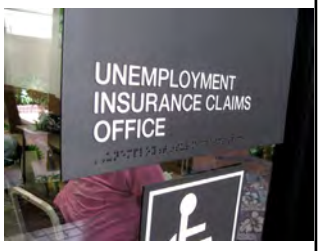
- *Sealey v. WCAB (Elwyn Inc.)*, unreported, 2020 WL 5785347
  - Holding: An oral job offer can support a suspension of benefits, but the job relied upon by WCJ while discussed at a deposition, was not formally offered to EE. Therefore, suspension was not proper in this situation.

## SUSPENSION OF BENEFITS

- *Sadler v. WCAB (Philadelphia Coca-Cola)*, 2021 WL 265131 (Pa. 2021) 1/27/2021
  - Holding – A WC Carrier is not entitled to a suspension of benefits for Claimant's pre-conviction incarceration

## EMPLOYER CREDITS

*Carbon Lehigh Intermediate Unit #21 v. Waardal (WCAB)*, No. 750 C.D. 2021, filed Jan. 3, 2022, 2022 WL 15825 (Reported, Pa. Commw. 2021). Held that the Employer is not entitled to a credit for the Federal Pandemic Employment Program Benefits established by the CARES Act.



COUNSEL FEES

*Lorino v. W.C.A.B. (Commonwealth of PA/Penn DOT)*, ___ A.3d ___, 2021 WL 6058030, filed 12.22.2021 (Pa. 2021). Held that the WCJ in their discretion can award claimant's attorney's fees where a claimant prevails even where the employer maintained a reasonable contest.

VOCATIONAL EVALUATION AND EARNING POWER ASSESSMENT

*Sadler v. Philadelphia Coca-Cola (WCAB)*, 1294 C.D. 2020, filed 1.7.2022, (Pa. Commw. 2022). The court held that the VE need not consider the claimant's incarceration for a Class II felony in the Act 57 EPA.