Dauphin County Bar Association

DCBA
MEMBER BENEFIT
COMPLIANCE SESSION
HANDOUTS

WEDNESDAY
APRIL 19, 2023

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

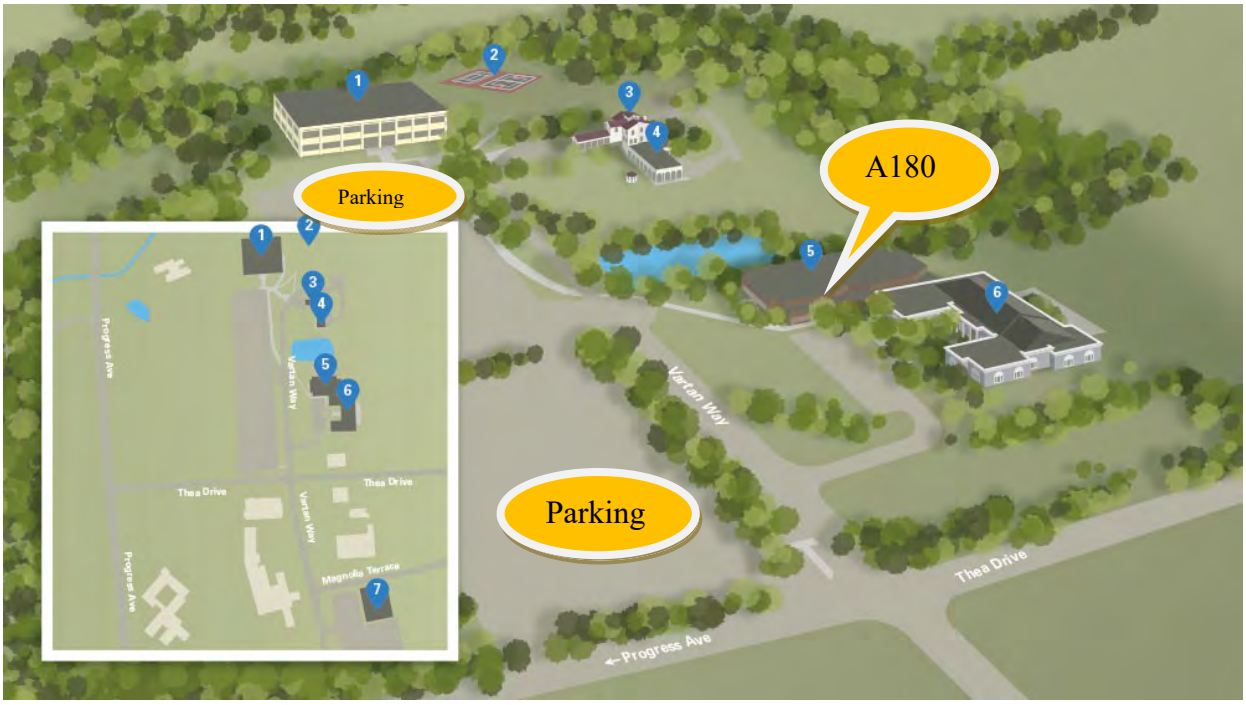
3 Student Activities Offices, Bookstore

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 | Student Loans in and out of Bankruptcy | James Jones & Tracy Updike

10:15 - 11:15am | Session # 2 | The ABC's of Family Law: An Overview of Divorce, Custody and PFA's | Natalie Burston, Ebony Hammond, & Karen Miller

11:30am - 12:30pm | Session # 3 | PBA Malpractice Avoid (ethics) | Edwin A. Schwartz

LUNCH BREAK

(Lunch provided for those that registered for lunch)

1:30 - 2:30pm | Session # 4 | Land Use Controls – Preemption by State Statutes of Local Land Use and Police Power Ordinances | Dennis Whitaker

2:45 - 3:45pm | Session # 5 | Workers' Compensation Case Law Update | Lucas Csovelak, & Steven Ryan

4:00 - 5:00pm | Session # 6 | Same Sex Marriage in Pennsylvania and The Effect of The Respect For Marriage Act | Thomas Gacki

Important Info:

- **Please DO NOT PARK in the upper lot in front of the administration building as that is for law school STAFF ONLY**
- **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.**
- **We will have coffee for the morning ONLY. We will also have bottled water and some soda available for the afternoon session; however, there is also a small vending machine.**
- **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 Association

213 NORTH FRONT STREET, HARRISBURG, PA 17101 (717) 232-7536 FAX (717) 234-4582

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FEDERAL CREDIT UNION

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We would also like to thank

Widener University
Commonwealth Law School

for the use of their facility.

SESSION #1

Bankruptcy Law

“Student Loans in and out of Bankruptcy”

Presented by: James Jones, Esquire &
Tracy Updike, Esquire

STUDENT LOANS

Curing Defaults and Changes in Discharge Litigation

Presented by the Bankruptcy Section of the Dauphin County Bar Association

Tracy L. Updike, Esquire, Mette Evans & Woodside (tlupdike@mette.com)
and
James K. Jones, Esquire, Cunningham, Chernicoff & Warshawsky
(jkj@cclawpc.com)

April 19, 2023

1

CURRENT SITUATION

- Approximately 45 million student loan borrowers owe **$1.757 trillion** in federal and private loans in 2023
- Student loan debt has increased **144%** since 2017 while the number of borrowers has increased 52%
- **40%** of borrowers have made **no progress** in repayment **3 years** after graduation

Report by Bipartisan Policy Center

2

CURING DEFAULT

- Pay the balance due
- Loan Rehabilitation
- Consolidation
- Bankruptcy Discharge

3

LOAN REHABILITATION

- Agreement with servicer to make 9 consecutive payments based on
  - Income
  - Family Size
- If successful in making timely payments
  - Default Cured
  - Collection actions cease
  - Other programs available
- If unsuccessful, no longer eligible for future rehabilitations

4

CONSOLIDATION

- All outstanding student loans are consolidated to one loan for servicing. Also available for spouses.
- Must make 3 consecutive payments on defaulted loans.
- Removes default status from the loans.
- Eligible for other programs.

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DEFERMENT

- Temporary Payment Issues:
  - Cancer Treatment
  - Economic Hardship
  - Graduate Fellowship
  - In-School
  - Military Service and Post-Active-Duty Students
  - Parent PLUS Borrowers
  - Rehabilitation Training
  - Unemployment
- No interest accrues for subsidized loans. Accrues for unsubsidized and PLUS loans.

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FORBEARANCE

- Direct, FFEL and Perkins loans can be granted in servicer's discretion for:
  - Financial Difficulties
  - Medical Expenses
  - Change in Employment
  - Other Acceptable Reasons
- Discretionary forbearance lasts up to 12 months, Can be renewed annually for up to 3 years if condition persists.

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FORBEARANCE

- Servicer must grant forbearance if:
  - Service in an AmeriCorps position
  - Qualify under Dept of Defense Student Loan Repayment Program
  - Medical or dental internship and meet qualifications
  - Member of National Guard activated by governor
  - Student loan is 20% or more of gross income (3-year limit)
  - Teaching at a position which qualifies for loan forgiveness
- Last for up to 12 months with annual renewal.
- Must maintain payments pending approval to avoid default.

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TRADITIONAL REPAYMENT PLANS

- Standard Repayment Plan
  - Fixed monthly payments for up to 10 years
- Graduated Repayment Plan
  - Initial payment covers at least interest
  - Payment increases every 2 years over 10 year period
- Extended Payment Plan
  - $30,000 threshold
  - 25 years to pay
  - Fixed or graduated payments

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INCOME-DRIVEN REPAYMENT PLANS

- Revised Pay As You Earn Repayment (REPAYE) Plan
- Pay As You Earn (PAYE) Plan
- Income-Based Repayment (IBR) Plan
- Income-Contingent Repayment (ICB) Plan

Loan Simulator (https://studentaid.gov/loan-simulator/) helps with decision

Any balance remaining after plan is forgiven but is generally taxable

Need to recertify every year to determine proper payment or may be removed from the program and placed in standard plan

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INCOME DRIVEN REPAYMENT PLANS

Revised Pay As You Earn

- 10% of discretionary income (Household Income less 150% of poverty guideline for family in state)
- Up to 20 years undergraduates
- Up to 25 years if some graduate
- Payment based on tax returns & current family size
- Possibly can exceed 10 plan

Pay As You Earn

- 10% of discretionary income
- Household income considered if file joint return with spouse
- Up to 20 years
- Never pays more than 10 year plan

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INCOME DRIVEN REPAYMENT PLANS

Income Based Repayment

- Lasts up to 20 years if loan taken after 7/1/14 and 25 years if taken out prior
- Monthly payment is 10-15% of discretionary income
- Will not exceed 10 year payment plan
- Payments calculated annually based on income and family size
- Spouse's income considered if file joint tax return

Income-Contingent Repayment

- Last for up to 25 years
- Payment is lesser of 20% of discretionary income OR amount paid over 12 year repayment plan
- Payments calculated annually based on income and family size
- May exceed 10 year plan
- Spouse's income considered if file joint tax return

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WHAT YOU ALL PROBABLY KNOW

- On August 24, 2022 DOE announced targeted student loan debt cancellation programs based on the continuing impact of COVID-19
- Applies to direct federal loans only
- Eligible borrowers limited to annual income during the pandemic of up to $125,000 ($250,00 for married couples and head of household)
- Forgives up to $20,000 in Pell Grants and $10,000 for all others
- For IDRs, discretionary income reduced from 10% to 5% for undergrad loans
- Public Service Loan Forgiveness would count partial, late payments Deferments and forbearances would credited
- Would hold colleges accountable when falling belov
- Would disclose college programs with the worse deb
- Currently stayed pending decision from SCOTUS

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WHAT MOST OF YOU PROBABLY DO NOT KNOW

- Actually before the August 2022 announcement of targeted student loan relief due to the pandemic, the DOE was actually already making important changes to IDR plans and debt forgiveness.
- One change is a revision to the REPAYE program to increase 'reasonable expenses' allowed before calculating the IBR payment. This provision is working it's way through Congress but is set to increase the expense calculation to 225% of the poverty index vs. current 150%
- But the biggest change - NOT under an executive order from President Biden but instead being conducted by the DOE under regulatory power over IDRs already granted by Congress – meaning not subject to challenge like the August 2022 relief is account audits
- Recognition that the IDR program was not working the way that it was supposed to and that borrowers were in many instances driven to increased indebtedness through forbearance when they would have qualified for IDR and just weren't provided appropriate lender guidance
- Chief initiative is a One Time Payment Count Adjustment for Eligible IDR borrowers

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WHAT IS BEING AUDITED

- All William D. Ford Federal Direct Loan Program Loans (Direct Loans) and **federally owned** (not federally backed) Federal Family Education Loan Program Loans (FFEL Loans like Subsidized and Unsubsidized Stafford Loans). HOWEVER, most FFEL are privately owned by companies and only backed by the feds, so those MUST consolidate into a Direct Loan by May 1, 2023 to be eligible for this account adjustment.
- Basically borrowers will get credit towards their 20/25 year plan for:
  - ALL months payments were made (regardless of the type of payment plan they were on – so even if before were IBR)
  - ALL forbearance months IF:
    - They were at least a 12 month consecutive forbearance OR
    - There were 36 months or more cumulative forbearance time, any months
  - ALL deferments before 2013 except in-school deferments
    - Military and economic hardship deferments post 2013 also count

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WHAT DOES NOT COUNT TOWARD AUDIT / WHAT DOES AUDIT DO?

- Months in default do not count towards IDR adjustment
- Time in forbearance for a bankruptcy does not count UNLESS paying under a plan that maintains an IDR plan
- Once the audit is completed, anyone with 20 years credit if ONLY undergrad loans; 25 years if ANY of the loans are grad loans, gets immediate forgiveness – purpose of IDR being that no one pays more than 25 years for student loans
- DOE estimates 3.6 million borrowers will received at least 3 years of credit towards forgiveness
- If additional time is required after recount, must remain on IDR to accumulate that time
- American Rescue Plan Act included a provision the excludes from gross income qualifying student loans that are discharged between 12/31/20 to 1/1/26

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STATUS

- The DOE originally promised that the one-time account adjustments would be completed by July 2023 (with the idea they would all be done before repayment restarts August 2023)
- However in March 2023 the DOE updated the status of the announcement to indicate their budget was not sufficient to meet the initial deadline and although some borrowers will begin to see loans forgiven in spring 2023, the Dept will continue to discharge loans as they reach the needed months, but that 'all other borrowers will see their accounts updated in 2024'
- https://studentaid.gov/announcements-events/idr-account-adjustment
- Politics?

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NEW DOJ GUIDELINES FOR BANKRUPTCY DISCHARGES

- Joint effort by DOE and DOJ to stream-line review of requests for discharge through bankruptcy
  - provides clear and consistent expectations
  - reduces debtors' burdens
  - increases stipulations of undue hardship
- Guidance does not create enforceable rights to be used against DOJ or DOE – instead just process and standards designed to reach settlement
- ONLY applies to DOE loans
- Applies to any case (7 or 13) open on or after November 17, 2022
- Adversary Complaint still filed but with new Attestation added
- Same "Undue Hardship" standards apply under the 3 part "Brunner" test, only the review process changes

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"BRUNNER" TEST 'modified'

- Guidelines on:
- 1) Present Ability to Pay – using existing bankruptcy standards developed via the IRS, DOJ will calculate reasonable expenses and compare against income – if expenses equal or exceed income, presumed lack of ability to pay
- 2) Future Ability to Pay – determine present inability to pay will persist if certain factors – such as being at retirement age, disability or chronic injury, protracted unemployment (5 of 10 years), lack of degree or extended repayment status (more than 10 years out of school) – are present.
- 3) Good Faith Efforts to Pay – focus on objective criteria such as whether the borrower made a payment, contacted DOE or servicer regarding deferment or forbearance, applied for IDR, applied for consolidation, engaged meaningfully in examining options
- Upon filing of the Attestation with this information, AUSA will review the account history, loan details and attestation – then submits any recommendation for settlement, along with DOE's recommendation, for approval within the local US Attorney's office.

SESSION #2

Family Law

"The ABC's of Family Law: An Overview of Divorce, Custody and PFA's"

No handouts

Presented by: Natalie Burston, Esquire,
Ebony Hammond, Esquire &
Karen Miller, Esquire

SESSION #3

"PBA Malpractice Avoidance" (Ethics)

Presented by: Edwin A. Schwartz, Esquire

PENNSYLVANIA BAR ASSOCIATION

Your Other Partner

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

USI AFFINITY

Avoiding Legal Malpractice

Identifying actions you can take to more effectively manage your risks

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 Assistance 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.

Pennsylvania Bar Association: 100 South Street, PO Box 186, Harrisburg, PA 17108-0186 Phone: 800.932.0311
Western Pennsylvania Office: Heinz 57 Center, 339 Sixth Avenue, Suite 760, Pittsburgh, PA 15222

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 program

- 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

- Succession Planning Toolkit
- 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

Avoiding Legal Malpractice

The 2023-2024 Avoiding Legal Malpractice Program
A benefit provided by the Pennsylvania Bar Association and USI Affinity

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

3

Recent Ethics Opinions…

In 2021 and 2022, the PBA Legal Ethics and Professional Responsibility Committee issued a number of significant opinions on issues impacting your practice.

- Ethical obligations for lawyers, using email and transmitting confidential information
- Ethical considerations for lawyer storing information relating to the representation of a client on a smart phone
- Ethical considerations for lawyers, practicing law from physical locations where they are not licensed
- Ethical considerations in the handling of flat, earned upon receipt and nonrefundable fees
- Ethical considerations relating to use of medical marijuana
- Ethical considerations for lawyers, retaining original wills
- Use of attorney IOLTA accounts for real estate settlement transactions
- Attorney's obligations to request counsel fees, under section 440 of the workers, compensation act

These opinions and more can be accessed on the PBA website.
PBA members can also reach the Ethics Hotline, by calling 800-932-0311.

A message from the D-Board…

Emergency Succession Planning

A succession plan requirement in the annual attorney registration "is going to become a reality in Pennsylvania very soon…" "It's coming, for sure."

"… you should know that a lot of the states that you are cross-admitted in are going to be doing this as well."

"trying to balance everything and come up with a rule that's going to be able to cover everybody without making it too hard on some people and too easy on others." "Really, just protecting the clients is kind of where the balancing act is going to be."

"We are considering requiring that lawyers designate a successor," Farrell said. "We're considering making that a mandatory question on the annual registration form."

Potential rollout date, he said, is sometime in 2023.

See handout - Plan Now: Don't Wait for Disaster to Cause Succession Catastrophe, PA Bar News article, February 7, 2022

A message from the D-Board…

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.

Succession Planning Data

released on October 19, 2022 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.	3,769	5.92%
I have a successor attorney. My successor is a law firm.	14,660	23.01%
I do not have a successor because I do not have PA clients.	31,217	49.00%
I do not have a successor and I do have PA clients.	**14,060**	**22.07%**
Total	63,706	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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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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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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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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Professional Liability Issues for Attorneys

Presented by:

- **Edwin A.D. Schwartz, Esquire**
  - McNees Wallace & Nurick LLC
  - Office: Harrisburg, PA
  - Phone: 717.237.5201
  - eschwartz@mcneeslaw.com

Legal Malpractice

- In order to prevail in a claim for legal malpractice sounding in negligence, a plaintiff must plead and prove the following:
  - employment of the attorney or other basis for duty;
  - the failure of the attorney to exercise ordinary skill and knowledge; and
  - that such negligence was the proximate cause of the actual damages.
  - Kituskie v. Corbman, 522 Pa. 275, 714 A.2d 1027 (Pa. 1998).
- Difficult to prove all four elements
  - It is the "practice" of law not the "perfection" of law.
  - Self-governing profession – the Rules of Professional Conduct cannot form the basis for a claim of legal malpractice (Preamble ¶ 19)

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"Case within a Case"

- The "case within a case" doctrine requires a plaintiff to demonstrate, by a preponderance of the evidence, that they would have prevailed in the underlying action had it not been for the defendant attorney's negligence. Kituskie, 714 A.2d at 1030. **It is insufficient for a plaintiff to speculate as to whether he or she would have prevailed in the underlying matter**.
- A plaintiff bears the burden of establishing, by a **preponderance of the evidence**, that he or she has sustained "**actual loss**" as a proximate result of the defendant attorney's negligence. See Rizzo v. Haines, 555 A.2d 58 (Pa. 1989); See also, Myers v. Robert Lewis Siegle, P.C., 751 A.2d 1182 (Pa. Super. 2000).

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Damages

- Difficult to prove damages (real, tangible and quantifiable)
- The law establishes that a claimant, as a matter of law, may **not** base his/her claim upon speculation and conjecture.
  - Kituskie v. Corbman, 552 Pa. 275, 741 A.2d 1027 (1998);
  - Rizzo v. Haines, 520 Pa. 484, 555 A.2d 58 (1989);
  - Mariscotti v. Tinari, 335 Pa. Super., 485 A.2d 56 (1984);
  - Pashak v. Barish, 303 Pa. Super. 559, 450 A.2d 67 (1982).
- This issue of "predicting" the outcome of an action but for the actions/omissions of an attorney has been ruled as pure speculation and most likely will not survive a dispositive motion.

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Examples of Speculation

- Another expert
- Another exhibit
- An additional deposition
- Sued another and/or different party
- Filed a different claim (breach of contract vs. defamation)
- "Could of, Should of, Would of"
- "Monday-morning quarterback"
  - It is impossible to state whether a jury would have awarded more damages if a suit had been filed against another potential party or under another theory of liability. It is indeed possible that a smaller verdict would have been reached or a defense verdict ultimately would have been rendered. Thus, sanctioning these "Monday-morning quarterback" suits would be to permit lawsuits based on speculative harm; something with which we cannot agree. Muhammad v. Strassburger, McKenna, Messer, Shilobod and Gutnick, 526 Pa. 541, 587 A.2d 1346 (1991)

Professional Judgment

- An informed judgment, even if subsequently proven to be erroneous, is not negligence. Mazer v. Security Ins. Group, 368 F. Supp. 418 (E.D. Pa. 1973)
- In this Commonwealth the litigant is the complete master of his own cause of action in matters of substance; he may press it to the very end regardless of the facts and law arrayed against him. Archbishop v. Karlak, 299 A.2d 294 (Pa. 1973).

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Alleged Error Type

- Administrative Error – 17%
  - You are responsible for your support staff
- Substantive Error – 69%
- Intentional Wrong – 14%
  - Coverage issues lurk for intentional acts

Claims by Practice Area

- Small firms have disproportionate amount of claims
  - Solo – 37%
  - Firms with 2-5 attorneys – 33%
  - Firms with 6-10 attorneys – 9%
  - Firms with 11-39 attorneys – 10%
  - Firms with 40+ attorneys 11%

Claims by Practice Area

- New lawyers with less than two years practice reported the least amount of claims
- Lawyers in practice 11 to 20 years reported the most

Claims by Practice Area

- Most disturbing increase involves claims of intentional wrongs
  - (fraud, theft, abuse of process, libel, etc.)
- increased from previous high of 9.8% to 13.8%

Practice Areas

- Personal injury:
  - Dabbling
  - Docket Control
  - Late filings
  - Out of state practice
  - Medical liens and tax consequences

Practice Areas

- Real Estate:
  - Drafting mistakes
  - Reliance on third party searches
  - Volume
  - Lien, zoning and inspection issues
  - Severance of estate rights (gas, oil, etc.)

Practice Areas

- Family Law:
  - Identification and evaluation of marital assets
  - Promising Results
  - Reliance on prior counsel evaluations
  - Lack of communication (not returning phone calls)
  - Representing Husband and Wife

Practice Areas

General Business:

- Failure to identify "real" client
- Deal going bad
- Ownership interest in entity

Practice Areas

Estates:

- Drafting errors
- Competency of client issues
- Tax implications
- Possible dissatisfied third party beneficiaries
- Pennsylvania law permits intended third-party beneficiaries to pursue breach of contract claims against attorneys under very limited circumstances – frustrated by inheritance Guy v. Liederbach, 459 A.2d 744 (Pa. 1983)
- Anticipated family fights over $$$$$

Common Allegations Against Attorneys

- Bad result = professional negligence
- Clients often view an attorney's performance by the outcome of the deal/transaction
- Unrealistic goals for a transaction set expectations for the attorney (**Listen** to your client and **Document** the file)
- Attorney should have done a better job
- Attorney did not follow the client's direction
- **Engagement Letters**

Common Allegations Against Attorneys

- Not active as my attorney (failure to communicate)
  - "If it isn't in the file, it didn't happen"
  - If client feels abandoned by attorney, claim is inevitable
- This is the most common reason for disciplinary complaints being filed
  - "My lawyer did not return my phone call"

Common Allegations Against Attorneys

- Unfair Trade Practice Consumer Protection Law (UTPCPL)
  - Not applicable to conduct of attorneys in scope of legal work
  - Applicable to attorneys if doing other work (title work, investment advice, ownership interest, etc.)
  - Be careful about wearing too many hats
    - **And make sure the client knows the limits of your involvement**

Common Allegations Against Attorneys

- Rules of Professional Conduct
  - Not basis for civil liability
  - However, if there are DB findings, may be used as evidence (if discipline imposed was public) – Court's discretion
  - Private reprimands will remain private

Technology

- Friend or Foe
- Social media? (Facebook, LinkedIn, Blogs, Twitter)
- Client's expect instant responses
- Always in contact
- Stay up-to-date on changes in technology
- Held to most current standard
- Always make sure your communications are secure when communicating via email or text
- Cloud Computing? Who "owns" the cloud? Is it secure?

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Top 10 Ways to Get Sued for **Malpractice**

10. Make promises to the client

- "this case is a slam-dunk"
- If you can't deliver on a promise, you will pay the price.

Top 10 Ways to Get Sued for **Malpractice**

9. Allow client to have (and keep) unrealistic expectations

- "Your case is worth One Million Dollars" (with pinky raised to lips Austin Powers style)

Top 10 Ways to Get Sued for **Malpractice**

8. Miss a filing deadline

- "Oops – sorry but I was counting on my paralegal to get that filed"
- Blaming support staff never works as a viable defense.

Top 10 Ways to Get Sued for **Malpractice**

7. Inappropriate relations with clients and/or their family members

- These relationships always end bad for the licensed professional

Top 10 Ways to Get Sued for **Malpractice**

6. Puff regarding relationship with other counsel and/or court

- "We go way back"
- If the Court sees that you use your relationship with the court as a marketing tool, the relationship will be severed by the court.

Top 10 Ways to Get Sued for **Malpractice**

5. Don't return calls, letters or e-mails

- The client who won't stop calling.
- If the client feels you don't care, then they won't care about you when they decide to file suit.

Top 10 Ways to Get Sued for **Malpractice**

4. Dabble in an area of law you are not familiar with as a favor to friend/family

- "Sure, I can help with that, it's easy"
- **Never run in the dark, you never know what you may hit**!

Top 10 Ways to Get Sued for **Malpractice**

3. Cookie-cutter approach

- If it worked once, it has to work again.
- Not all cases are the same. While you don't have to reinvent the wheel, you must recognize each case as unique.

Top 10 Ways to Get Sued for **Malpractice**

2. Abandon your client

- If you withdraw, the client will hold you responsible for everything that happens afterward.

Top 10 Ways to Get Sued for **Malpractice**

1. Sue your client for fees

- Analyze the possible recovery of the outstanding fees against the loss of your deductible and the costs associated with defending a suit

Conclusion

REMEMBER…

- Your entire file (and everything in it and not in it) may be used as an exhibit against you at some later date.
- Practice defensively - document everything and watch what you say.

Thank You!

- Questions?

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SESSION #4

Land Use Controls – Preemption by State Statutes of Local Land Use and Police Power Ordinances

&

Environmental Law: How Federalism Dictates Who Regulates What

Presented by: Dennis Whitaker, Esquire

LAND USE CONTROLS – PREEMPTION BY STATE STATUTES OF LOCAL LAND USE AND POLICE POWER ORDINANCES

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PREEMPTION

- The law of preemption is well established in the Commonwealth.
- The general rule is that a municipal ordinance cannot be sustained where it is contradictory to or inconsistent with a state statute. In those instances, the judicially created preemption principle applies to bar a municipality, as an agent of the state, from acting contrary to the state. *Duff v. Northampton Township*, 532 A.2d 500 (Pa. Cmwlth. 1987), *aff'd per curiam*, 550 A.2d 1939 (Pa. 1988).
- Two types of ordinances generally at issue: police power (public health safety and welfare) adopted under a municipal enabling act such as the Second-Class Township Code and zoning and subdivision ordinances adopted under the Municipalities Planning Code (MPC), 53 P.S § 10101 et. seq.

The Basic Framework

- Municipalities are creatures of the state and have no inherent powers of their own. Rather, they "possess only such powers of government as are expressly granted to them and as are necessary to carry the same into effect." *Huntley & Huntley, Inc. v. Borough Council of the Borough of Oakmont*, 964 A.2d 855, 862 (Pa. 2009).
- Even where the state has granted powers to act in a particular field, such powers do not exist if the Commonwealth preempts the field. *Id*.

The Basic Framework

- The preemption doctrine establishes a priority between potentially conflicting laws enacted by various levels of government. Under this doctrine, local legislation cannot permit what a state statute or regulation forbids or prohibit what state enactments allow. *See generally Liverpool Township v. Stephens*, 900 A.2d 1030, 1037 (Pa. Cmwlth. 2006) (*quoting Duff,* 532 A.2d at 504.)
- Additionally, a local ordinance may not stand as an obstacle to the execution of the full purposes and objectives of the Legislature. *Huntley & Huntley,* 964 A.2d at 863.

Three Types of Statutes

- First, there are state statutes that expressly allow municipalities to enact ordinances that are necessary to promote the purpose of the statute, provided the ordinances are not inconsistent with the statute or rules and regulations promulgated thereunder.
- Second, there are statutes that expressly forbid municipal enactments.
- Third, there are statutes that regulate an industry or occupation, but are silent on whether local legislation is preempted in the field.
- *Mars Emergency Medical Services, Inc. v. Township of Adams*, 740 A.2d 193 (Pa. 1999), *citing Western Pennsylvania Restaurant Ass'n v. Pittsburgh*, 77 A.2d 616, 619-620 (Pa. 1951).

Three Types of Preemption

- "Express" preemption: "where a statute specifically declares it has planted the flag of preemption in a field, all ordinances on the subject die away as if they did not exist."
- "Field" preemption: "if the statute is silent on supersession, but proclaims a course of regulation and control which brooks no municipal intervention, all ordinances touching the topic of exclusive control fade away into the limbo of 'innocuous desuetude'".
- "Conflict" preemption: which acts to preempt any local law that contradicts or contravenes state law.
- *Nutter v. Dougherty*, 938 A.2d 401, 404 (Pa.2007), *citing Department of Licenses and Inspections, Board of License and Inspection Review v. Weber*, 147 A.2d 326 (Pa. 1959). *See also, Mars*.

Conflict Preemption

- Here, municipal regulation is prohibited and thus is preempted where it is inconsistent with, or contradictory to, state law. *Mars*, 740 A.2d at 195.
- *Mars* further provides that a municipal regulation may survive despite imposing requirements beyond those provided in a state statute if those requirements are reasonable and necessary to aid and further the purpose of the state statute. *Id*.
- Assessing the extent to which a municipal ordinance duplicates but does not conflict with a state statute requires a determination of the legislative intent. *Id*.

Five Questions

- Commonwealth Court, in *Duff*, 532 A.2d at 505, posed the following five questions pertinent to determining the legislative intent:
- (1) Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, forbid what the legislature has permitted?
- (2) Was the state law intended expressly or impliedly to be exclusive in the field?
- (3) Does the subject matter reflect a need for uniformity?
- (4) Is the state scheme so persuasive or comprehensive that it precludes coexistence of municipal regulation?
- (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of our legislature?

Supreme Court Reluctance to Hold Local Ordinances Preempted

- The Court has found total preemption only in three areas: alcoholic beverages, anthracite strip mining and banking.
- The Court in *Council of Middletown Township v. Benham*, 523 A.2d 311 (Pa. 1987), described the test for preemption in Pennsylvania, holding that in order to preempt the field in which the general assembly has legislated, the statute must either (1) state on its fact that local legislation is forbidden; or (2) indicate an intention on the part of the legislature that it should not be supplemented by municipal bodies.
- The Court stated that if the General Assembly has preempted a field, the state has retained all regulatory and legislative power for itself, and no local legislation is permitted. Analyzing the Sewage Facilities Act, the Court did not believe that the legislature intended to preempt the field where the Act does not state that municipal legislation is forbidden.

Differences in Preemption Jurisprudence

- The Supreme Court also has stated that it is reluctant to strike down a local ordinance in cases where a state statute does not directly and inherently conflict with the zoning power.
- Commonwealth Court, on the other hand, consistently has found preemption where there is a pervasive regulatory scheme.

QUESTIONS TO CONSIDER REGARDING PREEMPTION

- Pertinent questions in determining whether a local ordinance is preempted by state law are:
- (1) Does the ordinance conflict with state law?
- (2) Was the state law intended expressly or impliedly to be exclusive in the field?
- (3) Does the subject matter reflect a need for uniformity?
- (4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulations?
- (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?

Whither Ordinances Adopted Per the MPC?

- Land use ordinances (i.e., zoning and subdivision ordinances) under the MPC can be a different animal.
- The purposes of zoning controls are both broader and narrower in scope than most subject specific state statutes. They are narrower because they ordinarily do not relate to matters of statewide concern but address only specific attributes and developmental objectives of the locality in question.
- However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development. *See* 53 P.S. § 10606; *see also* § 10603(b) (reflecting that, under the MPC zoning ordinances are permitted to restrict or regulate such things as the structures built upon land and watercourses and the density of the population in different areas).

Whither Ordinances Adopted Per the MPC?

- Zoning is the core municipal function of designating different areas of the municipality for different uses. *See* 53 P.S. § 10105 (reflecting that the legislative purposes behind the MPC include allowing localities to promote the safety, health, and morals of the community, to accomplish coordinated development, and to guide uses of land and structures).
- "The [MPC] is the Legislature's mandate for the unified regulation of land use and development." *Gary D. Reihart, Inc. v. Carroll Township,* 409 A.2d 1167, 1170 (Pa. 1979)

Whither Ordinances Adopted Per the MPC?

- Compare *Huntley & Huntley* with *Range Resources-Appalachia, LLC v. Salem Township*, 964 A.2d 869 (Pa. 2009).
- In *Huntley & Huntley*, the Court addressed whether Oakmont Borough's zoning ordinance was preempted by the 1984 Oil and Gas Act. Specifically, the issue was whether the Act preempted the Borough's ability to designate where in the Borough well pads and the like could be sited.

Whither Ordinances Adopted Per the MPC?

- The Court reviewed the Ordinance and the Act and concluded:
- "the express preemptive language of [the Act] pertains to features of well operations and the Act's stated purposes. This limitation on preemption regarding MPC-enabled legislation appears to reflect the General Assembly's recognition . . . that, while effective oil and gas regulation in service of the Act's goals may require the knowledge and expertise of the appropriate state agency, the MPC's authorization of local zoning laws is provided in recognition of the unique expertise of municipal governing bodies to designate where different uses should be permitted in a manner that accounts for the community's development objectives, its character, and the 'suitabilities and special nature of particular parts of the community.'"
- "Accordingly . . . we conclude that the Ordinance serves different purposes from those enumerated in the [Act], and hence, that its overall restriction on oil and gas wells in R–1 districts is not preempted by that enactment."

Whither Ordinances Adopted Per the MPC?

- In *Salem Township*, the township enacted a general (not MPC) ordinance directed at regulating surface and land development associated with oil and gas drilling operations.
- Range Resources and others challenged the ordinance as violative of the MPC and as preempted by the Oil and Gas Act. After the parties filed cross-motions for summary judgment, the township enacted, for the first time, a comprehensive subdivision and land development Ordinance, thereby supplanting the earlier ordinance.
- This new ordinance was adopted pursuant to the MPC and included as "Appendix B" a wholesale re-enactment of the oil and gas regulations found in the prior ordinance. In addition to its substantive restrictions on oil and gas drilling activities, the Ordinance established a fee for permit applications and provided for criminal penalties upon failure to comply with its terms.

Whither Ordinances Adopted Per the MPC?

- *Salem Township cont.*
- The trial court granted partial summary judgment in favor of Range on the basis that the Act preempted the Township's oil and gas regulations. On appeal, Commonwealth Court affirmed on the basis of the trial court's opinion. The Supreme Court granted review and held that:
- "not only does the Ordinance purport to police many of the same aspects of oil and gas extraction activities that are addressed by the Act, but the comprehensive and restrictive nature of its regulatory scheme represents an obstacle to the legislative purposes underlying the Act, thus implicating principles of conflict preemption. *See generally Huntley,* . . . (observing that precepts of conflict preemption apply to municipal laws that obstruct the full goals of the state legislature); *Nutter v. Dougherty,* . . . (local laws that contradict or contravene state laws are preempted under the rubric of conflict preemption). Furthermore, its stated purposes overlap substantially with the goals as set forth in the Oil and Gas Act, thus implicating the second statutory basis for express preemption of MPC-enabled local ordinances. In view of the Ordinance's focus solely on regulating oil and gas drilling operations, together with the broad preemptive scope of [the Act] with regard to such directed local regulations, we agree with the common pleas court's conclusion that each of the oil and gas regulations challenged . . . is preempted by [the Act] and its associated administrative regulations." Salem, 964 A.2d at 877.

Takeaways

- Local police power ordinances can regulate only that which a particular municipal enabling ordinance allows. Duplicating or exceeding state requirements for landfills, mines, land application of biosolids, etc., under the guise of regulating nuisances or the like will, if challenged, result in the ordinance being invalidated as preempted by state statute.
- Land development ordinances enacted under the MPC may regulate some aspects of activities controlled by state statutes where the local regulation is in the nature of and consistent with powers granted under the MPC (*Huntley*). Land use ordinances that seek to duplicate or exceed state regulation under the guise of the MPC likely will not survive (*Salem*).

Preemption in the Commonwealth Summarized

- The matter of preemption is a judicially created principle based on the proposition that a municipality, as an agent of the state, cannot act contrary to the state.
- Municipalities have been granted limited police power over matters of local concern and interest, but the scope of such power does not extend to subjects inherently in need of uniform treatment or to matters of general public interest which necessarily require exclusive state policy.
- A municipality may be foreclosed from exercising police power it would otherwise have if the state has sufficiently acted in a particular field and, beyond manifest conflicts with state policy, the ultimate question is the intent of the legislature. *Duff*.

Preemption in the Commonwealth Summarized

- The Supreme Court has found total preemption in only three instances.
- Commonwealth Court's decision in *Duff* supplies the rubric to be applied in those instances calling for "conflict" preemption analysis.
- The limited police power granted to municipalities over matters of local concern does not extend to these subjects which are inherently in need of uniform treatment, or to matters of general public interest that by necessity require exclusive state policy.

Preemption in the Commonwealth Summarized

- Commonwealth Court has developed an extensive body of case law which addresses those statutes that require "conflict" preemption analysis.
- There, the "ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act." *Duff*, 532 A.2d at 504.
- In making this determination of legislative intent, the touchstone principle remains that a municipal ordinance cannot be sustained where it is contradictory to or inconsistent with a state statute. *Id*.

Thank you!

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LAND USE CONTROLS – PREEMPTION BY STATE STATUTES OF LOCAL LAND USE AND POLICE POWER ORDINANCES

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INTRODUCTION

These materials examine the issue of preemption by state environmental statutes of local ordinances, particularly those dealing with land use issues. We will examine the relevant case law; highlight the differences in preemption jurisprudence between the Commonwealth Court and the Pennsylvania Supreme Court, and identify the pertinent questions to be asked when evaluating whether a local ordinance is preempted by state law.

PREEMPTION

The law of preemption is well established in the Commonwealth. Germane to this inquiry, the general rule is that a municipal ordinance cannot be sustained where it is contradictory to or inconsistent with a state statute. In those instances, the judicially created preemption principle applies to bar a municipality, as an agent of the state, from acting contrary to the state. *Duff v. Northampton Township,* 532 A.2d 500 (Pa. Cmwlth. 1987), *aff'd per curiam,* 550 A.2d 1939 (Pa. 1988).

In setting the standard for preemption, the Pennsylvania Supreme Court has recognized three types of statutes and provided the way each must be analyzed to determine whether local legislation is preempted. First, there are state statutes that expressly allow municipalities to enact ordinances that are necessary to promote the purpose of the statute, provided the ordinances are not inconsistent with the statute or rules and regulations promulgated thereunder. Second, there are statutes that expressly forbid municipal enactments. Third, there are statutes that regulate an industry or occupation, but are silent on whether local legislation is preempted in the field. *Mars Emergency Medical Services, Inc. v. Township of Adams,* 740 A.2d 193 (Pa. 1999), *citing Western Pennsylvania Restaurant Ass'n v. Pittsburgh,* 77 A.2d 616, 619-620 (Pa. 1951).

The Supreme Court, in *Nutter v. Dougherty*, 938 A.2d 401, 404 (2007), reiterated the principles of the doctrine of preemption and stated:

> Before relating the background of this case, it is necessary to establish, in broad strokes, the principle of state preemption of local lawmaking authority and its several forms. In *Department of Licenses and Inspections, Board of License and Inspection Review v. Weber,* 147 A.2d 326 (Pa. 1959), this Court explained two of the three closely related forms of preemption as follows:
>
> > Of course, it is obvious that where a statute specifically declares it has planted the flag of preemption in a field, all ordinances on the subject die away as if they did not exist. It is also apparent that, even if the statute is silent on supersession, but proclaims a course of regulation and control which brooks no municipal intervention, all ordinances touching the topic of exclusive control fade away into the limbo of 'innocuous desuetude.'

> *Id.* at 327. In addition to those two forms of preemption, respectively "express" and "field preemption," there is also a third, "conflict preemption," which acts to preempt any local law that contradicts or contravenes state law. *See Mars Emergency Medical Servs. v. Township of Adams,* 740 A.2d 193, 195 (Pa. 1999) (citing, *inter alia, W. Penna. Rest. Ass'n v. Pittsburgh,* 77 A.2d 616, 619-620 (Pa.1951)) ....

While the preemption question is easily addressed in the first and second instances, the third type of statute requires a more detailed analysis. In that third instance, municipal regulation is prohibited and thus is preempted where it is inconsistent with, or contradictory to, state law. *Mars,* 740 A.2d at 195. *Mars* further provides that a municipal regulation may survive despite imposing requirements beyond those provided in a state statute if those requirements are reasonable and necessary to aid and further the purpose of the state statute. *Id.* Assessing the extent to which a municipal ordinance duplicates but does not conflict with a state statute requires a determination of the legislative intent. *Id.*

The Commonwealth Court, in *Duff,* posed the following five questions pertinent to determining the legislative intent:

> (1) Does the ordinance conflict with the state law, either because of conflicting policies or operational effect, forbid what the legislature has permitted? (2) Was the state law intended expressly or impliedly to be exclusive in the field? (3) Does the subject matter reflect a need for uniformity? (4) Is the state scheme so persuasive or comprehensive that it precludes coexistence of municipal regulation? (5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of our legislature?

Duff, 532 A.2d at 505. In addition to this analysis, the Supreme Court in *Council of Middletown Township v. Benham,* 523 A.2d 311 (Pa. 1987), underscored its reluctance to hold that local ordinances are preempted by noting that the court has found total preemption only in three areas: alcoholic beverages, anthracite strip mining and banking. *See also Mars; Western Pennsylvania Restaurant Ass'n,* (both stating same).

The Court in *Benham* described the test for preemption in Pennsylvania, holding that in order to preempt the field in which the general assembly has legislated, the statute must either

(1) state on its fact that local legislation is forbidden; or
(2) indicate an intention on the part of the legislature that it should not be supplemented by municipal bodies.

If the General Assembly has preempted a field, the state has retained all regulatory and legislative power for itself, and no local legislation is permitted. Analyzing the Sewage Facilities

Act, the Court did not believe that the legislature intended to preempt the field where the Act does not state that municipal legislation is forbidden.

As noted above, the Pennsylvania Supreme Court has only found legislative intent to totally preempt local regulation in only three areas:

(1) alcoholic beverages
(2) banking
(3) anthracite strip mining

The Court also has stated that it is reluctant to strike down a local ordinance in cases where a state statute does not directly and inherently conflict with the zoning power. The Commonwealth Court, on the other hand, consistently has found preemption where there is a pervasive regulatory scheme.

In summary, while the Supreme Court has found total preemption in only three instances, *Mars* and the Commonwealth Court's decision in *Duff* supply the rubric to be applied in those instances where the statute at issue falls within the third category described above. In addition, the Supreme Court's decisions and the Commonwealth Court's jurisprudence establish that the limited police power granted to municipalities over matters of local concern does not extend to these subjects which are inherently in need of uniform treatment, or to matters of general public interest that by necessity require exclusive state policy. The Commonwealth Court has developed an extensive body of case law which addresses those statutes that fall within the third category. Under those cases, the "ultimate question is whether, upon a survey of all the interests involved in the subject, it can be said with confidence that the legislature intended to immobilize the municipalities from dealing with local aspects otherwise within their power to act." *Duff,* 532 A.2d at 504. In making this determination of legislative intent, the touchstone principle remains that a municipal ordinance cannot be sustained where it is contradictory to or inconsistent with a state statute. *Id.*

CASE LAW

The Commonwealth Court has seen a large number of cases dealing with the interplay between state environmental statutes and local ordinances, especially those ordinances regulating land use. In many instances, the court has been called upon to determine whether the state statute preempts the local regulation. However, as the cases cited below illustrate, preemption issues in the environmental/land use context are a longstanding litigation subject. A sample of these cases from several courts and the Environmental Hearing Board is listed below by the state statute implicated.

A. **Solid Waste Management Act (SWMA)**

1. *Hydropress Environmental Services, Inc. v. Township of Upper Mount Bethel,* 836 A.2d 912 (Pa. 2003) (opinion announcing the judgment of the Court). The Supreme Court considered whether a municipal ordinance that purported to regulate the land application of processed sewage sludge ("biosolids") on areas

within the municipality was preempted by SWMA. In a plurality opinion, Justice Lamb joined by Chief Justice Cappy and Justice Nigro concluded that SWMA did not preempt the township's ordinance, finding instead that the township lacked the delegated power under the Second Class Township Code to enact the restrictions at issue. *Id.* at 919-920. Three other justices dissented from the lead opinion on the preemption issue. Rather than invalidating the township ordinance on the ground that enactment was an *ultra vires* act, Justices Castille, Saylor and Eakin would have held that SWMA preempts any local regulation of the land application of waste such as biosolids. *Id.* at 920-921. Justice Newman dissented on the basis that Hydropress lacked standing, and did not address the preemption claim. *Id.* at 921-924.

Justice Lamb's plurality opinion applied the Court's reading of the Sewage Facilities Act in *Council of Middletown Township v. Benham* to SWMA to find that SWMA's provisions are "the language of intergovernmental coordination and cooperation, not of preemption." *Id.* at 918-919. Justice Castille's dissent focused on the *Western Pennsylvania Restaurant Ass'n* Court's instruction that when ""the general tenor of [a] statute indicates an intention of the part of the legislature that it should not be supplemented by municipal bodies, that intention must be given effect and the attempted legislation held invalid." 836 A.2d at 921, *citing Western Pennsylvania Restaurant Ass'n,* 77 A.2d at 620 (citations omitted).

Hydropress, at least regarding the preemption issue, is a plurality opinion. As such, it does not constitute binding authority. *Commonwealth v. Bomar,* 826 A.2d 831, 843-844 n. 13 (2003). *See also, Interest of O.A.,* 717 A.2d 490,496 n. 4 (1998) (opinion announcing the judgment of the court) ("While the ultimate order of a plurality opinion, *i.e.* affirmance or reversal, is binding on the parties in that particular case, legal conclusions and/or reasoning employed by a plurality certainly do not constitute binding authority.") Nonetheless, another court which has considered *Hydropress* opined that "a fair reading of *Hydropress* suggests that six justices agree that municipalities lack the power to require 'permits to engage in the beneficial use or processing of municipal waste.'" *SYNAGRO - WWT, Inc. v. Rush Township,* 299 F. Supp. 2d 410,418 n. 2 (M.D. Pa. 2003).

2. *Liverpool Township v. Stephens,* 900 A.2d 1030 (Pa, Cmwlth. 2006). Affirming county court order enjoining enforcement of ordinance that regulates application of processed sewage sludge to agricultural land. Ordinance conflicted with SWMA and thus was preempted.

3. *Southeastern Chester County Refuse Auth. v. Zoning Hearing Bd. of London* Grove *Twp.,* 898 A.2d 680 (Pa. Cmwlth. 2006). Municipalities are not preempted from requiring setback and height requirements because they are traditional land use regulations that do not regulate the operation of a landfill.

4. *SYNAGRO*-WWT, *Inc. v. Rush Township,* 299 F.Supp. 2d 410 (M.D. Pa. 2003). This matter, as did *Hydropress,* concerned an attempt by a municipality to regulate the land application of biosolids through an ordinance requiring the land applier to, *inter alia,* obtain a municipal permit and to conduct various tests. The *SYNAGRO* court concluded that *Hydropress,* as a plurality opinion, was not controlling authority. 299 F. Supp. 2d at 418. Instead, the *SYNAGRO* court surveyed Commonwealth Court's SWMA preemption jurisprudence in the context of our Supreme Court's decisions in *Mars, Western Pennsylvania Restaurant Ass'n* and *Council of Middletown Township. Id.* at 415-419.

   Based upon that analysis, the *SYNAGRO* court concluded that municipalities cannot impose requirements beyond those established in SWMA and in Department regulations where those requirements would impede the daily operations of a solid waste facility. *Id.* at 419. Further, citing the Commonwealth Court's decisions in *Klein* (below) and in *Duff,* the *SYNAGRO* court stated that municipal regulations "cannot impose onerous requirements that stand as obstacles 'to the accomplishment and execution of the full purposes and objectives of the legislature.'" *Id.,* citing *Klein,* 705 A.2d at 949-950; *Duff,* 532 A.2d at 505. Using this rubric, the court held that the municipal permit requirements were preempted by SWMA.

5. *Municipality of Monroeville v. Chambers Dev. Corp.,* 491A.2d 307 (Pa. Cmwlth. 1985). Municipalities are preempted from regulating any operational aspects of a sanitary landfill.

6. *Plymouth Twp. v. Montgomery County,* 531 A.2d 49 (Pa. Cmwlth. 1987). Pervasive powers conferred upon DER with respect to transportation, processing, treatment, and disposal of solid waste preempted township's operations regulations purporting to require permits for waste processing, to regulate transportation and disposal of waste, and to prescribe limits upon design, capacity, and size of waste disposal facilities, including trash-to-steam refuse disposal plant.

7. *Southeastern Chester County Refuse Authority v. Bd. of Supv'rs of London* Grove *Twp.,* 545 A.2d 445 (Pa. Cmwlth. 1988). Township board of supervisors cannot impose conditions on an application for permit which will interfere with the operation of a sanitary landfill; the power to impose those conditions is preempted by SWMA.

8. *Kuhl v. Bd. of Supervisors of Greene Twp.,* 11 D.&C. 4th 568 (1991). A township's zoning ordinance prohibiting the disposal of solid waste in a residentially zoned district is not preempted by the SWMA.

9. *Moyer's Landfill, Inc. v. Zoning Hearing Bd. of Lower Providence Twp.,* 450 A.2d 273 (Pa. Cmwlth. 1982). Municipalities are not preempted from regulating the location of landfill sites in local zoning ordinances.

10. *Heasley v. DER and County Landfill,* 1991 EHB 1, 10-11. The process for obtaining local zoning approval and the permitted process under SWMA are two separate and distinct procedures. While a municipality may regulate the location of a solid waste disposal/processing facility through its zoning ordinances, that is not a matter which is required by SWMA to ensure that local zoning ordinances have been complied with before DER may issue a permit. See also, Hilltown Township v. DER, 1988 EHB 1009, 1012; Township of Washington v. DER, 1988 EHB 325, 327-8.

11. *Phoenix Resources, Inc. v. Duncan Twp.*, 155 F.R.D. 507, 1994 U.S. Dist. Lexis 7855 (M.D. Pa. 1994). When land use in question is management or disposal of solid waste, most local Pennsylvania ordinances are preempted by SWMA.

12. *Sunny Farms, Ltd. v. North Codorus Twp.,* 474 A.2d 56 (Pa. Cmwlth. 1984). Municipalities are not preempted from requiring a buffer zone around a proposed hazardous waste disposal facility because the Act does not preempt local zoning provisions that do not affect stricter geological and engineering standards than the state.

13. *Klein v. Straban Township,* 705 A.2d 947, 949-950 (Pa. Cmwlth. 1998). While municipal regulations that further SWMA's goals are permitted, such regulations cannot impose requirements which "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislators."

14. *Longenecker v. Pine Grove Landfill, Inc.,* 543 A.2d 215 (Pa. Cmwlth. 1988). In Longenecker, the Court stated that regulation of matters such as "hazardous waste...while based on the exercise of police power, require a broad scale plan under state control." *Id.* at 216-217. The *Longenecker* Court further held that while SWMA provides for state and municipal cooperation, municipal interference is "at a minimum," and is thus "limited to such matters of a purely local character, such as zoning." *Id.* at 217.

15. *Abbey v. Zoning Hearing Board of the Borough of East Stroudsburg,* 559 A.2d 107 (Pa. Cmwlth. 1989). Court distinguished between "ordinance provisions governing *where* the location of the facility may be (zoning provisions) and . . . how it may be technically designed and operated (operational regulation)." The *Abbey* Court stated that the "former is purely a local zoning function, while the latter falls within the purview of [the Department]." *Abbey,* 559 A.2d at 112.

16. *Township of Ross v. Crown Wrecking Co., Inc.,* 500 A.2d 1293 (Pa. Cmwlth. 1985). Affirming trial court holding that township ordinance purporting to

establish requirements as to air and noise pollution, hours of operation, vehicle maintenance and fencing was preempted by SWMA.

17. *Greater Greensburg Sewage Auth. v. Hempfield Township,* 291 A.2d 318-321 (Pa. Cmwlth. 1982). Holding that SWMA's predecessor statute effected a "limited preemption of the field of sewage facility operations, including the disposal of 'sludge' from such operations."

18. *Green Township v. Kuhl,* 379 A.2d 1383 (Pa. Cmwlth. 1977). Obtaining a waste disposal/landfill permit from the Department does not obviate the requirement to obtain local *zoning* or building permits.

19. *Kavanagh v.* London *Grove Township,* 382 A.2d 148 (Pa. Cmwlth. 1978), *aff'd per curiam,* 486 Pa. 133, 404 A.2d 193 (1979), *appeal dismissed,* 444 U.S. 1041 (1980). Court held that SWMA did not preclude a municipality from limiting through its *zoning* ordinance the type of landfill (municipal vs. privately owned) which could operate in residential zones.

SUMMARY: SWMA does not prohibit appropriate zoning regulations, i.e., regulations which meet certain procedural requirements, and which do not impose stricter engineering or geological standards than provided under state regulations.

B. **Municipal Waste Planning, Recycling & Waste Reduction Act (Act 101)**

1. *Pennsylvania Waste Indus. Ass'n v. Monroe Cnty. Mun. Waste Mgmt. Auth.*, 80 A.3d 546 (Pa. Cmwlth. 2013). Commonwealth Court held that while the Municipal Waste Planning, Recycling, and Waste Management Act preempted local fees covering recycling programs, the Act did not preempt other local fees covering waste management, and that administrative fees imposed by the authority related to its implementation and administration of county's solid waste management plan were not preempted by the Act.

2. *Pennsylvania Independent Waste Haulers Ass'n v. County of Northumberland,* 885 A.2d 1106 (Pa. Cmwlth. 2005). Relying upon *Municipality of Monroe* and upon *Duff,* the panel concluded that Act 101 preempted appellant counties' and municipal authority's imposition of an administrative fee

3. *JES/ PA Bethlehem Landfill Corp. v. County of Lehigh,* 887 A.2d 1289 (Pa. Cmwlth. 2005). Relying on *Duff* and on the earlier *Northumberland* decision, the court found that Act 101 preempted Lehigh's attempt to impose an administrative fee. In addition, the court concluded that the General Assembly preempted the field when it enacted the Waste Transportation Safety Act (Act 90), 27 Pa. C.S. §§ 6201-6209, thus barring Lehigh's attempt to license waste haulers.

4. *Pennsylvania Independent Waste Haulers Ass'n v. Twp. of Lower Merion*, 872 A.2d 224 (Pa. Cmwlth. 2005). Township was authorized to implement a licensing and inspection program for garbage containers located in the township.

5. *Northern Tier Solid Waste Auth. v. Department of Revenue*, 860 A.2d 1173 (Pa. Cmwlth. 2004). The term "operator" in Waste Transportation Safety Act includes a municipal waste-disposal authority such that General Assembly necessarily intended to impose solid waste disposal fee on municipal waste-disposal authorities to overcome general exemption of municipalities from taxation.

6. *Kasper Bros., Inc. v. Falls Twp.,* 672 A.2d 1386 (Pa. Cmwlth. 1996). The court, citing *Plymouth Township,* first stated that SWMA preempted municipal regulation of the transportation, processing, treatment and disposal of solid waste. The township sought under Act 101 to impose a licensing fee on haulers transporting waste through the township. The Court held that the fee imposed on haulers transporting waste through the township exceeded the township's authority as delegated under Act 101 by Bucks County.

C. **Clean Streams Law**

1. *Taylor v. Harmony Twp. Bd. of Commissioners*, 851 A.2d 1020, 1024 n. 6 (Pa. Cmwlth. 2004). Township ordinance providing that no timber harvesting shall take place in areas determined to be landslide-prone or flood-prone was not preempted by regulations promulgated pursuant to The Clean Streams Law where the regulations did not show any express or implied intention on the part of the General Assembly to preempt municipalities from regulating timber harvesting and logging.

2. *Concerned Citizens for Orderly Progress et al. v. DER and Emerald Enterprises,* 387 A.2d 989 (Pa. Cmwlth. 1978): While it is the responsibility of local governmental agencies to deal with planning, zoning and related functions, it is incumbent upon DER to insure that a proposed project is in conformity with local planning and consistent with statewide supervision of water quality management. Thus, the DER, as trustee of the Commonwealth's public natural resources by virtue of Article I, Section 27 of the Constitution of Pennsylvania, must address the direct impact of issuing such a permit.

3. *Board of Supervisors of Springfield Township v. DER and Mozino,* 1982 EHB 104, 108-9: If legislation in question preempted local ordinances, DER's permit authority was not conditioned upon the applicant's compliance with local ordinances.

   Where ordinances were not preempted by statute, DER is not required to consider those ordinances unless:

(1) statute in question directs DER to do so

(2) the ordinances embodied a local land use decision which DER was required to consider in its role as trustee of the Commonwealth's public natural resources.

4. *Lower Mount Bethel Township v. Stabler Development Co.,* 509 A.2d 1332 (Pa. Cmwlth. 1986). Neither The Clean Streams Law nor SMCRA preempts local zoning ordinances on the issue of permitted land use. *See also: Lower Allen Citizen's Action Group, Inv. v. Lower Allen Township Zoning Hearing Board,* 500 A.2d 1253 (1985)

5. *Butler Township v. DER,* 1984 EHB 472: The Clean Streams Law preempts local zoning ordinances in situations where DER orders various municipalities to negotiate an agreement for the construction, operation and maintenance of a regional treatment facility at a DER specified site.

DER's duty to consider local land use ordinances, under Article I, Section 27 of the Pennsylvania Constitution and *Payne, supra.,* only arises if the statute at issue does not preempt those ordinances.

D. **Nutrient Management Act**

1. *Walck v. Lower Towamensing Township ZHB,* 942 A.2d 200 (Pa. Cmwlth. 2008). The Nutrient Management Act does not preempt the enforcement of a local ordinance to prohibit the long-term stockpiling of large amounts of biosolids (sewage sludge) on a farm. There was no indication that the ordinance or its enforcement was inconsistent with or more stringent than the NMA or regulations where the farm owner did not have an approved nutrient management plan.

2. *Burkholder v. Zoning Hearing Bd. of Richmond Twp.,* 902 A.2d 1006 (Pa. Cmwlth. 2006). Municipalities are preempted from imposing setback requirements that are more stringent that those expressly provided for in the NMA.

E. **Flood Plain Management Act**

1. *In re: Hoover,* 608 A.2d 607 (Pa. Cmwlth. 1992). Although local ordinances are superseded to the extent that they contradict or are inconsistent with a statute that is not explicitly preemptive, municipalities may promulgate supplemental or additional regulations which are reasonable and do not offend the spirit of state regulatory provisions. The Statute providing that DER would have exclusive jurisdiction to regulate obstruction owned by person or maintained by a person

engaging in rendering public utility service did not preempt municipal zoning ordinance regulating land use in floodplain area.

F. **Noncoal SMCRA**

1. *Warner Co. v. Zoning Hearing Board of Tredyffrin Township,* 612 A.2d 578 (Pa. Cmwlth. 1992): Court held that Noncoal SMCRA preempts the township ordinance because the amendments to the ordinance attempt to regulate Warner's surface mining operations.

When a township ordinance attempts to regulate "surface mining" as that term is defined in the Noncoal Act, the ordinance is preempted in accordance with Section 16 of the Noncoal Act.

When an ordinance regulates land use, a legitimate exercise of the township's powers under the MPC, it is not preempted by the Act.

SMCRA § 17.1, Local Ordinances Noncoal
SMCRA § 16, Local Ordinances

2. *Penn. Coal Co. v. Twp. of Conemaugh,* 612 A.2d 1090 (Pa. Cmwlth. 1992). The challenged provisions of the zoning ordinances in this case were adopted on January 2, 1991, after the effective date of N-SMCRA. Therefore, N-SMCRA preempted the challenged provisions and they were found to be invalid.

3. *Hogan, Lepore & Hogan v. Pequea Twp. Zoning Board,* 638 A.2d 464 (Pa. Cmwlth. 1994). Here, the court held that because the Pequea Township Zoning Ordinance was promulgated under the MPC, the N-SMCRA does not supersede the zoning ordinance. Furthermore, the ordinance was not preempted because it became effective in 1980, before the December 19, 1984 effective date of N-SMCRA.

4. *Tinicum Twp. v. Del. Valley Concrete, Inc.,* 812 A.2d 758 (Pa. Cmwlth. 2002). A township's attempt to enforce a stand-alone blasting ordinance was preempted, although blasting could be enjoined as a common law nuisance.

5. *Southdown, Inc. v. Jackson Twp. Zoning Hearing Bd.,* 809 A.2d 1059 (Pa. Cmwlth. 2002). A township zoning ordinance prohibiting extraction of minerals on lands zoned agricultural and residential was not preempted with respect to operation of limestone quarry.

G. **SMCRA**

1. *Miller & Son Paving v. Wrightstown Township,* 451 A.2d I002 (Pa. 1982): Here, landowner challenged the validity of a township zoning ordinance adopted

pursuant to the Pennsylvania Municipalities Planning Code (MPC), 53 P.S. §§ 101101-11201, which imposed new setback regulations applicable to existing quarry operations. However, the township's ordinance preceded the effective date of SMCRA by 18 days. The Court held that SMCRA neither preempted nor superseded the township's ordinance.

2. *McClimans v. Board of Supervisors of Shenago,* 529 A.2d 562 (Pa. Cmwlth. 1987). Commonwealth Court reviewed a challenge to a township zoning ordinance which regulated surface mining. SMCRA did not supersede the challenged ordinance because the township enhanced the ordinance before the effective date of SMCRA.

3. *Lower Mount Bethel Township v. Stabler Development Co.,* 509 A.2d 1332 (Pa. Cmwlth. 1986). Neither the Clean Streams Law nor SMCRA preempts local zoning ordinances on the issue of permitted land use.

4. *Amerikohl Mining Inc. v. Zoning Hearing Bd. of Wharton Twp*., 597 A. 2d 219 (Pa. Cmwlth. 1991). In connection with an application for special exception for surface mining operations, the zoning hearing board was not preempted from considering whether a proposed mine would adversely impact air or water quality or cause damage from blasting. The township's zoning ordinance was enacted pursuant to §604 of the MPC, which authorizes municipalities to adopt ordinance provisions promoting adequate light and air and designed to prevent loss of health, life or property from flooding.

H. **Game Law**

1. *Wolfe v. Twp. of Salisbury,* 880 A.2d 62 (Pa. Cmwlth. 2005). Commonwealth Court held that ordinance, permitting hunting by participants in junior hunting program in park's recreation areas was not preempted by the Game Law.

2. *Commonwealth v. Brandon,* 872 A.2d 239 (Pa. Cmwlth. 2005). The Game Law did not preempt township ordinance which prohibited shining a spot lamp across another person's property.

3. *Knightlinger v. Bradford Twp. Zoning Hearing Bd.*, 872 A.2d 234 (Pa. Cmwlth. 2005). A deer propagation permit issued to landowner by the Game Commission did not serve to circumvent a duly-enacted local zoning ordinance, limiting fence height in deer propagation areas to six feet or no more than eight feet.

I. **Oil and Gas Act**

1. *Robinson Township v. Commonwealth of Pennsylvania*, 83 A.3d 901 (Pa. 2013). The Supreme Court concluded that sections of Act 13 that sought to establish statewide uniform zoning of oil and gas operations and preemption of

conflicting local zoning were "incompatible with the commonwealth's duty as trustee of Pennsylvania's public natural resources" under the Environmental Rights Amendment and unconstitutional.

2. *Huntley & Huntley, Inc. v. Borough of Oakmont*, 964 A.2d 855 (Pa. 2009). The Supreme Court held that municipal zoning governing gas well location is not preempted by Oil and Gas Act).

3. *Range Resources-Appalachia, LLC v. Salem Township*, 964 A.2d 869 (Pa.2009). SALDO that regulated same aspects of oil and gas activities as did Oil and Gas Act preempted.

4. *Commonwealth v. Whiteford,* 884 A.2d 364 (Pa. Cmwlth. 2005). Court held that a local ordinance was not preempted by the Oil and Gas Act, Act of December 19, 1984, P.L. 1140, *as amended,* 58 P.S. §§ 601.101-601.605, where Whiteford failed to offer any evidence that the township was attempting to enforce any area subject to Department enforcement under the Act.

J. **Sewage Facilities Act**

1. *Delaware Riverkeeper v. Department of Environmental Protection*, 879 A.2d 351 (Pa. Cmwlth. 2005). DEP could approve plan and issue permit, even though neighboring township did not submit any sewage facilities plan or submit a joint municipal plan.

2. *Hornstein v. Lynn Twp. Sewer Auth.*, 866 A.2d 1192 (Pa. Cmwlth. 2005). Affirming township sewer authority's adoption of resolution establishing sewer tapping fee regarding connections to authority's sewer system.

3. *Holland Enterprises v. Joka,* 439 A.2d 876 (Pa. Cmwlth. 1982). Township ordinance requiring builder to post bond guaranteeing proper functioning of individual on-site sanitary sewage disposal systems was not preempted by SFA.

4. *Council of Middletown Township* v. *Benham,* 523 A.2d 311 (Pa. 1987): A township ordinance dealing with sewage and sewers was not invalid based on the Sewage Act which did not intend to preempt by giving municipalities specific authority to issue permits, inspect facilities, and collect fees; and that the legislature intended to combine state and local powers to regulate sewage disposal. *See also: State College Borough Water Authority v. Board of Supervisors of Halfmoon Township,* 659 A.2d 640 (Pa. Cmwlth. 1995).

5. *Stewart v. Zoning Hearing Bd. of Radnor Twp.,* 531 A.2d 1180 (1987). Zoning Hearing Board did not have jurisdiction to decide what type of sewage system to be installed at subdivision site, as waste management considerations had been preempted by DER, under the SFA. Local zoning ordinance dealing with

sewage and sewers were not invalid as preempted by the general assembly's promulgation of the SFA.

K. **Harms/Benefits**

1. *Berks County v. Department of Environmental Protection*, 894 A.2d 183 (Pa. Cmwlth. 2006). DEP's failure to specifically consider comprehensive planning and zoning ordinances did not preclude approval of application to modify solid waste permit.

L. **Agriculture, Communities, and Rural Environment Act (ACRE) 3 Pa. C.S. §§ 311-318**

1. *Commonwealth ex rel. Corbett v. Richmond Twp.,* 917 A.2d 397 (Pa. Cmwlth. 2007). Municipalities Planning Code did not conflict with ACRE because the MPC provided for administrative appeals by landowners, while ACRE applied to original actions by the attorney general.

2. *Commonwealth ex rel. Corbett v. Locust Twp.,* 968 A.2d 1263 (Pa. 2009). Attorney General's petition seeking to invalidate Township ordinance regulating intensive animal operations as an unauthorized local ordinance, which pre-dated the effective date of portion of ACRE that addressed local regulation of normal agricultural operations, presented a justiciable cause of action, even though the Township had not attempted to enforce the ordinance.

M. **Public Utility Code.**

1. *UGI Utilities, Inc. v. City of Reading*, 179 A.3d 624 (Pa. Cmwlth. 2017). Commonwealth Court held that a local ordinance imposing restrictions on the location of gas meters in historic districts was preempted by Public Utility Commission regulation and Public Utility Code.

N. **OTHER ISSUES**

HR. Miller Co. v. Lancaster Township, 605 A.2d 321 (Pa. 1992):

The focus of the inquiry in all cases is the (1) constitutionality of the ordinance and (2) whether the ordinance is a proper exercise of the police power. The focus is not whether the landowner deserves to be able to make a particular use of his property.

If the ordinance can be "saved" from unconstitutionality by severance of an offending provision, if the ordinance as severed is constitutional, the landowner/litigant is not entitled to proceed with his proposal as a reward for having pursued the litigation.

To the extent that “success” in the litigation was limited, relief is limited as well; landowner will have the opportunity to acquire and develop in the zone where the use is permitted.

QUESTIONS TO CONSIDER REGARDING PREEMPTION

Pertinent questions in determining whether a local ordinance is preempted by state law are:

(1) Does the ordinance conflict with state law?

(2) Was the state law intended expressly or impliedly to be exclusive in the field?

(3) Does the subject matter reflect a need for uniformity?

(4) Is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulations? And

(5) Does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?

The matter of preemption is a judicially created principle based on the proposition that a municipality, as an agent of the state, cannot act contrary to the state.

Municipalities have granted limited police power over matters of local concern and interest, but the scope of such power does not extend to subjects inherently in need of uniform treatment or to matters of general public interest which necessarily require exclusive state policy.

A municipality may be foreclosed from exercising police power it would otherwise have if the state has sufficiently acted in a particular field and, beyond manifest conflicts with state policy, the ultimate question is the intent of the legislature. *Duff v. Township of Northampton,* 532 A.2d 500 (Pa. Cmwlth. 1987).

Environmental Law: How Federalism Dictates Who Regulates What

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The U.S. Constitution Provides for federal and state regulation

The Tenth Amendment provides:

> The powers not delegated to the United States by the Constitution, nor prohibited to it by the States, are reserved to the States respectively, or to the people

The Powers reserved to the States are commonly known as "Police Powers"

"Public Health, Safety and Welfare"

"Police Powers"

"A State's police power is one of the most essential powers of government which allows it to promote the public health morals or safety and the general well-being of the community." ***Commonwealth v. Harmar Coal Co.***, 452 Pa. 77, 306 A. 2d 308, 316 (1973)

The state's police powers are also one of the state's least limitable powers. ***Hadacheck v. Sebastian***, 239 U.S. 394, 410 (1915)

Article I, Section 8 of the Constitution provides that Congress shall have the power:

- To regulate Commerce... among the several States, and with the Indian Tribes;
- To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States....

Result is that the Federal Government broadly regulates environmental activity which affects interstate commerce and the States regulate "local" concerns

WIDE ARRAY OF FEDERAL STATUTES*

- Clean Air Act
- Clean Water Act
- Coastal Zone Management Act
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA-Superfund)
- Emergency Planning and Community Right-to-Know Act (EPCRA)
- Endangered Species Act
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
- Federal Power Act
- Fish and Wildlife Coordination Act
- Fisheries Conservation and Management Act (Magnuson-Stevens)
- Marine Mammal Protection Act
- Migratory Bird Treaty Act
- Mineral Leasing Act
- National Environmental Policy Act (NEPA)
- Nuclear Waste Policy Act
- Ocean Dumping Act
- Oil Pollution Act
- Resource Conservation and Recovery Act (RCRA)
- Safe Drinking Water Act
- Surface Mining Control and Reclamation Act (SMCRA)
- Toxic Substances Control Act (TSCA)

*List not exhaustive

EXTENT OF STATE REGULATION VARIES WIDELY

- Generally, older industrial states have a more robust regulatory environment. PA, NY, NJ (CA)
- Sunbelt (FL, LA, TX) less so.

OCCUPYING THE FIELD VERSUS DELEGATION

- Some federal statutes occupy the field for obvious reasons, e.g., Atomic Energy Act
- Others set a regulatory floor and delegate primary enforcement (primacy) to states that enact programs "at least as effective as" the federal act, e.g., Clean Air Act, Clean Water Act, SMCRA
- For example, at least 22 states have some degree of coal mining activity. Of those, all have gained primacy under SMCRA, save one, Tennessee, with the result that in Tennessee day-to-day coal operations are regulated by the federal Office of Surface Mining (OSM), an agency of the U.S. Department of the Interior.

Pennsylvania Fed'n of Sportsmen's Clubs, Inc. v. Hess, 297 F.3d 310 (3d Cir. 2002)

- SMCRA does not provide for shared regulation but provides for either State regulation of surface coal mining within its borders or federal regulation, but not both.
- Because Pennsylvania's regulatory plan had been approved by the Secretary, jurisdiction over the alleged violations of the state statute and regulations lies exclusively in the courts of Pennsylvania.

THE FEDERAL GOVERNMENT DOES NOT REGULATE DIRECTLY ALL ENVIRONMENTAL ACTIVITY, FOR EXAMPLE. . .

- Non-Coal (sometimes called industrial minerals) Mining
- Solid Waste Disposal-federal government does regulate interstate transportation of solid waste via the commerce clause. *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383 (1994).

FEDERALISM GENERALLY ENABLES EFFICIENT FEDERAL AND STATE REGULATION OF THE SAME ENVIRONMENTAL ACTIVITIES

Thank you!

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SESSION #5

Workers' Compensation

"Workers' Compensation Case Law Update"

No handouts

Presented by: Lucas Csovelak, Esquire &
Steven Ryan, Esquire

SESSION #6

Estate Planning Law

"Same Sex Marriage in Pennsylvania and The Effect of The Respect For Marriage Act"

Presented by: Thomas Gacki, Esquire

SAME SEX MARRIAGE IN PENNSYLVANIA AND THE EFFECT OF THE RESPECT FOR MARRIAGE ACT

By: Thomas P. Gacki, Esquire

I. History of Same Sex Marriage

A. Before 2000

1. No jurisdictions in the U.S. or anywhere in the world recognized same-sex marriage.

2. Civil Unions and Domestic Partnerships, providing some of the legal benefits of marriage, began to be recognized in some local jurisdictions starting in the late 1970's and early 1980's.

3. California enacted the first law recognizing domestic partnerships state-wide in 1999. It was expanded effective 2005 to provide basically all of protections and benefits of marriage to domestic partnerships, which consisted of any two people regardless of gender.

4. Other countries:

a. Netherlands became the first country to fully legalize same sex marriages in 2000.

b. Other notable countries to do the same: Belgium in 2003, Canada in 2005, France, England and Wales in 2013.

B. Opposition to Same Sex Marriage in the U. S.

1. Defense of Marriage Act (DOMA) of 1996.

a. Federal law that passed with veto-proof bi-partisan majorities in both the House and Senate.

b. Signed by President Clinton, although he called it "divisive and unnecessary".

c. Opposed only by about one-third of the Democratic caucuses of the House and Senate.

d. Section 2 of DOMA allowed states to deny recognition of same-sex marriages conducted by other states.

e. Section 3 codified non-recognition of same sex marriages for all federal purposes, including insurance benefits for government employees, Social Security survivors' benefits, immigration, bankruptcy, and the filing of joint tax returns.

f. DOMA It also excluded same-sex spouses from the scope of other federal protections.

2. State Legislative Efforts against Same-Sex Marriage

a. In 1993, the Hawaii Supreme Court ruled that existing state law banning same-sex marriage was unconstitutional unless the state could show a compelling reason for discriminating against same-sex couples.

b. Case was sent back to lower court for reconsideration and ultimately voters approved a referendum leaving the decision to the state legislature, but decision triggered a nationwide backlash.

c. Over the next ten years or so, legislatures in more than 40 states passed “defense of marriage” acts defining marriage as solely a union between one man and one woman.

d. Pennsylvania did so by Act 124 of 1996, which added the definition of “marriage” to 23 Pa. C. S. Section 1102, “A civil contract by which one man and one woman take each other for husband and wife.”

e. Act 124 also added Section 1704 to Title 23:

“It is hereby declared to be the strong and longstanding public policy of this Commonwealth that marriage shall be between one man and one woman. A marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.”

Act 124 of 1996 has not been legislatively repealed and these provisions can still be found in Title 23.

C. State Judicial and Legislative Actions to Recognize Same-Sex Marriage

1. In the early 2000's some states began moving towards recognizing same-sex marriage through court or legislative action.

2. In the 2003 Massachusetts case of Goodridge vs. Department of Public Health, the Massachusetts Supreme Judicial Court ruled that denying marriage rights to same-sex couples violated the Massachusetts constitution. Same-sex marriages were recognized in Massachusetts beginning May 17, 2004.

3. After the Goodridge case, local authorities in some other jurisdictions began issuing marriage licenses to same-sex couples in defiance of state laws. These licenses were ultimately declared invalid.

4. In 2008, the Supreme Court of California ruled similarly to the Massachusetts Supreme Court, and same-sex marriage was legalized in California. However, less than six months later, the state constitution was amended by Proposition 8 to end same-sex marriage.

5. Later in 2008, the Connecticut Supreme Court ruled that the state's civil unions statute discriminated against same-sex couples and required the state to recognize same-sex marriages. In 1999, Connecticut became the first state in the U.S. to enact gender-neutral marriage legislation.

6. Vermont, New Hampshire and the District of Columbia followed suit, legislating the validity of same-sex marriage in 2009.

D. Patchwork of State Laws and Uncertainty

1. By the turn of the decade in 2010, same-sex marriage was therefore legal in some states and barred in others by state constitutional amendments and statutes.

2. Further, based on the authority of DOMA, many states that barred same-sex marriage also refused to recognize same-sex marriages performed in other states, including Pennsylvania.

3. Under the common law concept of Lex Loci Celebrationis, a marriage that is valid under the local law of the jurisdiction where it is performed is recognized everywhere.

4. This is consistent with the Full Faith and Credit Clause of the Federal Constitution, which generally requires states to respect the "public acts, records and judicial proceedings of every other state."

5. DOMA was specifically drafted to provide that each state had such an important state policy interest in its own marriage laws that the Full Faith and Credit clause did not apply.

6. Hence many problems were created, including potential bigamy (a person could enter into a same sex marriage in a state that recognized such a marriage, and then go to a state like Pennsylvania and marry an opposite sex spouse).

E. State Legislative Action and Federal Judicial Decisions Post 2010/Shifting Public Opinion

1. Meanwhile, other states moved to legalize same-sex marriages, via state court decisions and/or legislation.

2. The state by state moves to recognize same-sex marriage were largely motivated by a remarkable shift in public opinion on the subject.

a. In Pew Research Center polling in 2004, Americans opposed same-sex marriage by a margin of 61% to 31%.

b. By 2011, 46% supported same-sex marriage and 44% were opposed to it.

c. By 2019, the percentages were reversed from 2004—61% in favor and 31% opposed.

3. New York legalized same-sex marriage by statute in 2011. Washington and Maryland did so in 2012. Rhode Island, Delaware, Minnesota, Hawaii and Illinois did so in 2013.

F. Federal Court Decisions 2013-2014

1. In 2013, The United States Supreme Court, in the case of Windsor v. United States, by a 5-4 majority, held that Section 3 of DOMA, denying federal benefits to same-sex couples, was unconstitutional.

2. On May 19, 2014, U.S. District Judge Michael J. McShane ruled in Geiger v. Kitzhaber that Oregon's voter-approved constitutional amendment banning same-sex marriage was unconstitutional. He ordered same-sex marriages to begin immediately.

3. One day later, U.S. District Judge John E. Jones III struck down Pennsylvania's same-sex marriage ban in his ruling in Whitewood v. Wolf. Republican Governor Tom Corbett announced he would not appeal the ruling.

4. In a 5-4 decision issued in the case of Obergefell v. Hodges, the U. S. Supreme Court required all states to issue marriage licenses to same-sex couples and to recognize same-sex marriages validly performed in other jurisdictions. All state same-sex marriage bans were held to be unconstitutional and same-sex marriage was legalized in in all remaining states.

II. Current State of Same-Sex Marriage in Pennsylvania

A. Aftermath of Whitewood v. Wolf

1. Although there was some resistance on the part of conservative Clerks of the Orphans' Court (the County officials who issue marriage licenses), marriage licenses have been issued to same-sex couples in all counties in Pennsylvania since Mary, 2014.

2. However, the Pennsylvania Legislature has not acted to repeal Act 124 of 1996.

B. Aftermath of Dobbs v. Jackson Women's Health Organization

1. In the 2022 landmark decision in Dobbs v. Women's Health Organization, the U. S. Supreme Court reversed Roe v. Wade and held that the U. S. Constitution did not confer a right to abortion.

2. While Justice Alito in the majority decision stated explicitly that the Court's decision only applied to abortion, the dissenters in the case, Justices Breyer, Kagan and Sotomayor, expressed their concern that the reasoning of the decision could lead to the reversal of other holdings, in particular the Obergefell decision legalizing same-sex marriage.

3. A concurring opinion by Justice Clarence Thomas in Dobbs specifically argued the Court "should reconsider" the Obergefell decision.

4. The result was new uncertainty regarding the continued right to same-sex marriages, particularly in states like Pennsylvania which still have statutes like Act 124 on the books.

C. Federal Respect for Marriage Act

1. Enacted on December 13, 2022, with some bi-partisan support, particularly in the Senate.

2. Repealed DOMA. Requires the U. S. federal government and all U. S. states and territories to recognize same-sex and interracial marriages in the United States.

3. Contains a number of protections for religious liberties, which helped garner some Republican support.

4. Supported by some churches and religious groups, opposed by others.

D. Effect of Potential Repeal of Obergefell in Pennsylvania

1. If Obergefell is reversed, Whitewood v. Wolf will be over-ruled as well.

2. Nothing in the Respect for Marriage act actually requires the individual states to issue marriages to same-sex couples.

3. Based on the Act 124 definition of “marriage” added to 23 Pa. C. S. Section 1102, limiting marriage to one man and one woman, Clerks of the Orphans Court would likely refuse to issue marriage licenses to same-sex couples.

4. However, Pennsylvania would still be required to recognize same-sex marriages legal in other states and foreign jurisdictions.