



DCBA MEMBER BENEFIT
CLE COMPLIANCE SESSION HANDOUTS

WEDNESDAY, DECEMBER 13, 2023

Widener University
Commonwealth Law School
3800 Vartan Way
Harrisburg, PA
LIBRARY ROOM L202
(building with flagpole)

Thank you to our Premier Sponsor:



Thank you to our Coffee Sponsor:



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

Library/Classroom
Bldg.



SESSION AGENDA

**Reminder: We will be in the library building, L202
(building at far end of campus by the flag pole, 2nd floor)**

- **8:30 – 8:55am – Pick up your registration form at registration table**
- **9:00 - 10:00am | Session # 1 | Intellectual Property for the General Practitioner | Charles A. Hooker | Substantive**
- **10:15 - 11:15am | Session # 2 | Hiding in Plain Sight: The Intersection between D.V. and Human Trafficking | Steven V. Turner, SVT Strategies, LLC & Karen Miller | Ethics**
- **11:30am - 12:30pm | Session # 3 | PBA Malpractice Avoidance | Robert H. Davis, Jr. & Erik Anderson | Ethics**

LUNCH BREAK

(R&K Subs boxed lunches for those that have registered for the lunch)

- **1:30 - 2:30pm | Session # 4 | Refresher on Professional Licensing Issues | Travis N. Gery | Substantive**
 - **2:45 - 3:45pm | Session # 5 | Federal Estate Tax Planning in 2023 | Neil W. Yahn | Substantive**
 - **4:00 - 5:00pm | Session # 6 | Workers' Compensation Case Law Update | Adam N. Crosier | Substantive**
-

Important Info:

- **We will be in the library building room L202. The building is on the far end of campus and is by the flagpole. We will be on the 2nd floor and there is an elevator.**
- **The Wi-Fi password and log in information will be at the TOP of your CLE confirmation form.**
- **Space is limited for each session due the classroom size.**
- **You must be in attendance for the complete HOUR of a program to receive credit.**
- **Coffee will be provided in the morning and is sponsored by Hooker & Habib. Some bottled water and soda will also be available.**
- **After completion of your last session, please drop off your SIGNED CLE form at the registration table.**
- **Please bring a sweater if you think you may get chilly.**

- **PLEASE KEEP ALL CELL PHONE CALLS TO BETWEEN SESSIONS!**

See you at Widener University on tomorrow!



Dauphin County Bar Association

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

Please take some time today to thank our
Premier and Coffee Sponsors

Thanks to our Premier Sponsor



MEMBERS 1st
FEDERAL CREDIT UNION

5000 Marketplace Way | Enola, PA 17025 | 1-800-283-2328

Coffee Sponsor:



REFER A MEMBER, REAP THE REWARDS

MEMBERSHIP DRIVE

DECEMBER 1, 2023 - MARCH 1, 2024

SOME BENEFITS OF MEMBERSHIP

- FREE CLE (12 hours per calendar year) by attending any of our three compliance sessions.
- Access to ABA's Retirement Fund Program.
- Top quality lunch & learns and virtual CLEs.
- Lawyer Referral Service (to help you grow your practice)
- Committee and leadership opportunities
- Social Activities
- Summer Volleyball
- InCite (legal research provided through PBA)
- Reduced room rentals for events & depositions
- Dauphin County Reporter weekly electronic subscription
- Mediation Services
- Personal Members 1st Federal Credit Union Concierge

Members are encouraged to recruit NEW MEMBERS to join DCBA. A new member is defined as brand new to the organization **OR** NOT HOLDING any type of membership within the last five years.

- Recruit 1 member, receive ONE additional free DCBA CLE session
- Recruit 2-4 members, receive TWO additional free DCBA CLE sessions.
- Recruit 5-10 members, receive TWO additional free DCBA CLE sessions AND a \$50 gift card (restaurant or store of your choice)
- Recruit 10 or more members, in addition to all above prizes, your name will be entered into a raffle for a \$100 gift card (restaurant or store of your choice)



All new members will receive a chance to win a FREE Bench Bar Registration/Hotel Accommodations.

SESSION #1

“Intellectual Property for the General Practitioner”

Presented by:
Charles A. Hooker, Esquire

No Handouts

SESSION #2

Family Law

“Hiding in Plain Sight: The Intersection between D.V. and Human Trafficking”

Presented by: Steven V. Turner,
Esquire; SVT Strategies, LLC &
Karen Miller, Esquire

Brochures to be handed out

SESSION #3

“PBA Malpractice Avoidance”

Presented by:
Robert H. Davis, Jr., Esquire,
Erik Anderson, Esquire &
Susan Etter, Esquire

Avoiding Legal Malpractice

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



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Presenters


- Robert H. Davis, Jr., Davis Law Offices
- Erik R. Anderson, McNees
- Susan E. Etter, Pennsylvania Bar Association

2

Growing Areas of Concern for Lawyers in 2023

- Succession Planning
- Disciplinary Matters
- Technology & Social Media
- Counterclaims for Legal Malpractice

3



PBA – Your Other Partner


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

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

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PBA member benefits that can help you manage your risks

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




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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.



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PBA member benefit ... updates that you need to know

- A few "hot off the press" updates from our recent meetings with USI Affinity and CNA
- An increase in concerns about cognitively impaired lawyers
- Tail coverage - what you can do as a retired attorney and what activities are not covered with the free tail?
- Wire transfers – still a big issue with new more sophisticated tactics to trick you ... and your staff
- Cyber threats to your business and your clients – there are strategies and steps everyone one can take immediately.



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A few "hot off the press" updates from our recent meetings with USI Affinity and CNA

- An increase in concerns about **cognitively impaired lawyers** – we are a self-policing profession and we have to look out for each other and for clients. **Lawyers Concerned for Lawyers** is a resource. The bar association is a resource. Please find a respectful and dignified way to help a lawyer that is struggling and impaired. It's not easy, but it is important.
- Rules of Disciplinary Enforcement related to cognitive impairment and competence
 - Rule 301 – Proceedings Where an Attorney is Declared to be Incapacitated or Severely Mentally Disabled
 - Rule 321 – Appointment of Conservator to Protect Interest of Clients of Absent Attorney

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Symptoms of Cognitive Related Risks

- Confusion, forgetfulness, indecisiveness
- Anxiety, worry, fretting
- Memory lapses
- Failure to return calls or correspondence
- Over-reaction to events
- Under-reaction to events
- Unsteady gait, poor balance, tremors
- Unpreparedness

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Stepping Down with Dignity

- Older lawyers may fear losing their independence
- Mandatory retirement ?
- Lawyers are working longer; putting off retirement
- Enlist the assistance of family members
- Physicians
- Psychologists
- Partners and colleagues
- Judiciary
- Seek assistance from the Bar Association
- Disciplinary Board

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A few "hot off the press" updates from our recent meetings with USI Affinity and CNA

- Tail coverage - We all know that more and more baby boomers are starting to retire –free tail that is available if you are insured by CNA. USI is noticing an increase in questions about **what you can do as a retired attorney and what activities are not covered with the free tail** – so our best advice if you are thinking of retiring or you recently retired – call your agent if you have any questions – **you do not want your first malpractice suit after a very successful career to occur in your retirement and – even worse - to possibly be left without coverage!**

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Extended Reporting Period

- Also called a Tail.
Tail coverage addresses the continuing possibility of claims after:
- Law firm dissolves
 - Attorney retires or leaves private practice, death, disability (Non-Practicing ERP)
 - Generally, provides coverage for claims arising from conduct within the policy period, which would otherwise be covered by the policy, but the claim is first made during the extended reporting period.

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Extended Reporting Period

If an insured ceases, permanently, and totally, the private practice of law during the policy period due to:

- Death or disability, or any other reason

Some carriers provide an Unlimited ERP at no additional charge if insured for 3 consecutive years

Deductible is sometimes waived

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A few "hot off the press" updates from our recent meetings with USI Affinity and CNA

- Wire transfers – still a big issue – because they often involve large dollar transfers – and as always the **criminals keep getting smarter** – they have now upgraded their spoofed fake transfer message so that not only does it look like it is coming from a legitimate known-familiar person – now for your convenience – they provide you with a number to call to verify that the wire transfer request and instructions are legitimate – but guess where they number goes??? The lessons – **the takeaway – if you do nothing else after this program today – remind or train all of your staff – DO NOT call the number in the email to verify the transfer request – use a number that is known to you. You cannot be too cautious or suspicious.**

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A few "hot off the press" updates from our recent meetings with USI Affinity and CNA

- If you do not already have a stand-alone cyber policy – we are urging you to at least **consider and explore getting one – start doing your research** – each step you take in the direction of getting cyber coverage is a benefit to you and your practice – make sure you understand what coverage is included – Mark Lefever is an excellent resource. **And PBA is here to help with a free cyber webinar for members.**

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Cyber Exposure: How to Prepare and Protect Your Firm Against Cyber Liability Claims

This webinar is provided at no cost as a valuable PBA member benefit. After attending this program, you will have important information to help make informed business decisions to prepare and protect your firm, your clients and your reputation.

You will leave with takeaways that can be immediately put into action to reduce cyber risks and help you operate as a more educated and technology-aware lawyer.

Even if you already have cyber liability insurance, you will benefit from this program and learn why staying informed about ever-evolving cyber threats and cyber insurance market trends are a critical component to the successful management of today's law practice.

Perhaps one of the best reasons to make time in your day to attend this program is that you will hear valuable and relevant information from someone who is very knowledgeable on cyber threats to lawyers, without pressure or obligation to buy insurance. You listen, learn and then you decide what to do with the information and what makes the most sense for your business. The PBA and USJ Affinity are providing the information and resources you need to make the best decision for your practice. *We are your other partners.*

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Cyber Exposure: How to Prepare and Protect Your Firm Against Cyber Liability Claims

Why are we focusing on this?

- Roughly 26% of all law firms already victim of a data breach
- Roughly 51% of law firms have taken no measures to prevent data breach
- Roughly 50% of law firms have no data breach response plan
- Ransomware attacks occur every 10 seconds
- Based on one study, 60 percent of all targeted cyberattacks last year struck small to mid-sized businesses.
- It has been estimated that half of the small businesses that suffer a cyberattack go out of business within six months as a result.

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Cyber Exposure: How to Prepare and Protect Your Firm Against Cyber Liability Claims

You will learn:

1. Why law firms are a target for cyber theft and hacking
2. The types of cyber claims received by insurers
3. What "social engineering" is and why you need to know about it. Did you know that roughly 60% of all targeted cyberattacks last year struck small and mid-sized businesses?
4. The average cost of a cyber breach
5. Understanding cyber insurance coverages and what you need to do to apply for coverage

Watch the 1-hour program at your convenience
Email susan.etter@pabar.org for a sample incident response plan



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Another heads-up related to avoiding malpractice and disciplinary action from the September Disciplinary Board monthly newsletter ...

From Tom Farrell, chief disciplinary counsel, the Pennsylvania Supreme Court Disciplinary Board

Recently, I reviewed a self-report by two attorneys. Someone had hacked into their firm trust account at the bank, stealing nearly \$900,000. They reported the matter to law enforcement, and the bank admitted fault and reimbursed the account, eventually. No case, I figured. They were good lawyers, responsible lawyers. Months later, however, we imposed an informal admonition because we found they had not been reconciling their trust account. Had the bank not discovered the fraud after seven months, the loss could have been more; had the attorneys followed RPC 1.15(c)(4), they would have stopped the damage in the first month. For that seven-month period, the firm or its accountant hadn't done any reconciliations. They didn't find out about the theft until the bank found out. The amount of theft in the first month was \$30,000. The loss would have been limited to the \$30,000 if they did the reconciliations and shut it down promptly.

Read this article in the September D-Board newsletter. It contains a self-assessment and questions that Tom Farrell suggests every attorney review.

The IOLTA Board's website, provides attorneys with an excellent handbook on all of RPC 1.15's requirements.

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Another heads-up related to avoiding malpractice and disciplinary action from the September Disciplinary Board monthly newsletter ...

Disciplinary Board Proposes Extension of Sex with Clients to Nonphysical Communications

"Recently, Pennsylvania's disciplinary system has experienced an increase in 'sex with clients' investigations where the matters involve sexual communications by way of 'sexting' or similar communications, as opposed to actual physical relationships."

In a proposed rulemaking published at [53 Pa.B. 5275 \(8/26/23\)](#), the Disciplinary Board has proposed an amendment to the comments to [Rule 1.8\(j\) of the Pennsylvania Rules of Professional Conduct](#). It seeks to clarify that the prohibition on sex between lawyers and clients extends to communications that are sexual in nature. Written comments were invited and were due September 26, 2023

Rule 1.8(j) states, "A lawyer shall not have sexual relations with a client unless a consensual relationship existed between them when the client-lawyer relationship commenced." Comment (17) to Rule 1.8 explains the intentions behind the rule:

[A] sexual relationship between lawyer and client can involve unfair exploitation of the lawyer's fiduciary role, in violation of the lawyer's basic ethical obligation not to use the trust of the client to the client's disadvantage. In addition, such a relationship presents a significant danger that, because of the lawyer's emotional involvement, the lawyer will be unable to represent the client without impairment of the exercise of independent professional judgment . . .

The Board proposes to add a line to Comment (17) stating, "For purposes of this Rule, 'sexual relations' includes, but is not limited to, sexual communications with a client."

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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

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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.

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Succession Planning Data

released on October 30, 2023 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.	3,838	6.04%
I have a successor attorney. My successor is a law firm.	14,898	23.45%
I do not have a successor because I do not have PA clients.	32,145	50.60%
I do not have a successor and I do have PA clients.	12,645	19.91%
Total	63,526	100%

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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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PBA member benefit ... Professional Liability Insurance

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

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

There are two ways to save through this program (restrictions and qualifications do apply)

1. If a new attorney, who is a PBA member, decides to open their own firm or join a small firm with up to four attorneys, the new attorney can receive up to two years of complimentary professional liability insurance.

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

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

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



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Know your policy, what coverage do you have?

CNA Policy Highlights

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

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Know your policy, what coverage do you have?

Extended Reporting Period - also called a Tail.

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

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Engagement Letters - an invaluable best practice in managing your risk

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

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Engagement Letters - an invaluable best practice in managing your risk

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

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Engagement Letters - an invaluable best practice in managing your risk

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

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

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What is "File Retention and Destruction language"

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

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

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Call ... sooner rather than later

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

888-200-5212

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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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Failure to Communicate

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

Launch video 1



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What are some of the red flags you noticed in this vignette?

1. Attorney failed to return calls from the client and did not respond to the client's emails and texts
 - Lack of communication
 - Duty to keep client informed
 - Duty of candor
2. Attorney admits he knew he should never have taken the case – "it's an awful case, it will cost a fortune to litigate. I should have told him 'no' from the beginning."
 - Case selection - Evaluate merits, likelihood of success and is it a good fit
3. Attorney has not done any work on the case and cannot find the file ... for six months
 - Procrastination/diligence
4. Attorney cannot find file
 - Security of client file and information - possible confidentiality issues

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What are some of the red flags you noticed in this vignette?

5. Attorney moved the retainer fee to the operating account due to cash flow problems
 - Borrowing from IOLTA Account
6. Attorney hasn't done any work on the case and the retainer fee has been spent
 - Taking fee prior to earning it
7. Attorney asks his assistant when the statute of limitations runs
 - Calendaring / Missing SOL
8. Assistant informs attorney that the client threatened to call the D-Board

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ISSUE 1

Attorney failed to return calls from the client and did not respond to the client's emails and texts

The #1 Complaint to the Disciplinary Board is **lack of communication.**

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Failure to Communicate

Calls not returned, client felt neglected

Pa. R.P.C. Rule 1.4 (a) Communication

A lawyer shall:

- 1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent ...is required
- 2) reasonably consult with the client ...
- 3) keep the client reasonably informed ...
- 4) promptly comply with reasonable requests for information; and
- 5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

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Instead, Keep the Client Informed

- Don't Allow Unreasonable Expectations to Exist
 - Don't Guarantee Outcomes
- Discuss All Potential Outcomes – Good and Bad
- Identify and regularly revisit the client's goals and expectations of the process and outcome.
- Educate the client on the process and its unpredictability
- Stay in touch!

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Communication

- Communicate regularly
 - Phone calls, status reports, key pleadings and discovery, document drafts
 - Discuss strategy
 - Explain delays
 - **CONFIRM COMMUNICATIONS IN WRITING!**
- Tell the client when mistakes are made.
- Happy clients rarely sue or make ethical claims.

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Duty of Candor to Client

- Pa.R.P.C. Rule 1.4(a) requires an attorney keep a client informed about the status of a matter and promptly reply to reasonable requests for information
- Pa.R.P.C. Rule 1.4(b) requires a lawyer to explain matters to a client to the extent necessary to permit the client to make informed decisions regarding the representation
 - Office of Disciplinary Counsel v. Duffield, 537 Pa. 485, 489, 644 A.2d 1186, 1188 (1994)
- Pa.R.P.C. Rule 8.4(c) prohibits "dishonesty, fraud, deceit or misrepresentation."

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ISSUE 2

Attorney admits he knew he should never have taken the case – "it's an awful case, it will cost a fortune to litigate. I should have told him 'no' from the beginning."

- Case Selection/Accepting or Rejecting a New Client or a New Matter?
 - Evaluate the merits, the likelihood of success, and determine whether it is a good fit

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Accepting or Rejecting a New Client or a New Matter

Rule 1.1 Competence - A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation

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Accepting or Rejecting a New Client or a New Matter

Rule 1.1 Competence, Comment 5: Thoroughness and Preparation
Competent handling of particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence. An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible. See Rule 1.2(c).

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Accepting or Rejecting a New Client or a New Matter

Rule 1.16, Comment 1: A lawyer should not accept representation in a matter unless it can be performed competently, **promptly**, without improper conflict of interest and to completion

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ISSUE 3

Attorney has not done any work on the case and cannot find the file ... for six months

Rule 1.3 Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.

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Rule 1.3 Diligence

Relevant Comments:

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. . .

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

[3] Perhaps no professional shortcoming is more widely resented than **procrastination**. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer **overlooks a statute of limitations**, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

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ISSUE 4

Attorney cannot find the file

Where is it? Who has it?

- Security of client file and information
- Possible confidentiality issues

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ISSUES 5 and 6

Attorney moved the retainer fee to the operating account due to cash flow problems

Attorney hasn't done any work on the case and the retainer fee has been spent

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Rule 1.15 Safekeeping Property

- Borrowing from IOLTA Account
- Don't take fee until you've earned it.

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Rule 1.15 Safekeeping Property

- (a) The following definitions are applicable to Rule 1.15:
- (5) *Interest On Lawyer Trust Account (IOLTA) Account.* An IOLTA Account is an income producing Trust Account from which funds may be withdrawn upon request as soon as permitted by law. Qualified Funds are to be held or deposited in an IOLTA Account.
- (6) *IOLTA Board.* The IOLTA Board is the Pennsylvania Interest On Lawyers Trust Account Board.
- (7) *Non-IOLTA Account.* A Non-IOLTA Account is an income producing Trust Account from which funds may be withdrawn upon request as soon as permitted by law in which a lawyer deposits Rule 1.15 Funds. Only Nonqualified Funds are to be held or deposited in a Non-IOLTA Account. A Non-IOLTA Account shall be established only as:
- (i) a separate client Trust Account for the particular client or matter on which the net income will be paid to the client or third person; or
 - (ii) a pooled client Trust Account with sub-accounting by the Eligible Institution or by the lawyer, which will provide for computation of net income earned by each client's or third person's funds and the payment thereof to the client or third person

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Rule 1.15 Safekeeping Property

- (a) The following definitions are applicable to Rule 1.15:
- (8) *Nonqualified Funds.* Nonqualified Funds are Rule 1.15 Funds, whether cash, check, money order, or other negotiable instrument, which are not Qualified Funds.
- (9) *Qualified Funds.* Qualified Funds are Rule 1.15 Funds which are nominal in amount or are reasonably expected to be held for such a short period of time that sufficient income will not be generated to justify the expense of administering a segregated account.
- (10) *Rule 1.15 Funds.* Rule 1.15 Funds are funds which the lawyer receives from a client or third person in connection with a client-lawyer relationship, or as an escrow agent, settlement agent or representative payee, or as a Fiduciary, or receives as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such. When the term "property" appears with "Rule 1.15 Funds," it means property of a client or third person which the lawyer receives in any of the foregoing capacities.
- (11) *Trust Account.* A Trust Account is an account in an Eligible Institution in which a lawyer holds Rule 1.15 Funds. A Trust Account must be maintained either as an IOLTA Account or as a Non-IOLTA Account.

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Rule 1.15 Safekeeping Property

- (b) A lawyer shall hold all Rule 1.15 Funds and property separate from the lawyer's own property. Such property shall be identified and appropriately safeguarded....
- (h) A lawyer shall not deposit the lawyer's own funds in a Trust Account except for the sole purpose of paying service charges on that account, and only in an amount necessary for that purpose.
- (i) A lawyer shall deposit into a Trust Account legal fees and expenses that have been paid in advance, **to be withdrawn by the lawyer only as fees are earned or expenses incurred**, unless the client gives informed consent, confirmed in writing, to the handling of fees and expenses in a different manner.
- (j) At all times while a lawyer holds Rule 1.15 Funds, the lawyer shall also maintain another account that is not used to hold such funds.
- (k) All Nonqualified Funds which are not Fiduciary Funds shall be placed in a Non-IOLTA Account or in another investment vehicle specifically agreed upon by the lawyer and the client or third person which owns the funds.
- (l) All Fiduciary Funds shall be placed in a Trust Account (which, if the Fiduciary Funds are also Qualified Funds, must be an IOLTA Account) or in another investment or account which is authorized by the law applicable to the entrustment or the terms of the instrument governing the Fiduciary Funds.
- (m) All Qualified Funds which are not Fiduciary Funds shall be placed in an IOLTA Account.

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Rule 1.15 Safekeeping Property

- Comments:**
- [1] A lawyer should hold property of others with the care required of a professional fiduciary. The obligations of a lawyer under this Rule apply when the lawyer has come into possession of property of clients or third persons because the lawyer is acting or has acted as a lawyer in a client-lawyer relationship, or when the lawyer is acting as a Fiduciary, or as an escrow agent, a settlement agent or a representative payee, or as an agent, having been designated as such by a client or having been so selected as a result of a client-lawyer relationship or the lawyer's status as such. Securities should be appropriately safeguarded. **All property which is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if Rule 1.15 Funds, in one or more Trust Accounts, or, if a Fiduciary entrustment, in an investment or account authorized by applicable law or a governing instrument.** The responsibility for identifying an account as a Trust Account shall be that of the lawyer in whose name the account is held. Whenever a lawyer holds Rule 1.15 Funds, the lawyer must maintain at least two accounts: one in which those funds are held and another in which the lawyer's own funds may be held.
- [7] Lawyers often receive funds from which the lawyer's fee will be paid. Unless the fee is non-refundable, **it should be deposited to a Trust Account and drawn down as earned.** The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a Trust Account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

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ISSUE 7

Attorney asks his assistant when the statute of limitations runs

Calendaring / Missing SOL

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Avoid Missed Deadlines

- Calendar system with one point of entry
 - Don't have multiple calendars – one at home, one at the office and sticky notes elsewhere – disaster waiting to happen
- Centralized shared calendar
- Easy to use system
- Train office staff on use of calendar
- Take time to review calendar

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ISSUE 8

Assistant informs attorney that the client threatened to call the Disciplinary Board

When Do I Report a Claim?

- What is a claim for insurance reporting purposes?
- Do I have to report potential claims to my carrier?

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Notifying Insurer of Claims

What is a Claim?

- A demand made upon any insured for loss, ... including, but not limited to service of suit or institution of arbitration proceedings or administrative proceedings against any insured.

... must always be reported to your insurer.

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Notifying Insurer of Claims

What is a Potential Claim?

- Any act, error, omission, circumstance or personal injury which might reasonably be expected to give rise to a claim

Need not be reported if you are a CNA insured and you continue to renew your CNA policy from year to year.

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Notifying Insurer of Claims

No notice, no coverage!

- Policy may attempt to limit the amount of time the insured has to report a claim
- Notice in writing

CNA will permit PBA insureds to withhold reporting potential claims if the insured continues to maintain uninterrupted CNA coverage.

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Notifying Insurer of Claims

Better Practice...

Report even potential claims to receive claims repair advice and to assure that insurer does not later deny coverage by contending that what you thought was a "potential claim" was really a "claim."

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Claim Mitigation: Do's and Don'ts

What to do:

- Furnish notice of any claim or potential claim to LPL carrier
- Make copy of entire underlying file
- Keep client informed
- Cooperate with successor counsel, if any, to protect client's interests

What NOT to do:

- Avoid or mislead client as to bad developments
- Refuse to turn over a client file
- Turn over a client file without making a copy

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Disciplinary Board complaints threaten your license.

Civil complaints threaten your income.

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Disciplinary Board Complaints

90 % of complaints dismissed before notice to respondent

- Frivolous
- Policy considerations (e.g. fee dispute)

Occur in all practice areas

- family law, criminal law and estates and trusts at higher risk

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Legal Malpractice Claims

Legal malpractice claims predominantly end up in state court.

Occur in all practice areas

- plaintiff litigation, estates and trusts and business transaction at highest risk.

Less likely if your practice is focused in one or two areas.

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I got a letter from the Disciplinary Board

Should I call my LPL carrier? This isn't malpractice, so its probably not covered and I don't want them to raise my rates or drop my coverage.

CNA Policy Highlights

- Coverage for disciplinary proceedings up to \$50,000

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Discipline Process

Complaint Received

- Investigation
 - DB-7 (Request for Statement of Position)
 - Form 3 (approved by CDC)
 - Reviewing Member of HC
 - Reprimands: 3 Board members
 - Petition for Discipline
 - Hearing Committee
 - Board – argument
 - Supreme Court - argument

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Discipline Statistics

- About 4,000 complaints per year
- DB-7s issued in about 12-14% of those cases (~600) – meaning that in about 85% the lawyer might never even learn s/he was under investigation.
- About 150-200 sanctions imposed per year (i.e., in about 5% of cases)
- 50/50 private and public discipline

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DB-7 Request for Statement of Respondent's Position

- Complaint survived the initial screening and investigation stage.
- Allegations made which, if true, constitute violations of the Rules of Professional Conduct.
- Disciplinary Counsel believes there may be sufficient evidence to prove allegations.

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§ 87.7. Notification to Respondent-Attorney of Complaint and Duty to Respond

(a) Condition precedent to recommendation for discipline. Disciplinary Counsel shall not recommend or undertake a disposition of discipline under Enforcement Rule 204 (relating to types of discipline) until the respondent-attorney has been notified of the allegations and the time for response under subdivision (b)(2) of this rule, if applicable, has expired.

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Horizontal lines for writing.

§ 87.7. Notification to Respondent-Attorney of Complaint and Duty to Respond

(b) Transmission of notice. Except as provided in subsection (a) of this section, the district office shall prepare and forward to the respondent-attorney Form DB-7 (Request for Statement of Respondent's Position), advising the respondent-attorney of: (1) the nature of the grievance and if the investigation has not been initiated by the Office of Disciplinary Counsel pursuant to § 87.1(b) (relating to initiation of investigations), the name and address of the complainant; and

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Horizontal lines for writing.

§ 87.7. Notification to Respondent-Attorney of Complaint and Duty to Respond

(2) the requirement that the respondent-attorney respond to the allegations against the respondent-attorney by filing with the district office a statement of position. Unless a shorter time is fixed by the Chief Disciplinary Counsel in such notice, the respondent-attorney shall have 30 days from the date of such notice within which to file a statement of position in the district office.

The notice requirements of this subdivision (b) shall be applicable to any Form DB-7A (Supplemental Request for Statement of Respondent's Position), in which case the notice shall advise the respondent-attorney of the requirement that the respondent-attorney respond to the supplemental allegations by filing with the district office a statement of position with respect thereto.

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Horizontal lines for writing.

§ 87.7. Notification to Respondent-Attorney of Complaint and Duty to Respond

(c) Contents of statement of position. All statements of position shall be in writing and sufficiently detailed as to advise Disciplinary Counsel and any reviewing hearing committee member that the Board Secretary may appoint under § 87.32 (relating to action by reviewing hearing committee member) of the nature of any defense. The respondent-attorney should include with the statement any corroborating documentation and may include in the statement mitigating factors and any relevant facts or circumstances that may assist Disciplinary Counsel in determining under § 87.8(b) the action to be taken or the disposition recommended.

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§ 87.7. Notification to Respondent-Attorney of Complaint and Duty to Respond

(d) Effect of failure to respond. Enforcement Rule 203(b)(7) provides that failure by a respondent-attorney without good cause to respond to a request (Form DB-7) or supplemental request (Form DB-7A) by Disciplinary Counsel for a statement of the respondent-attorney's position shall be grounds for discipline. Failure to respond may also be a violation of Rule of Professional Conduct 8.1(b).

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PBA Ethics Hotline

Any PBA member with an ethical question concerning his or her own prospective conduct may call the PBA Ethics Hotline at 800-932-0311, ext. 2214

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CNA Claims Assistance Hotline

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

888-200-5212

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Thank you for attending today's program.

- Be sure to complete and return your USI discount form.
- We invite you to email or call any of the presenters after the program.

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SESSION #4

Government Law

“Refresher on Professional Licensing Issues”

Presented by:
Travis N. Gery, Esquire

A Refresher on Professional Licensing Issues

Presented by:
Travis N. Gery
Counsel
K&L Gates LLP

The Bureau of Professional and Occupational Affairs

The Bureau of Professional and Occupational Affairs (“BPOA”) was established in 1963 to provide administrative and legal support to the professional and occupational licensing boards and commissions. The two-fold mission of BPOA is to protect the health, safety and welfare of the citizens of the Commonwealth and to protect the integrity of the licensed professions and occupations.

1. The structure of BPOA

a. The Commissioner of Professional and Occupational Affairs

i. 71 P.S. § 279.1

1. Appointed by the Governor (and confirmed by the Senate).
2. Power to keep records of all of the professional and occupational examining boards.
3. To hold the examination, make such investigations, require such information and do and perform all other acts which may be necessary to determine whether applicants for licensure or registration are qualified to practice the profession or work at the trade or occupation within this Commonwealth, and in proper cases to issue licenses and certificates of registration.
4. Responsible for all administrative affairs of each of the professional and occupational examining boards and to coordinate their activities.
5. To assure that notice is published, in a newspaper of general circulation in the area where the licensee, certificate holder or registrant of any professional or occupational licensing board or commission conducts or recently conducted his or her practice, of any order suspending or revoking his or her right to practice.
6. Full voting member of each of the said boards.

b. The Boards and Commissions

- i. 71 P.S. § 62 - Each Board is a Departmental Administrative Board or Commission in the Department of State. Each Board is independent.
- ii. Made up of members of the profession as well as public members.

1. 71 P.S. § 279.4 - Public members may not:
 - a. be a member of any occupation or profession licensed by the board of BPOA;
 - b. be an immediate family member of a licensee;
 - c. be affiliated in any way with the profession or occupation;
 - d. hold any other appointive or elective public office or position.
 2. 71 P.S. § 279.3 - no member shall at the same time be an officer or agent of any Statewide association or organization representing the profession or occupation subject to the board's action
 - iii. Between seven and seventeen members on each board.
 - iv. Each board is established and governed by its own statute and regulations. The statutes are found in Title 63 of the Pennsylvania Statutes. The regulations are found in Title 49 of the Pa. Code.
- c. The Board Administrator
- i. Coordinates, participates, and prepares agenda packages for board meetings.
 - ii. Administrative duties for the exam program, application forms, records, prepare correspondence, schedule interviews and informal meetings or conferences, provide statistical information to board and direction to board staff.
 - iii. Custodian of records.
 - iv. Prepare per diem vouchers for board members.
- d. The Legal Office
- i. Counsel Division
 1. Serve as "general counsel" to the board.
 2. Provide general legal advice to the board.
 3. Assist in the review and drafting of regulations and provide analysis on proposed legislation.
 4. Assist in the drafting of Adjudications and Orders issued by the board.
 - ii. Prosecution Division
 1. Professional Compliance Office - evaluate complaints.

2. Draft Orders to Show Cause and Petitions for Immediate Temporary Suspension.
 3. Prosecute cases against licensees (formal actions as well as citations).
 4. Represent the Commonwealth in application denial cases.
- e. Bureau of Enforcement and Investigations
- i. Conduct inspections (both routine and complaint driven).
 - ii. Investigate complaints.
2. Health Related Boards
- a. Chiropractic (Title 63, Chapter 18A / 49 Pa. Code Chapter 5)
 - b. Dentistry (Title 63, Chapter 4 / 49 Pa. Code Chapter 33)
 - c. Massage Therapy (Title 63, Chapter 18C / 49 Pa. Code Chapter 20)
 - d. Medicine (Title 63, Chapter 12 / 49 Pa. Code Chapters 16, 17, and 18)
 - e. Nursing (Title 63, Chapter 7 / 49 Pa. Code Chapter 21)
 - i. Practical Nurse Law (Title 63, Chapter 20 /
 - f. Nursing Home Administrators (Title 63, Chapter 25 / 49 Pa. Code Chapter 39)
 - g. Occupational Therapy (Title 63, Chapter 29 / 49 Pa. Code Chapter 42)
 - h. Optometry (Title 63, Chapter 8 / 49 Pa. Code Chapter 23)
 - i. Osteopathic Medicine (Title 63, Chapter 9 / 49 Pa. Code Chapter 25)
 - j. Pharmacy (Title 63, Chapter 11 / 49 Pa. Code Chapter 27)
 - k. Physical Therapy (Title 63, Chapter 27 / 49 Pa. Code Chapter 40)
 - l. Podiatry (Title 63, Chapter 3 / 49 Pa. Code Chapter 29)
 - m. Psychology (Title 63, Chapter 26 / 49 Pa. Code Chapter 41)
 - n. Social Workers, Marriage and Family Therapists and Professional Counselors (Title 63, Chapter 33 / 49 Pa. Code Chapters 47, 48, and 49)
 - o. Speech-Language Pathology and Audiology (f/k/a Speech-Language and Hearing) (Title 63, Chapter 29 / 49 Pa. Code Chapter 45)
 - p. Veterinary Medicine (Title 63, Chapter 15 / 49 Pa. Code Chapter 31)

3. Business Related Boards

- a. Accountancy (Title 63, Chapter 1 / 49 Pa. Code Chapter 11)
- b. Architects (Title 63, Chapter 2A / 49 Pa. Code Chapter 9)
- c. Auctioneer Examiners (Title 63, Chapter 21A / 49 Pa. Code Chapter 1)
- d. Barbers (Title 63, Chapter 17 / 49 Pa. Code Chapter 3)
- e. Certified Real Estate Appraisers (Title 63, Chapter 13C / 49 Pa. Code Chapter 36)
- f. Cosmetology (Title 63, Chapter 16 / 49 Pa. Code Chapter 7)
- g. Crane Operators (Title 63, Chapter 38 / 49 Pa. Code Chapter 6)
- h. Funeral Directors (Title 63, Chapter 14 / 49 Pa. Code Chapter 13)
- i. Landscape Architects (Title 63, Chapter 23 / 49 Pa. Code Chapter 17)
- j. Navigation Commission for the Delaware River and its Navigable Tributaries
- k. Professional Engineers, Land Surveyors and Geologists (Title 63, Chapter 5 / 49 Pa. Code Chapter 37)
- l. Real Estate Commission (Title 633, Chapter 13A / 49 Pa. Code Chapter 35)
- m. Vehicle Manufacturers, Dealers and Salespersons (Title 63, Chapter 22A / 49 Pa. Code Chapter 19)

4. Typical Powers of the Boards

- a. Establish reasonable rules and regulations.
- b. Establish standards of the profession and scope of practice (Practice Act or Title Protection).
- c. Schedule examinations.
- d. Issue licenses, certificates, permits, etc.
- e. Administer and enforce the laws relating to the profession / occupation.
- f. Take disciplinary action (suspension or revocation of licenses).
 - i. *Lyness v. State Board of Medicine*. Addressed the requirement of procedural due process in disciplinary proceedings.
 - 1. Notice.
 - 2. Opportunity to be heard.

3. Before a fair and impartial tribunal. Therefore, board members, in their role as adjudicators, may not participate in the investigation or prosecution of a licensee.

5. Typical Duties of the Board

- a. Keep a record of proceedings and materials related to applications.
- b. Maintain an up-to-date roster of all licensees.
- c. Maintain records relating to all licensed professionals.
- d. Submit annual reports.

6. Licensees

- a. 250+ License Classifications.
- b. 2.6 Million total licenses.
- c. Approximately 1 Million active licensees.

7. The Disciplinary Process

- a. Complaint
- b. Investigation
- c. General Rules of Administrative Practice and Procedure
 - i. Charging Documents
 - ii. Hearing Examiner
 - iii. Board Action
 - iv. Right to Appeal
- d. Consent Agreements
 - i. Requires consent
 - ii. Board may accept or reject (too harsh or too lenient)
- e. Recusal of a board member
 - i. Mandatory if the board member has had some prosecutorial role in the matter or the board member has a direct personal financial interest in the outcome of the matter.
 - ii. Strongly suggest if the board member has a personal affection for someone directly involved in the subject at issue or has knowledge from outside of a

case that they cannot set aside in order to make a fair and unbiased determination based solely on the record made at the hearing or presented via a consent agreement.

- iii. Discretionary if the board member feels that he or she cannot hear and dispose of the case or participate in a decision on a subject fairly and without prejudice.
 - f. Petition for Immediate Temporary Suspension
 - g. The Professional Health Monitoring Program (“PHMP”)
 - i. Disciplinary Monitoring Unit
 - ii. Voluntary Recovery Program
 - h. Collateral impacts of discipline
8. The application process
- a. Governed by the statute and regulations.
 - b. Pa Licensing System (PALS).
 - c. Submit an application.
 - d. Applicant or third party response.
 - e. Examination.
 - f. Confirmation.
 - g. Background checks.
9. Act 53 of 2020
- a. With regard to the consideration of criminal convictions, Act 53:
 - i. Prohibits BPOA’s licensing boards and commissions from denying licensure based on considerations of “good moral character,” “crimes of moral turpitude,” or “ethical or honest practice;”
 - ii. Requires each board and commission to develop and publish a schedule of criminal offenses that may constitute grounds to deny, suspend or revoke a license. The list must also identify which crimes are likely to pose a barrier to licensure because they are considered to be offenses “directly related” to the occupation/profession;
 - iii. Provides for an “individualized assessment” of each license applicant using objective, detailed criteria that includes rehabilitation and public safety;

- iv. Provides a process for individuals who have criminal convictions to request a “preliminary determination” as to whether a particular conviction will be a bar to licensure. This new tool will enable people with criminal convictions to find out if their convictions would prevent them from getting a license – before enrolling in a training or educational program, before investing significant time and resources, and before formally applying for licensure;
- b. Preliminary determinations - with regard to the consideration of criminal convictions, Act 53:
- i. If you have a criminal conviction in your past and are concerned about whether it could prevent you from getting a license, certificate, registration or permit for a particular occupation or profession, your first step should be to review this Best Practices Guide closely, including the Appendices;
 - ii. If, after reviewing this Guide, you are still unsure whether your conviction is likely to prevent you from getting a license, you may submit an application to the appropriate board or commission requesting what is known as a preliminary determination;
 - iii. The preliminary determination will inform you whether your specific conviction falls within the set of crimes that the board has determined to be “directly related” to the occupation or profession you are considering;
 - iv. A “directly related” crime is significant. It means that in the board’s view, the nature of the criminal conduct has a direct bearing on a person’s fitness or ability to perform the tasks, duties or responsibilities necessarily related to a particular profession or occupation;
 - v. For the most part, with a few notable exceptions, the fact that your criminal conviction has been identified as being “directly related” to the profession does not mean that you will automatically be denied a license;
 - vi. The board could still grant a license notwithstanding the conviction. For example, the board may have the option to grant a license on probation, or may place certain restrictions on the license;
 - vii. If you subsequently do decide to formally apply for a license, you would have the opportunity to present any evidence in your favor as part of the application process;
 - viii. Download and print Instructions that explain how to request a preliminary determination. There is a \$45 fee for each request (this fee may be waivable where in forma pauperis status is established);
 - ix. The board/commission is required to issue a preliminary determination within 45 days of your request;
 - x. Asking for a preliminary determination is an optional step. There is no requirement that you request one;

- x. If you ultimately decide to formally apply for a license, you should review the next section of this Best Practices Guide, which explains “Consideration of Criminal Convictions;”
- xii. The Assessment Factors discussed below are particularly important: they outline the criteria the board will use to consider your conviction in making the overall determination whether or not to grant you a license. You should be prepared to provide the board with as much information as possible;

c. The Assessment Factors

- i. The facts and circumstances surrounding your conviction;
- ii. The number of convictions you have;
- iii. Whether the criminal conduct for which you were convicted involved an act or threat of harm against you;
- iv. The increase in your age or maturity since your conviction;
- v. Your criminal history, or lack of criminal history, after the date of the conviction;
- vi. Whether you have successfully completed any training or education activities, such as those offered through programs within an SCI or county correctional facility.
- vii. References from employers or others, including probation/parole officers, etc.;
- viii. Whether you can show evidence of progress in personal rehabilitation since your conviction;
- ix. Whether you meet all of the other licensing qualifications for the type of license you are seeking;
- x. Any other factor which the board deems relevant, and any additional information that you may wish to provide, or that the board may request;

d. Exceptions

- i. Sexual Offenses.
- ii. Crimes of Violence.
- iii. Drug Trafficking Offenses.

SESSION #5

Estate Planning & Probate

“Federal Estate Tax Planning in 2023”

Presented by:
Neil W. Yahn, Esquire

Federal Estate Tax Planning in 2023

DAUPHIN COUNTY BAR ASSOCIATION

DECEMBER 13, 2023

NEIL WARNER YAHN, ESQUIRE (LL.M.) – JSDC LAW

Today's Agenda

Federal Estate and Gift Tax

1. 706 - Federal Estate Tax – Rev Proc – 2022-32
Preserve the DSUE and Use of it – Example
2. Spousal Lifetime Access Trust/SLATS

1. FEDERAL ESTATE TAX RETURN

Form 706 (Rev. August 2013)		United States Estate (and Generation-Skipping Transfer) Tax Return			OMB No. 1545-0015	
Department of the Treasury Internal Revenue Service		<p>► Estate of a citizen or resident of the United States (see instructions). To be filed for decedents dying after December 31, 2012.</p> <p>► Information about Form 706 and its separate instructions is at www.irs.gov/form706.</p>				
Part 1—Decedent and Executor	1a Decedent's first name and middle initial (and maiden name, if any)	1b Decedent's last name		2 Decedent's social security no.		
	3a City, town, or post office; county; state or province; country; and ZIP or foreign postal code.	3b Year domicile established	4 Date of birth	5 Date of death		
	6a Name of executor (see instructions)	6b Executor's address (number and street including apartment or suite no.; city, town, or post office; state or province; country; and ZIP or foreign postal code) and phone no.				
	6c Executor's social security number (see instructions)					
	6d If there are multiple executors, check here <input type="checkbox"/> and attach a list showing the names, addresses, telephone numbers, and SSNs of the additional executors.					7b Case number
	7a Name and location of court where will was probated or estate administered					

Federal Estate Tax Exemption

- 40% tax
- Date of death value – 706 due 9 months following death
- Basic exclusion amount (unified Estate and Gift):

1997	\$ 600,000
2002	\$ 1,000,000
2017	\$ 5,490,000
2018	\$11,180,000
2019	\$11,400,000
2020	\$11,580,000
2021	\$11,700,000
2022	\$12,060,000
2023	\$12,920,000
2024	\$13,610,000
2025	\$ _____
2026	\$ 5,000,000

The current estate and gift tax exemption is scheduled to end on the last day of 2025 and thus in 2026 \$ 5,000,000 (** as adjusted for inflation)(speculate about \$7,000,000)

What are the current estate and gift tax exemptions, and do they 'expire'?

- The increased exemption amounts are scheduled to cease at the end of the year **2025**, but see:
 - IRS, "Final regulations confirm: Making large gifts now won't harm estates after 2025."
 - https://www.irs.gov/newsroom/final-regulations-confirm-making-large-gifts-now-wont-harm-estates-after-2025?fbclid=IwAR1KvcLVEM2T1wr2E_eEqWRZX36vqyUI_N1WWGxalBD_EMTtIVz3ce_iPdRI

Estate Tax – Portability

- Decedents dying after 1/1/2011
- Elect to transfer unused basic exclusion amount to surviving spouse, known as the **Deceased Spousal Unused Exclusion (DSUE)**
- **Code § 2010(c)(5)(A)** states that an election must be made on a return that must be filed within the time "prescribed by law."
- Why file the 706 if under the Estate Tax exemption?

Preserve the DSUE

Revenue Procedure 2022-32

New tax savings opportunity was effective July 8, 2022!

- ▶ The Section 2010 (c)(5)(A) of the Internal Revenue Code allows certain taxpayers a simplified way to make a portability election in order to reduce the number of letter ruling requests.

The portability election to elect DSUE:

- ▶ **Previously:** had to be made within nine months of the decedent's date of death if a Form 706 was required or **within two years of death if a Form 706 was not required as per Rev Proc 2017-34**
- ▶ **Now:** within five years of the decedent's date of death under Rev Proc. 2022-32

Estate Tax – Portability (Cont.)

- Timely filed federal estate tax return or filed "Pursuant to Rev. Proc. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(a)"
- But now use
 - <https://www.irs.gov/pub/irs-drop/rp-22-32.pdf>

Estate Tax – Portability (Cont.)

- Rev Proc 2032-32
- SECTION 3. SCOPE
- The simplified method of this revenue procedure is available to the executor (either an appointed executor or, if none, a non-appointed executor, as provided in § 20.2010-2(a)(6)) of the estate of a decedent if:
 - (1) The decedent: (a) was survived by a spouse; (b) died after December 31, 2010; and (c) was a citizen or resident of the United States on the date of death.
 - (2) The executor is not required to file an estate tax return under § 6018(a) as determined based on the value of the gross estate and adjusted taxable gifts and without regard to the need to file for portability purposes;
 - (3) The executor did not file an estate tax return within the time required by § 20.2010-2(a)(1) for filing an estate tax return; and
 - (4) The executor satisfies all requirements of section 4.01 of this revenue procedure.

Revenue Procedure 2022-32 (Cont.)

- ▶ If the surviving spouse has already passed away and paid the estate tax, the executor of the surviving spouse's estate can file a protective claim for a refund or credit. This credit is for any over payment of tax within the next three years after filing.
- ▶ The statute of limitations still applies under the IRC Section 6511(a) if the increase in the surviving spouse's exemption amount with the addition of the DSUE is now an overpayment of gift or estate tax.
 - ▶ In anticipation of the DSUE being added to the exemption, the surviving spouse can file a protective claim for credit in anticipation of the DSUE. This will prevent the spouse from the statute of limitations barring their credit.
- ▶ The grant of relief will be null if it is later determined that the estate needed to file a return.
- ▶ IRS Revenue Procedure 2022-32 PDF:
 - ▶ <https://www.irs.gov/pub/irs-drop/rp-22-32.pdf>

Estate Tax Portability – (Example)

- John dies 1/1/2023 with \$3,000,000 passing all to wife
- Jane, wife, already has \$3,000,000 and John's basic exclusion \$12,920,000 in 2023 (year of his death)
- DSUE to wife by filing a timely 706 \$12,920,000 (marital deduction)
- **What if missed the filing – are we too late?**
 *** Filed Pursuant to Rev. Proc. 2022-32 TO ELECT PORTABILITY UNDER § 2010(c)(5)(a) ***
 Nine months from date of death, the 706 is due.

Estate Tax – Portability (Example)

- **DSUE applies to:**
 - Surviving spouse lifetime gifting first
 - Then to surviving spouse's estate
- Wife can shield

\$12,920,000 (DSUE) and
her Exemption in 2026***
<u>\$ 5,000,000 (Exemption phased out)</u>
\$17,920,000 DSUE and Exemption

*** 2026 Exemption is unknown – illustration only

Estate Tax – Portability (Cont.)

- Filing for portability only:
 - Page 1 – Box 11: If you are estimating the value of assets included in the gross estate on line 1 pursuant to the special rule of Reg. section 20.2010-2T(a)(7)(ii) check here.

Estate Tax – Portability (Cont.)

Table of Estimated Values

If the total estimated value of the assets eligible for the special rule under Reg. section 20.2010-2T(a)(7)(ii) is more than	But less than or equal to	Include this amount on lines 10 and 23:
\$0	\$250,000	\$250,000
\$250,000	\$500,000	\$500,000
\$500,000	\$750,000	\$750,000
\$750,000	\$1,000,000	\$1,000,000

**MARY AND BILL SMITH –
Estate Tax Form 706 – DSUE
DCBA HYPO**

Smith Family

Bill & Mary Smith – Married 2019 – Second Marriage



The New Smith Family – created in 2019

Susan
(Mary's daughter from prior marriage)

Neil
(Bill's son from prior marriage)

Mary Bill



Mary's Estate \$7,000,000

- ▶ Marketable Securities: \$3,000,000
 - ▶ Apple Inc Stock \$1,000,000
 - ▶ Sale Force: \$1,000,000
 - ▶ Hershey Stock: \$1,000,000
- ▶ Cocoa LLC (closely held business): \$2,000,000 (Valuation - Capitalization of Earnings)(Susan is now the President)
- ▶ Commercial Property – Cocoa Ave Hershey, PA: \$2,000,000 _____

Bill's Estate \$4,000,000

- ▶ Shore Property: Stone Harbor NJ - Parcel 10 – Block 8 Cape May County NJ: \$2,000,000
- ▶ Marketable Securities: IRA – \$1,000,000
- ▶ Life Insurance: \$1,000,000 (owned by Bill on his life payable to Neil on his death)

Owned Jointly by and between Bill and Mary

- ▶ Primary Residence: \$1,000,000 – 124 Maple Ave Hershey Pa (not encumbered)

Total Combined Assets: \$ 12,000,000 (with insurance)

Mary dies in 12/1/2023 leaves all to Bill in a QTIP Trust



- Estate Tax Exemption 2023: \$12,920,000
- Complete Form 706 and use DSUE (\$7,000,000)
 - Marketable Securities: \$3,000,000 (new tax basis for shares)
 - Cocoa LLC (closely held business): \$2,000,000 (Valuation - Capitalization of Earnings)(754 election)
 - Commercial Property – Cocoa Ave Hershey, PA: \$2,000,000 - new tax basis for depreciation – 39 years – why is this important?

QTIP Trust – FBO Bill

ARTICLE VII QTIP Marital Trust fbo Bill

Property that is to be held in the QTIP Marital Trust shall be held under this Article and all references to the "QTIP Marital Trust" shall be to the trusts held under this Article.

- A. During The Settlor's (Bill) Husband's Life. The following provisions shall apply during the Settlor's Husband's life.
1. The Trustee shall distribute to the Settlor's Husband the net income of the trust at least quarterly.
 2. The Trustee shall distribute to the Settlor's Husband as much of the principal of the trust as the Trustee may from time to time determine, for the Settlor's Husband's health, education, support in his accustomed manner of living, or maintenance.

QTIP Trust – FBO Bill

3. The Settlor's Husband may direct the Trustee to make any unproductive assets productive of income or to convert any unproductive assets to property that produces income, within a reasonable time, notwithstanding any provision of this Agreement otherwise authorizing the Trustee to retain unproductive property. The application of any specific provision of this Agreement shall in all events be construed so as to give the Settlor's Husband that degree of beneficial enjoyment of the trust property during his life which the principles of the law of trusts accord to a person who is the sole income beneficiary of a trust, and to ensure that the QTIP Marital Trust qualifies for the federal estate tax marital deduction to the extent so elected.

QTIP Trust – Upon Bill's death

B. Upon The Settlor's Husband's Death. The following provisions shall apply after the Settlor's Husband's death.

1. Unless the Settlor's Husband provides otherwise by specific reference to this paragraph in a will or other writing, the Trustee shall pay any increase in death taxes payable upon the death of the Settlor's Husband caused by the inclusion of a QTIP marital trust or a portion of a marital trust in his gross estate from the principal of the trust or portion so included. The Trustee may rely upon the written statement by the Settlor's Husband's Trustee of the amounts thus payable.

2. The balance of the property then held in the Marital Trust shall be distributed to the Settlor's daughter, Susan, and if she fails to survive to her descendants then living, per stirpes, subject to the terms of the Descendants' Separate Trust.

Bill dies in 2026 and leaves all his assets to Neil...
What is his estate tax exemption? \$5,000,000

Prepare 706 – QTIP Trust assets now worth \$10,000,000 which
go to Susan? DSUE?



Estate Tax Return – Bill Passes Away – No DSUE

- 40% tax
2026 \$15,000,000 – see Estate Tax Return

So, what is the Estate Tax on \$15,000,000?

First	\$ 1,000,000 = \$345,800
	\$14,000,000
	<u> x 40% = \$5,600,000</u>
	\$5,945,800

See Estate Tax Return without DSUE.

So, what is Bill's exemption in 2026 and does he get the DSUE from Mary?

Estate Tax Return – Bill Passes Away – With a DSUE

- 40% tax
2026 \$15,000,000 – see Estate Tax Return

But see box 9 (a) and 9 (b) of the 706? 17,920,000

First	\$ 1,000,000 = \$345,800
	\$ 16,920,000
	<u> x 40% = \$6,768,000</u>

\$7,113,800 of credit and so no estate tax owed with proper use of DSUE.

Line 9 (b) on Bill's 706 is critical!

See attached Forms 706

What is the tax basis in the assets passing to Susan?

QTIP Trust assets now worth \$10,000,000 which go to Susan? Did the trustee diversify inside the trust after Mary passed away in 2023 (or did they stay the same?)?



Marketable Securities: \$4,000,000
 Apple Inc Stock \$1,500,000
 Sales Force: \$1,500,000
 Hershey Stock: \$1,000,000

Cocoa LLC (closely held business): \$3,000,000 (Valuation - Capitalization of Earnings)(CVA)

Commercial Property – Cocoa Ave Hershey, PA: \$3,000,000 (39/3,000,000) = roughly \$76,925 in depreciation deduction

What is the tax basis in the assets passing to Susan?

Commercial Property – Cocoa Ave Hershey, PA: \$3,000,000 (39/3,000,000) = roughly \$76,925 in depreciation deduction

	Rental Income Schedule E	
	2023	2026
Rental Income	\$ 300,000.00	\$ 300,000.00
Depreciation	\$ -	\$ 77,000
Insurance	\$ 9,343.00	
Mortgage	\$ 4,482.00	
Labor hired	\$ 7,925.00	
Repairs and maintenance	\$ 5,360.00	
Taxes	\$ 13,812.00	
Utilities	\$ 1,339.00	
Other expenses	\$ 1,090.00	
Total expenses	\$ 43,351.00	
Net Taxable Income	\$ 256,649.00	\$ 179,649.00

What is the tax basis in the assets passing to Susan out of the QTIP?

Apple Inc Stock \$1,500,000
 Sales Force: \$1,500,000
 Hershey Stock:\$1,000,000



Cocoa LLC - U.S. Income Tax Return (Form 1120) HYPO DCBA						
2017 to 2021						
	12/01/2017 - 11/30/2018	12/01/2018 - 11/30/2019	12/01/2019 - 11/30/2020	12/01/2020 - 11/30/2021	Average	
1a	Gross receipts or sales	\$ 17,142,632.00	\$ 18,848,679.00	\$ 14,940,017.00	\$ 12,414,075.00	\$ 15,836,350.75
1b	Returns and Allowances					#DIV/0!
1c	Balance. Subtract line 1b from line 1a	\$ 17,142,632.00	\$ 18,848,679.00	\$ 14,940,017.00	\$ 12,414,075.00	\$ 15,836,350.75
2	Cost of goods sold	\$ 13,862,568.00	\$ 14,333,073.00	\$ 11,425,012.00	\$ 10,279,061.00	\$ 12,474,928.50
3	Gross Profit	\$ 3,280,064.00	\$ 4,515,606.00	\$ 3,515,005.00	\$ 2,135,014.00	\$ 3,361,422.25
4	Interest	\$ 21,568.00	\$ 54,468.00	\$ 40,767.00	\$ 15,958.00	\$ 33,190.25
5	Net Gain/Loss		\$ (68,140.00)			\$ (68,140.00)
6	Other Income	\$ 283,007.00	\$ 269,391.00	\$ 193,136.00	\$ 1,430,902.00	\$ 544,109.00
7	Total Income	\$ 3,584,639.00	\$ 4,771,325.00	\$ 3,748,908.00	\$ 3,581,874.00	\$ 3,921,686.50
8	Compensation of officers	\$ 593,414.00	\$ 579,826.00	\$ 858,512.00	\$ 736,066.00	\$ 691,954.50
9	Salaries and wages	\$ 1,437,230.00	\$ 1,785,543.00	\$ 1,295,795.00	\$ 1,702,716.00	\$ 1,555,321.00
10	Repairs and maintenance	\$ 72,589.00	\$ 82,309.00	\$ 60,838.00	\$ 75,711.00	\$ 72,861.75
11	Bad Debts	\$ 19,900.00	\$ 1,643.00	\$ 207.00	\$ 1,250.00	\$ 5,750.00
12	Rents	\$ 100,027.00	\$ 104,569.00	\$ 116,356.00	\$ 82,182.00	\$ 100,783.50
13	Taxes and licenses	\$ 246,712.00	\$ 323,378.00	\$ 313,199.00	\$ 309,830.00	\$ 298,279.75
14	Interest	\$ 79,986.00	\$ 90,955.00	\$ 92,787.00	\$ 68,899.00	\$ 83,156.75
15	Charitable contributions	\$ 37,662.00	\$ 14,687.00	\$ 81,756.00	\$ 30,962.00	\$ 41,266.75
16	Depreciation not claimed	\$ 741,902.00	\$ 1,343,545.00	\$ 404,591.00	\$ 341,661.00	\$ 707,924.75
17	Depletion					
18	Advertising	\$ 36,524.00	\$ 10,369.00	\$ 9,293.00	\$ 18,155.00	\$ 18,585.25
19	Pension, profit-sharing, etc.	\$ 67,801.00	\$ 164,283.00	\$ 136,342.00	\$ 177,494.00	\$ 136,480.00
20	Employee benefit programs	\$ 211,515.00	\$ 200,755.00	\$ 203,374.00	\$ 196,360.00	\$ 203,001.00
21	Domestic Production activities deduction	\$ 30,356.00				\$ 30,356.00
22	Other deductions	\$ (399,578.00)	\$ (623,863.00)	\$ (684,378.00)	\$ (801,265.00)	\$ (627,271.00)
23	Total deductions	\$ 3,276,040.00	\$ 4,077,999.00	\$ 2,888,672.00	\$ 2,940,021.00	\$ 3,295,683.00
24	Ordinary business income (pre tax)	\$ 308,599.00	\$ 693,326.00	\$ 860,236.00	\$ 641,853.00	\$ 626,003.50

Capitalization Rate	12%
Value of Asset (Business)	\$ 5,216,695.83
Capitalization Rate	14%
Value of Asset (Business)	\$ 4,471,453.57
Capitalization Rate	16%
Value of Asset (Business)	\$ 3,912,521.88
Capitalization Rate	17.66%
Value of Asset (Business)	\$ 3,544,753.68
Capitization Rate	20%
Value of Asset (Business)	\$ 3,130,017.50

MARY AND BILL SMITH –
USE EXEMPTION NOW -
SLAT – Spousal Lifetime Access Trust

Smith Family

The New Smith Family – created in 2009
Use of SLAT

Susan
(Mary's daughter from prior marriage)

Neil
(Bill's son from prior marriage)

Mary Bill



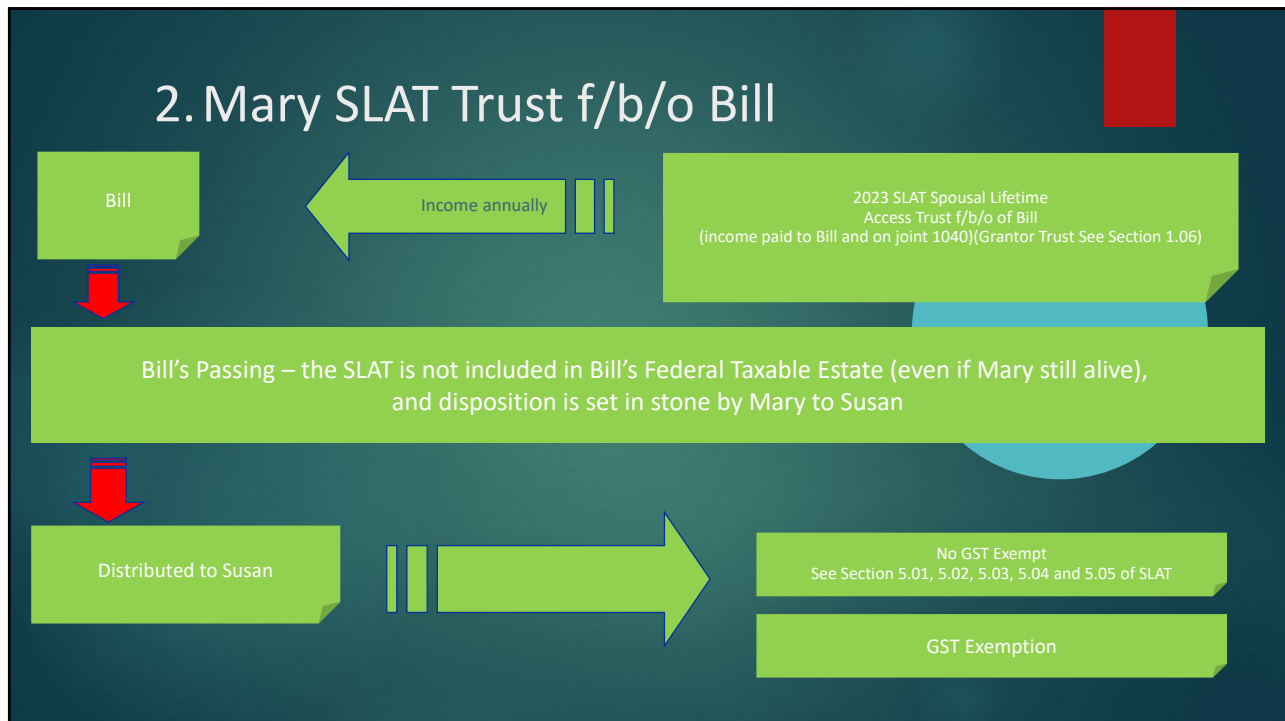


1. Mary makes a gift into SLAT from her own assets

Mary makes a gift totaling \$10,920,000 into a Spousal Lifetime Access Trust (SLAT) and assets are then held during Bill's life as per Article Four of SLAT



2. Mary SLAT Trust f/b/o Bill



3. SLAT Trust f/b/o Bill

During Bill's Lifetime – Bill receives all the "income" of the SLAT

Bill

The SLAT is a grantor trust to be picked up on joint 1040 with Mary

(What are the investments inside the SLAT will also dictate the income?)

Even upon Mary's passing, Bill remains the income beneficiary for his lifetime, but at that point It is no longer a grantor trust (SLAT files a 1041)(reexamine the investment strategy).

While SLAT assets do not get a step-up in basis for Income Tax purposes, the funding by Mary is critical given the assets are not included in Mary's estate upon her passing (must be from him to avoid Section 2036 inclusion or transfer by Bill to a trust of which he benefits).

4. Outright/Descendant's Separate Trust at Bill's Passing?

Does the SLAT provide for a GST Exempt Trust and not pass outright to Susan, but rather in trust for her lifetime subject to ascertainable standards

Trust for the benefit of Susan

Into Trust – GST

Bill passes away – SLAT ends

Susan passes away – to her children subject to the DST

Susan's children

(Mary's grandchildren) with principal outright at ages 30/35/40

Critical SLAT Issues



SLAT critical issues to consider...

- Risk of death or divorce of the non-donor spouse ...
- The reciprocal trust doctrine ...
- Ability for non-donor spouse to serve as trustee ...
- Tradeoffs with respect to basis step-up at death ... None!
- Types of assets to fund a SLAT ... Productive
- Tax return filing requirements ... IDGTs and PA (non-grantor trust status)



SESSION #6

“Workers’ Compensation Law Updates”

Presented by:
Adam N. Crosier, Esquire

Workers' Compensation Case Law Update



General Practice Updates

- Impact of COVID-19 on PA Workers' Compensation Practice
 - Wide use of remote hearings throughout the Commonwealth
 - Microsoft Teams adopted as official format for use in hearings via video
 - Present transition back to "live" hearings in special circumstances and particular judges
 - Expect there to be a variety of procedures used by workers' compensation judges for live hearings
 - Some judges continue to use exclusive virtual hearings, except when live hearing is requested by parties
 - Many judges are using a hybrid model – all testimonial hearings live with status and Compromise and Release hearings via Microsoft Teams
 - Disfigurement/scarring cases for purposes of viewing
 - Pros and cons of virtual hearings

General Practice Updates

- Updated judge practice questionnaires based upon post-COVID-19 procedures
 - <https://www.dli.pa.gov/Individuals/Workers-Compensation/wcoa/judge/Pages/default.aspx>
- Important for submission of evidence – uploading procedures from judge to judge will vary with specific deadlines sometimes requested given documents are not submitted at live hearings
- Procedures for submission of settlement documents
- Procedures for presentation of witnesses and participation by claimants (video sometimes always required, even for status, pre-trial, and supersedeas hearings)
- Medical expert procedure presently (mostly remote)

WCAB Procedures

- WCAB has updated briefing and argument procedures to expedite the process of rendering decisions.
- Refer to § 111.16. Briefs: content and form and time for filing
- Briefing Updates
 - Brief of the Petitioner is due 30 days after the filing of the appeal
 - Respondent brief is due **30 days after Petitioner submits brief**, or 30 days after Petitioner's brief was due when no brief is submitted
 - Brief extensions will be granted as long as submitted before brief due date
 - If extension is not timely requested, party will be precluded from submitting a brief and no extension will be granted.

WCAB Procedures

- Brief Contents
 - Short Statement of Questions Involved
 - Statement of Facts
 - Summary of Argument (must not exceed one page)
 - Argument
 - Short Conclusion with Relief Sought
- Argument Updates
 - Parties may waive the argument
 - Board will schedule arguments based upon predetermined dates for WCAB arguments
 - Most arguments to be conducted virtually (scar cases as exception)

Gerard Steibler v. PHI

- Issue: Whether a claimant's Due Process rights are violated when a WCJ conducts a video hearing over a claimant's objection?
- Holding: Yes. Because the WCJ failed to follow the regulations and denied the Claimant an in-person hearing over his counsel's objection, Claimant's due process rights were violated. As a result, the court vacated the WCJ's decision and remanded for further consideration.

Gerard Steibler v. PHI

- Relevant Facts
 - Underlying litigation concerned a Petition for Modification filed by the Employer, and the first hearing was held in September 2021.
 - At the time of the hearing, Claimant requested that all testimony be presented live rather than by virtual means.
 - The Judge denied the request based upon concerns associated with COVID-19 and having an in-person event.
- Rationale
 - Section 131.54 - "At the discretion of the judge, the hearings may be conducted by telephone or other electronic means if the *parties do not object.*"
 - Here a party objected, and the WCAB determined that lingering effects of the pandemic was not sufficient "good cause" to deny a live hearing for testimony and constituted a denial of due process.
- Impact on current virtual practice

Teresa Fegley v. Firestone Tire & Rubber (WCAB)

- Issue: Are expenses related to medical marijuana, deemed reasonable and necessary to treat a work injury, reimbursable under the Pennsylvania Workers' Compensation Act?
- Holding: Yes. The court found that, while a carrier can not be made to "cover" expenses related to medical marijuana, it is required to reimburse out of pocket expenses related to medical marijuana expenses deemed reasonable and necessary.

Teresa Fegley v. Firestone Tire & Rubber (WCAB)

- Relevant Facts
 - Claimant had chronic pain due to a 1997 low back injury resulting in two surgeries.
 - Claimant had been using opioid medications and transitioned to medical marijuana for pain management.
 - Employer filed a Utilization Review, and the provider performing the review determined treatment was reasonable and necessary. Employer did not pay for treatment regardless.
 - Claimant filed a Petition for Penalties, which was denied by the Judge because paying medical marijuana would violate federal law.
- Rationale
 - Commonwealth court held reimbursement of out-of-pocket medical expenses for medical marijuana was permitted as the treatment related to the injury.
 - Citation to Medical Marijuana Act section stating insurers do not need to pay for marijuana
 - However, Medical Marijuana Act did not preclude reimbursement for out-of-pocket expenses, just direct pay
- Impact on practice

Edward Appel v. GWC Warranty Corp. (WCAB)

- Issue: Whether an Employer is required to reimburse the Claimant for out-of-pocket medical expenses for medical marijuana in Pennsylvania when the medical marijuana is required to treat a work-related injury?
- Holding: Yes, similar to Fegley. The Commonwealth Court found that reimbursement, as opposed to direct payment, is permitted under the Pennsylvania Workers' Compensation Act and complies with the Medical Marijuana Act.

Edward Appel v. GWC Warranty Corp. (WCAB)

- Relevant Facts
 - Claimant sustained a work-related injury involving his low back in 2006 resulting in two low back surgeries.
 - Claimant initially used opioid medications for pain management, but he was able to wean off these medications with some difficulty.
 - Claimant indicated medical marijuana was helpful with the weaning off of the opioid medications and also proved to be more effective in treating his pain.
- Rationale
 - Same rationale as Fegley.
 - Medical Marijuana Act prohibits direct insurer payment of medical marijuana. However, it does not specifically forbid reimbursement for out-of-pocket expenses.
 - Pennsylvania Workers' Compensation Act requires payment of reasonable, necessary, and causally-related medical treatment, not specifically indicating that medical marijuana or something similar would not be permissible.

Mark Davis v. Crothall Healthcare, Inc. (WCAB)

- Issue: What is the burden of proof a claimant bears on a Claim Petition following an unexcused late answer?
- Holding: A claimant is entitled to a rebuttable presumption that disability continues after the last day the employer could've filed a timely answer to the claim petition.

Mark Davis v. Crothall Healthcare, Inc. (WCAB)

- Relevant Facts
 - Claimant filed a Claim Petition alleging cumulative trauma to the low back. Neither Employer nor Counsel appeared at the initial hearing and a timely Answer was not filed. Claimant requested *Yellow Freight* relief due to the lack of a timely Answer, which the Judge granted.
- Rationale
 - On appeal, the Commonwealth Court stated, "An employee's failure to timely file an answer is not equivalent to a default judgment, however, as the claimant must still present evidence regarding any facts that were not well-pleaded in the claim petition, and an employer may rebut such evidence."
 - The Claimant is only entitled to a presumption of ongoing disability "up to the last day the answer could have been timely filed." Thereafter, there is a rebuttable presumption as to ongoing disability, and the Employer may offer evidence to rebut this presumption.

Hollis v. C&R Laundry Services LLC (WCAB)

- Issue: Whether identifying a body part is sufficiently "well-pled" for purposes of a *Yellow Freight* late answer.
- Holding: No. Simply identifying a body part as part of the alleged work-related injury does not constitute a well-pled work injury when considering a late answer and admission of well-pled facts.

Hollis v. C&R Laundry Services LLC (WCAB)

- Relevant Facts
 - Claimant filed a Claim Petition alleging an injury in the nature of "left rotator cuff pathology." The Employer filed an untimely Answer, resulting in a *Yellow Freight* motion.
- Rationale:
 - Simply identifying a body part (not an uncommon practice by some claimant attorneys) is not sufficient to identify the nature of the injury. A particular body part may involve a multitude of different medical diagnoses.
 - Here, "left rotator cuff pathology," could include a plethora of different diagnoses including tendinopathy, a tear, a strain, etc. It does not allow the workers' compensation judge to identify a specific injury for purposes of granting a *Yellow Freight* motion.
 - Note: Claimant attorneys should be sure to list specific medical diagnoses in a Claim Petition in the event they would encounter an opportunity to raise a *Yellow Freight* motion in light of a late answer.

**Stephen Clark v. Keystone Lawn
Spray (WCAB)**

- Issue: Whether the Claimant was in the course and scope of employment when he was injured stepping from a work area into a vehicle after clocking out?
- Holding: No. Claimant was not engaged in an activity in furtherance of the employer’s business, and the injury was not caused by the premises. This is a good case reviewing course and scope issues, when the facts of a case do not clearly demonstrate that an employee was injured while performing work-related activities.

**Stephen Clark v. Keystone Lawn
Spray (WCAB)**

- Relevant Facts:
 - Claimant worked on the employer’s premises moving equipment, and he began to feel some pain and weakness in his left calf and ankle over the course of the day.
 - At the end of his shift, the Claimant clocked out and went to his vehicle to leave the premises. Upon entering his vehicle, he pushed off the ground with his left lower extremity and felt his Achilles tendon tear. It was undisputed that the injury specifically occurred as a result of the Claimant exerting force upon the ground to propel himself into the vehicle.

**Stephen Clark v. Keystone Lawn
Spray (WCAB)**

- Rationale: Great summary and overview of course and scope cases.
 - Course and scope – two situations:
 - Employee injured on or off the premises while actually engaged in furtherance of the employer’s business of affairs – This is the vast majority of compensable, undisputed workers’ compensation injuries.
 - Employee NOT engaged in work at the time of the injury, BUT is on the premises under control of the employer, is required by the nature of the employment to be on the premises, and sustains an injury due to the condition of the premises or operation of the business – This is where we often see disputes in terms of course and scope cases.
 - In this situation, the Claimant failed to prove there was any condition of the premises that caused the injury based upon the mechanism of injury.
 - He did satisfy that he was on the premises under the control of his employer and was required to be there.
 - Very fact specific cases when course and scope in dispute when employee NOT engaged in work.

Gonzalez v. Guizetti Farms, Inc.
(WCAB)

- Issue: Whether an Employer is entitled to a credit for accumulated partial disability payments pursuant to a pre-Protz impairment rating evaluation, after the enactment of Act 111.
- Holding: Yes. Act 111 allows for a credit for an employer who previously converted claimant's benefits to partial disability based upon an impairment rating evaluation
- Relevant hold over case from prior *Protz* decision finding past impairment rating evaluation portion of the Act to be unconstitutional. Despite Act 111 reinstating the impairment rating evaluation process, there have been continued *Protz*-like attempts to invalidate pre-*Protz* impairment rating evaluations.

Questions and Comments