Dauphin County Bar Association

DCBA MEMBER BENEFIT
CLE COMPLIANCE SESSION HANDOUTS

WEDNESDAY, APRIL 10, 2024

Dauphin County Bar Association
213 North Front Street
Harrisburg, PA

Reminder: The DCBA does not have parking during business hours as our lot is for DCBA and MidPenn Legal Services employees.

You may find parking available in the River Street Parking Garage located behind the Bar Association for $10 for 2 hours or less; $15 for 2 to 4 hours and $30 for the entire day.

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

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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!

SESSION #1
Government Law

"The Constitution, the Campaign, and the Courtrooms: Donald Trump and the 2024 Election"

Presented by:
Professor Michael R. Diminio

DISQUALIFICATION FOR ENGAGING IN INSURRECTION

U.S. Constitution, Amendment XIV, § 3:

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

U.S. Constitution, Amendment XIV, § 5:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

***Trump v. Anderson*, 601 U.S. (2024) (*per curiam*):**

[To determine which persons are disqualified by Section 3 of the Fourteenth Amendment], proceedings, evidence, decisions, and enforcements of decisions, more or less formal, are indispensable. . . . [Section 5 of the Amendment] empowers Congress to prescribe how those determinations should be made.

We conclude that States may disqualify persons holding or attempting to hold *state* office. But States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the Presidency.

[Because the Fourteenth Amendment took power away from the States and gave the national government additional power, i]t would be incongruous to read this particular Amendment as granting the States the power—silently, no less—to disqualify a candidate for federal office.

PRESIDENTIAL IMMUNITY FROM CRIMINAL PROSECUTION

U.S. Constitution, Article I, § 3, cl. 7:

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy and Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

***Nixon v. Fitzgerald*, 457 U.S. 731 (1982):**

[W]e hold that [Richard Nixon], as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts. We consider this immunity a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history. . . .

Because of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government. As is the case with prosecutors and judges—for whom absolute immunity now is established—. . . there exists the greatest public interest in providing [the President] "the maximum ability to deal fearlessly and impartially with" the duties of his office. . . . Nor can the sheer prominence of the President's office be ignored. In view of the visibility of his office and the effect of his actions on countless people, the President would be an easily identifiable target for suits for civil damages. Cognizance of this personal vulnerability frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve. . . .

In view of the special nature of the President's constitutional office and functions, we think it appropriate to recognize absolute Presidential immunity from damages liability for acts within the "outer perimeter" of his official responsibility.

SESSION #2

Family Law

"All about the Benjamins: The Financial Aspect of Divorce"

Presented by:
Daniel Bell-Jacobs, Esquire
Casey Johnson-Welsh, Esquire
Ebony Hammond, Esquire

§ 3502. Equitable division of marital property.

(a) General rule.--Upon the request of either party in an action for divorce or annulment, the court shall equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties without regard to marital misconduct in such percentages and in such manner as the court deems just after considering all relevant factors. The court may consider each marital asset or group of assets independently and apply a different percentage to each marital asset or group of assets. Factors which are relevant to the equitable division of marital property include the following:

(1) The length of the marriage.

(2) Any prior marriage of either party.

(3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.

(4) The contribution by one party to the education, training or increased earning power of the other party.

(5) The opportunity of each party for future acquisitions of capital assets and income.

(6) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.

(7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property, including the contribution of a party as homemaker.

(8) The value of the property set apart to each party.

(9) The standard of living of the parties established during the marriage.

(10) The economic circumstances of each party at the time the division of property is to become effective.

(10.1) The Federal, State and local tax ramifications associated with each asset to be divided, distributed or assigned, which ramifications need not be immediate and certain.

(10.2) The expense of sale, transfer or liquidation associated with a particular asset, which expense need not be immediate and certain.

(11) Whether the party will be serving as the custodian of any dependent minor children.

(b) Lien.--The court may impose a lien or charge upon property of a party as security for the payment of alimony or any other award for the other party.

(c) Family home.--The court may award, during the pendency of the action or otherwise, to one or both of the parties the right to reside in the marital residence.

(d) Life insurance.--The court may direct the continued maintenance and beneficiary designations of existing policies insuring the life or health of either party which were originally purchased during the marriage and owned by or within the effective control of either party. Where it is necessary to protect the interests of a party, the court may also direct the purchase of, and beneficiary designations on, a policy insuring the life or health of either party.

(e) Powers of the court.--If, at any time, a party has failed to comply with an order of equitable distribution, as provided for in this chapter or with the terms of an agreement as entered into between the parties, after hearing, the court may, in addition to any other remedy available under this part, in order to effect compliance with its order:

(1) enter judgment;

(2) authorize the taking and seizure of the goods and chattels and collection of the rents and profits of the real and personal, tangible and intangible property of the party;

(3) award interest on unpaid installments;

(4) order and direct the transfer or sale of any property required in order to comply with the court's order;

(5) require security to insure future payments in compliance with the court's order;

(6) issue attachment proceedings, directed to the sheriff or other proper officer of the county, directing that the person named as having failed to comply with the court order be brought before the court, at such time as the court may direct. If the court finds, after hearing, that the person willfully failed to comply with the court order, it may deem the person in civil contempt of court and, in its discretion, make an appropriate order, including, but not limited to, commitment of the person to the county jail for a period not to exceed six months;

(7) award counsel fees and costs;

(8) attach wages; or

(9) find the party in contempt.

(f) Partial distribution.--The court, upon the request of either party, may at any stage of the proceedings enter an order providing for an interim partial distribution or assignment of marital property.

(Nov. 29, 2004, P.L.1357, No.175, eff. 60 days)

2004 Amendment. Act 175 amended subsec. (a) and added subsec. (f). See section 5(8) and (9) of Act 175 in the appendix to this title for special provisions relating to applicability.

CHAPTER 37
ALIMONY AND SUPPORT

Sec.

Enactment. Chapter 37 was added December 19, 1990, P.L.1240, No.206, effective in 90 days.

Cross References. Chapter 37 is referred to in section 3505 of Title 5 (Athletics and Sports).

§ 3701. Alimony.

(a) General rule.--Where a divorce decree has been entered, the court may allow alimony, as it deems reasonable, to either party only if it finds that alimony is necessary.

(b) Factors relevant.--In determining whether alimony is necessary and in determining the nature, amount, duration and manner of payment of alimony, the court shall consider all relevant factors, including:

(1) The relative earnings and earning capacities of the parties.

(2) The ages and the physical, mental and emotional conditions of the parties.

(3) The sources of income of both parties, including, but not limited to, medical, retirement, insurance or other benefits.

(4) The expectancies and inheritances of the parties.

(5) The duration of the marriage.

(6) The contribution by one party to the education, training or increased earning power of the other party.

(7) The extent to which the earning power, expenses or financial obligations of a party will be affected by reason of serving as the custodian of a minor child.

(8) The standard of living of the parties established during the marriage.

(9) The relative education of the parties and the time necessary to acquire sufficient education or training to enable the party seeking alimony to find appropriate employment.

(10) The relative assets and liabilities of the parties.

(11) The property brought to the marriage by either party.

(12) The contribution of a spouse as homemaker.

(13) The relative needs of the parties.

(14) The marital misconduct of either of the parties during the marriage. The marital misconduct of either of the parties from the date of final separation shall not be considered by the court in its determinations relative to alimony, except that the court shall consider the abuse of one party by the other party. As used in this paragraph, "abuse" shall have the meaning given to it under section 6102 (relating to definitions).

(15) The Federal, State and local tax ramifications of the alimony award.

(16) Whether the party seeking alimony lacks sufficient property, including, but not limited to, property distributed

under Chapter 35 (relating to property rights), to provide for the party's reasonable needs.

(17) Whether the party seeking alimony is incapable of self-support through appropriate employment.

(c) Duration.--The court in ordering alimony shall determine the duration of the order, which may be for a definite or an indefinite period of time which is reasonable under the circumstances.

(d) Statement of reasons.--In an order made under this section, the court shall set forth the reason for its denial or award of alimony and the amount thereof.

(e) Modification and termination.--An order entered pursuant to this section is subject to further order of the court upon changed circumstances of either party of a substantial and continuing nature whereupon the order may be modified, suspended, terminated or reinstituted or a new order made. Any further order shall apply only to payments accruing subsequent to the petition for the requested relief. Remarriage of the party receiving alimony shall terminate the award of alimony.

(f) Status of agreement to pay alimony.--Whenever the court approves an agreement for the payment of alimony voluntarily entered into between the parties, the agreement shall constitute the order of the court and may be enforced as provided in section 3703 (relating to enforcement of arrearages).

(Dec. 16, 1997, P.L.549, No.58, eff. Jan. 1, 1998; Mar. 24, 1998, P.L.204, No.36, eff. imd.)

1998 Amendment. Act 36 amended subsec. (b)(14).

1997 Amendment. Act 58 amended subsec. (b).

Cross References. Section 3701 is referred to in section 3703 of this title.

§ 3702. Alimony pendente lite, counsel fees and expenses.

(a) General rule.--In proper cases, upon petition, the court may allow a spouse reasonable alimony pendente lite, spousal support and reasonable counsel fees and expenses. Reasonable counsel fees and expenses may be allowed pendente lite, and the court shall also have authority to direct that adequate health and hospitalization insurance coverage be maintained for the dependent spouse pendente lite.

(b) Exception.--Except where the court finds that an order for alimony pendente lite or spousal support is necessary to prevent manifest injustice, a party who has been convicted of committing a personal injury crime against the other party shall not be entitled to spousal support or alimony pendente lite. Any amount paid by the injured party after the commission of the offense but before the conviction of the other party shall be recoverable by the injured party upon petition.

(Dec. 16, 1997, P.L.549, No.58, eff. Jan. 1, 1998; Mar. 24, 1998, P.L.204, No.36, eff. imd.; Oct. 24, 2018, P.L.680, No.102, eff. 60 days)

1997 Amendment. Act 58 of 1997 was suspended by Pennsylvania Rule of Civil Procedure No. 1910.50(3), as amended May 31, 2000, insofar as it is inconsistent with Rule No. 1910.20 relating to the availability of remedies for collection of past due and overdue support.

Cross References. Section 3702 is referred to in section 3703 of this title.

§ 5339. Award of counsel fees, costs and expenses.

Under this chapter, a court may award reasonable interim or final counsel fees, costs and expenses to a party if the court finds that the conduct of another party was obdurate, vexatious, repetitive or in bad faith.

APPENDIX C

HANDBOOK FOR CLIENTS

AN ORIENTATION TO THE DIVORCE PROCESS, THE DISPUTE-RESOLUTION OPTIONS AVAILABLE TO CLIENTS, AND THE NEW DISPUTE-RESOLUTION OPTION, "COLLABORATIVE LAW."

1. What are my choices for professional help in my divorce?

All divorces involve decisions and choices. Which professionals will assist you, and how you will utilize their help, are decisions that can powerfully affect whether your divorce moves forward smoothly or not.

Some couples resolve all their divorce issues without any professional assistance at all, and process their own divorce papers themselves through the courts. On the other end of the spectrum, some couples engage in drawn-out courtroom battles that cost dearly in emotional and financial resources and can take considerable time to complete. Most people find their needs fall between these extremes.

Below are the choices for obtaining professional legal services in divorce that are available in most localities today. The list moves from choices involving the least degree of professional intervention, and the most privacy and client control, to choices involving greater professional intervention and the least privacy and control.

Unbundled Legal Assistance: The client in this model acts as a "general contractor" and takes primary responsibility for the divorce, making use of legal counsel on an "as needed" basis for help in resolving specific issues, drafting papers, and so forth. The lawyer doesn't take over responsibility for managing the case.

Mediation: A single neutral person, who may be a lawyer, a mental health professional, or simply someone with an interest in mediation, acts as the mediator for the couple. The mediator helps the couple reach agreement, but does not give individual legal advice, and may or may not prepare the divorce agreement. Few mediators will process the divorce through the court. Retaining your own lawyer for independent legal advice during mediation is generally wise. In some locales the lawyers sit in on the mediation process, and in other locales they remain outside the mediation process. Mediators do not have to have to be licensed professionals in most jurisdictions.

Collaborative Law: Each person retains his or her own trained collaborative lawyer to advise and assist in negotiating an agreement on all issues. All negotiations take place in "four-way" settlement meetings that both clients and both lawyers attend. The lawyers cannot go to court or threaten to go to court. Settlement is the only agenda. If either client goes to court, both collaborative lawyers are disqualified from further participation. Each client has built-in legal advice and advocacy during negotiations, and each lawyer's job includes guiding the client toward reasonable resolutions. The legal advice is an integral part of the process, but all the decisions are made by the clients. The lawyers generally prepare and process all papers required for the divorce.

Conventional Representation: Each person hires a lawyer. The lawyers may be good at settling cases, in which case they work toward that goal at the same time that they prepare the case for the possibility of trial. If the lawyers are not particularly good at, or interested in, settling the case all lawyer efforts are aimed solely at preparing for trial, though a settlement may still result at or near the time of trial. Either way, the pacing and objectives of the legal representation tend to be dictated by what happens in court. Cases handled this way generally involve higher legal fees, and take longer to complete, than collaborative law cases or mediated cases. The risk of a high conflict divorce is higher than with mediation or collaborative law.

Arbitration, Private Judging, and Case Management: In some states, it is possible for clients and their lawyers to choose

private judges or arbitrators who will be given the power to make certain decisions for the clients as an alternative to taking the case into the public courts. Case management is an option available from private and some public judges, in which the judge is given the power to manage the procedural stages of pretrial preparation, as well as settlement conferences, by agreement of the clients and their lawyers. These options can reduce somewhat the financial cost and delays associated with litigation in the public courts. The financial and emotional costs may still remain high, however, because positions are polarized and the lawyers have no particular commitment to settlement as the preferred goal, and continue to represent the client whether the case settles or goes to trial.

"War": One or both parties is motivated primarily by strong emotion (fear, anger, guilt, etc.) and as a consequence the parties take extreme, black and white positions and look to the courts for revenge or validation. Reasonable accommodations are not made. The attorneys often function as "alter egos" for their clients instead of counseling the clients toward sensible solutions. This is the costliest form of dispute resolution, emotionally and financially. It is always destructive for the children involved. Such cases can drag on for many years. Few clients report satisfaction with the outcome of cases handled this way, regardless of who won.

2. Can you say more about Collaborative Law?

Collaborative law is the newest divorce dispute-resolution model. In collaborative law, both parties to the divorce retain separate, specially trained lawyers whose only job is to help them settle the case. If the lawyers do not succeed in helping the clients resolve the issues, the lawyers are out of a job and can never represent either client against the other again. All participants agree to work together respectfully, honestly, and in good faith to try to find win-win solutions to the legitimate needs of both parties. Four creative minds work together to devise individualized settlement scenarios. No one may go to court, or even threaten to do so, and if that should occur, the collaborative law process terminates and both lawyers are disqualified from any further involvement in the case. Lawyers hired for a collaborative law representation can never under any circumstances go to court for the clients who retained them.

3. Is Collaborative Law only for divorces?

Collaborative lawyers can do everything that a conventional family lawyer does except go to court. They can negotiate non-marital custody agreements, premarital and postnuptial agreements, and agreements terminating gay and lesbian relationships. Collaborative Law can also be used in probate disputes, business partnership dissolutions, employment and commercial disputes—wherever disputing parties want a contained, creative, civilized process that builds in legal counsel

and distributes the risk of failure to the lawyers as well as the clients.

4. What is the difference between Collaborative Law and mediation?

In mediation, there is one neutral professional who helps the disputing parties try to settle their case. Mediation can be challenging where the parties are not on a level playing field with one another, because the mediator cannot give either party legal advice, and cannot help either side advocate its position. If one side or the other becomes unreasonable or stubborn, or lacks negotiating skill, or is emotionally distraught, the mediation can become unbalanced, and if the mediator tries to deal with the problem, the mediator may be seen by one side or the other as biased, whether or not that is so. If the mediator does not find a way to deal with the problem, the mediation can break down, or the agreement that results can be unfair. If there are lawyers for the parties at all, they may not be present at the negotiation and their advice may come too late to be helpful. Collaborative Law was designed to deal with these problems, while maintaining the same absolute commitment to settlement as the sole agenda. Each side has legal advice and advocacy built in at all times during the process. Even if one side or the other lacks negotiating skill or financial understanding, or is emotionally upset or angry, the playing field is leveled by the direct participation of the skilled advocates. It is the job of the lawyers to work with their own clients if the clients are being unreasonable, to make sure that the process stays positive and productive.

5. How is Collaborative Law different from the traditional adversarial divorce process?

- In Collaborative law, all participate in an open, honest exchange of information. Neither party takes advantage of the miscalculations or mistakes of the others, but instead identifies and corrects them.
- In Collaborative law, both parties insulate their children from their disputes and, should custody be an issue, they avoid the professional custody evaluation process.
- Both parties in collaborative law use joint accountants, mental health consultants, appraisers, and other consultants, instead of adversarial experts.
- In collaborative law, a respectful, creative effort to meet the legitimate needs of both spouses replaces tactical bargaining backed by threats of litigation.
- In collaborative law, the lawyers must guide the process to settlement or withdraw from further participation, unlike adversarial lawyers, who remain involved whether the case settles or is tried.
- In collaborative law, there is parity of payment to each lawyers so that neither party’s representation is

disadvantaged vis-a-vis the other by lack of funds, a frequent problem in adversarial litigation.

6. What kind of information and documents are available in the collaborative law negotiations?

Both sides sign a binding agreement to disclose all documents and information that relate to the issues, early and fully and voluntarily. “Hide the ball” and stonewalling are not permitted. Both lawyers stake their professional integrity on ensuring full, early, voluntary disclosure of necessary information.

7. What happens if one side or the other does play “hide the ball,” or is dishonest in some way, or misuses the Collaborative Law process to take advantage of the other party?

That can happen. There are no guarantees that one’s rights will be protected if a participant in the collaborative law process acts in bad faith. There also are no guarantees in conventional legal representation. What is different about collaborative law is that the collaborative agreement requires a lawyer to withdraw upon becoming aware his/her client is being less than fully honest, or participating in the process in bad faith.

For instance, if documents are altered or withheld, or if a client is deliberately delaying matters for economic or other gain, the lawyers have promised in advance that they will withdraw and will not continue to represent the client. The same is true if the client fails to keep agreements made during the course of negotiations, for instance an agreement to consult a vocational counselor, or an agreement to engage in joint parenting counseling.

8. How do I know whether it is safe for me to work in the Collaborative Law process?

The collaborative law process does not guarantee you that every asset or every dollar of income will be disclosed, any more than the conventional litigation process can guarantee you that. In the end, a dishonest person who works very hard to conceal money can sometimes succeed, because the time and expense involved in investigating concealed assets can be high, and the results uncertain. However, far greater efforts to track down concealed assets and income can be expected in conventional litigation than in collaborative law, which relies upon voluntary disclosure.

You are generally the best judge of your spouse or partner’s basic honesty. If s/he would lie on an income tax return, he or she is probably not a good candidate for a Collaborative Law divorce, because the necessary honesty would be lacking. But if you have confidence in his or her basic honesty, then the process may be a good choice for you. The choice ultimately is yours.

9. Is Collaborative Law the best choice for me?

It isn't for every client (or every lawyer), but it is worth considering if some or all of these are true for you:

a) You want a civilized, respectful resolution of the issues.
b) You would like to keep open the possibility of friendship with your partner down the road.
c) You and your partner will be co-parenting children together and you want the best coparenting relationship possible.
d) You want to protect your children from the harm associated with litigated dispute resolution between parents.
e) You and your partner have a circle of friends or extended family in common that you both want to remain connected to.
f) You have ethical or spiritual beliefs that place high value on taking personal responsibility for handling conflicts with integrity.
g) You value privacy in your personal affairs and do not want details of your problems to be available in the public court record.
h) You value control and autonomous decision making and do not want to hand over decisions about restructuring your financial and/or child-rearing arrangements to a stranger (i.e., a judge).
i) You recognize the restricted range of outcomes and "rough justice" generally available in the public court system, and want a more creative and individualized range of choices available to you and your spouse or partner for resolving your issues.
j) You place as much or more value on the relationships that will exist in your restructured family situation as you place on obtaining the maximum possible amount of money for yourself.
k) You understand that conflict resolution with integrity involves not only achieving your own goals but finding a way to achieve the reasonable goals of the other person.
l) You and your spouse will commit your intelligence and energy toward creative problem solving rather than toward recriminations or revenge—fixing the problem rather than fixing blame.

10. My lawyer says she settles most of her cases. How is collaborative law different from what she does when she settles cases in a conventional law practice?

Any experienced collaborative lawyer will tell you that there is a big difference between a settlement that is negotiated during the conventional litigation process, and a settlement that takes place in the context of an agreement that there will be no court proceedings or even the threat of court. Most conventional family law cases settle figuratively, if not literally, "on the courthouse steps." By that time, a great deal of money has been spent, and a great deal of emotional damage can have been caused. The

settlements are reached under conditions of considerable tension and anxiety, and both “buyer’s remorse” and “seller’s remorse” are common. Moreover, the settlements are reached in the shadow of trial, and are generally shaped largely by what the lawyers believe the judge in the case is likely to do.

Nothing could be more different from what happens in a typical collaborative law settlement. The process is geared from day one to make it possible for creative, respectful collective problem solving to happen. It is quicker, less costly, more creative, more individualized, less stressful, and overall more satisfying in its results than what occurs in most conventional settlement negotiations.

11. Why is collaborative law such an effective settlement process?

Because the collaborative lawyers have a completely different state of mind about what their job is than traditional lawyers generally bring to their work. We call it a “paradigm shift.” Instead of being dedicated to getting the largest possible piece of the pie for their own client, no matter the human or financial cost, collaborative lawyers are dedicated to helping their clients achieve their highest intentions for themselves in their post-divorce restructured families.

Collaborative lawyers do not act as a hired guns, nor do they take advantage of mistakes inadvertently made by the other side, nor do they threaten, or insult, or focus on the negative either in their own clients or on the other side. They expect and encourage the highest good-faith problem-solving behavior from their own clients and themselves, and they stake their own professional integrity on delivering that, in any collaborative representation they participate in.

Collaborative lawyers trust one another. They still owe a primary allegiance and duty to their own clients, within all mandates of professional responsibility, but they know that the only way they can serve the true best interests of their clients is to behave with, and demand, the highest integrity from themselves, their clients, and the other participants in the collaborative process.

Collaborative Law offers a greater potential for creative problem solving than does either mediation or litigation, in that only collaborative law puts two lawyers in the same room pulling in the same direction with both clients to solve the same list of problems. Lawyers excel at solving problems, but in conventional litigation they generally pull in opposite directions. No matter how good the lawyers may be for their own clients, they cannot succeed as Collaborative Lawyers unless they also can find solutions to the other party’s problems that both clients find satisfactory. This is the special characteristic of collaborative law that is found in no other dispute resolution process.

12. What if my spouse and I can reach agreement on almost everything, but there is one point on which we are stuck. Would we have to lose our Collaborative Lawyers and go to court?

In that situation it is possible, if everyone agrees (both lawyers and both clients), to submit just that one issue for decision by an arbitrator or private judge. We do this with important limitations and safeguards built in, so that the integrity of the collaborative law process is not undermined. Everyone must agree that the good faith atmosphere of the collaborative law process would not be damaged by submitting the issue for third party decision, and everyone must agree on the issue and on who will be the decision maker.

13. What if my spouse or partner chooses a lawyer who doesn't know about Collaborative Law?

Collaborative lawyers have different views about this. Some will "sign on" to a collaborative representation with any lawyer who is willing to give it a try. Others believe that is unwise and will not do that.

Trust between the lawyers is essential for the collaborative law process to work at its best. Unless the lawyers can rely on one another's representations about full disclosure, for example, there can be insufficient protection against dishonesty by a party. If your lawyer lacks confidence that the other lawyer will withdraw from representing a dishonest client, it might be unwise to sign on to a formal collaborative law process (involving disqualification of both lawyers from representation in court if the collaborative law process fails).

Similarly, collaborative law demands special skills from the lawyers—skills in guiding negotiations, and in managing conflict. Lawyers need to study and practice to learn these new skills, which are quite different from the skills offered by conventional adversarial lawyers. Without them, a lawyer would have a hard time working effectively in a collaborative law negotiation.

And some lawyers might even collude with their clients to misuse the collaborative law process, for delay, or to get an unfair edge in negotiations. For these reasons, some lawyers hesitate to sign on to a formal collaborative law representation with a lawyer inexperienced in this model. That doesn't mean your lawyer could not work cordially or cooperatively with that lawyer, but caution is advised in signing the formal agreements that are the heart of collaborative law where there is no track record of mutual trust between the lawyers. You and your spouse will get the best results by retaining two lawyers who both can show that they have committed to learning how to practice collaborative law by obtaining training as well as experience in this new way of helping clients through divorce.

14. Why is it so important to sign on formally to the official Collaborative Law Agreement? Why can't you work collaboratively with the other lawyer but still go to court if the process doesn't work?

The special power that Collaborative Law has to spark creative conflict resolution seems to happen only when the lawyers and the clients are all pulling together in the same direction, to solve the same problems in the same way. If the lawyers can still consider unilateral resort to the courts as a fallback option, their thought processes do not become transformed; their creativity is actually crippled by the availability of court and conventional trials. Only when everyone knows that it is up to the four of them and only the four of them to think their way to a solution, or else the process fails and the lawyers are out of the picture, does the special "hypercreativity" of collaborative law get triggered. The moment when each person realizes that solving both clients' problems is the responsibility of all four participants is the moment when the magic can happen.

Collaborative law is not just two lawyers who like each other, or who agree to "behave nicely." It is a special technique that demands special talents and procedures in order to work as promised.

Any effort by parties and their lawyers to resolve disputes cooperatively and outside court is to be encouraged, but only collaborative law is collaborative law.

15. How do I find a collaborative lawyer?

You can check the yellow pages and contact your local bar association to see if there are listings of collaborative lawyers in your area. You can contact the International Academy of Collaborative Professionals (web site: http://www.collabgroup.com) to inquire about collaborative lawyers near you. Find the best collaborative practitioner that you can; interview several, and ask for resumes. Ask how many collaborative cases the lawyer has handled and how many of them terminated without agreements. Ask what training the lawyer has in Collaborative Law, alternate dispute resolution, and conflict management.

16. How do I enlist my spouse in the process?

Talk with your spouse, and see whether there is a shared commitment to collaborative, win-win conflict resolution. Share materials with your spouse such as this handbook and articles that discuss collaborative law. Encourage your spouse to select counsel who has experience and training in collaborative law and who works effectively with your own lawyer: lawyers who trust one another are an excellent predictor of success in dispute resolution.

17. How long will my divorce take if I use collaborative law?

The collaborative law process is flexible and can expand or contract to meet your specific needs. Most people require from three to seven of the four-way negotiating meetings to resolve all issues, though some divorces take less and some take more. These meetings can be spaced with long intervals between, or close together, depending on the particular needs of the clients. Once the issues are resolved, the lawyers will complete the paperwork for the divorce. Time limits and requirements for divorce vary from state to state; ask your lawyer.

18. How expensive is collaborative law?

Collaborative lawyers generally charge by the hour as do conventional family lawyers. Rates vary from locale to locale and according to the experience of the lawyer.

No one can predict exactly what you will pay for this kind of representation because every case is different. Your issues may be simple or complex; you and your partner may have already reached agreement on most, or none, of your issues. You may be very precise or very casual in your approach to problems. You and your partner may be at very different emotional stages in coming to terms with separating from one another. What can be said with confidence is that no other kind of professional conflict resolution assistance is consistently as efficient or economical as collaborative law for as broad a range of clients. While the cost of your own fees cannot be predicted accurately, a rule of thumb is that collaborative law representation will cost from one tenth to one twentieth as much as being represented conventionally by a lawyer who takes issues in your case to court.

19. Isn't mediation cheaper because only one neutral, instead of two lawyers, has to be paid?

No, mediation is not usually cheaper. Because there is nobody in a mediation negotiation whose job it is to help the client refine issues and participate with maximum effectiveness in the process, mediation can become stalled more easily than collaborative law does. Mediations can take longer, and can involve more wheel-spinning, than collaborative law negotiations. They also can be at greater risk for falling apart entirely, since

the mediator must remain neutral and cannot work privately with the more disturbed client to get past impasses. In either event, the resulting inefficiencies can be costly.

Also, most mediators strongly urge that independent lawyers for each party review and approve the mediated agreement. If the lawyers have not been a part of the negotiations, the lawyers may be unhappy with the results and a new phase of negotiations or even litigation may result. If the lawyers do participate, then three professionals are being paid in the mediation.

Lawyers who do both mediation and collaborative law typically see collaborative law as the model that offers greatest promise of successful outcome for the broadest range of divorcing couples. Of course, if two calm and reasonable people whose issues are not complex go to a mediator, they can usually achieve agreement efficiently and often at low cost. Generally, it is only after the fact that we know that a couple was well-suited for mediation. Strong feelings arise unexpectedly; issues become more complicated than anyone anticipated. Collaborative law can usually deal with these predictable happenings more readily than can mediation.

Many people genuinely believe that they will have a very quick and simple divorce negotiation, but life can be surprising. Many people prefer to have a process in place from the start that is well-equipped to deal with unexpected problems rather than to have to terminate a mediation and start over with litigation counsel.

20. How does the cost of collaborative law compare with the cost of litigation?

Litigation is, quite simply, the most expensive way of resolving a dispute. By way of illustration, it is common for litigated divorces to begin with a motion for temporary support. The result is exactly that—a temporary order, not any final resolution of any issues. It is not uncommon for a single temporary support motion to cost as much or more in lawyers' fees and costs as it costs for an entire collaborative law representation.

— END —

SESSION #3

"PBA Malpractice Avoidance"

Presented by:
Robert H. Davis, Jr., Esquire,
Edwin A. Schwartz &
Susan Etter, Esquire

CNA

PROFESSIONAL COUNSEL℠

ADVICE AND INSIGHT INTO THE PRACTICE OF LAW®

Better with a Letter: Why Attorneys Should Use Engagement Letters

INTRODUCTION

Documentation of the attorney-client relationship constitutes a critical risk control technique for law firms. Memorializing the nature and scope of the attorney-client relationship with a thorough, well-written engagement letter will help resolve potential misunderstandings and also serve to establish good communications throughout the course of the relationship. Moreover, in the event of an attorney-client dispute, an engagement letter may protect an attorney in the event of an unwarranted legal malpractice claim.

As a leader in the lawyers' professional liability insurance marketplace, CNA strongly encourages its policyholders to consistently issue engagement letters. CNA has published *Lawyers' Toolkit 3.0: A Guide to Managing the Attorney-Client Relationship* to assist attorneys in this effort. *Lawyers' Toolkit 3.0* contains sample engagement letters, some of which are practice-specific, that attorneys can use as templates in drafting their own engagement letters. Prior to exploring *Lawyers' Toolkit 3.0*, however, it is important to understand existing rules and case law regarding the use of engagement letters.

MANDATORY ENGAGEMENT LETTERS

All states except California have developed rules of professional conduct based upon the American Bar Association ("ABA") Model Rules of Professional Conduct. ABA Model Rule 1.5, Fees, suggests that lawyers communicate key terms of the representation to clients, "preferably in writing," either before or within a reasonable time after the representation has begun.

Under certain circumstance, Rule 1.5 requires a written engagement letter. For example, if the attorney intends to charge a client a contingent fee, the fee agreement must be in writing. Similarly, lawyers in different firms who co-represent a client must reduce their fee agreement to writing.

Failing to comply with the rule on fees may encompass more than the threat of attorney discipline. In the introduction to the Model Rules, the ABA states that a violation of its rules is not designed to be a basis for civil liability and should not "give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached." ABA Preamble and Scope, Comment 20. The ABA acknowledges, however, that since it rules "do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Id.

A handful of states have adopted rules that transcend ABA Model Rule 1.5 in requiring written engagement letters. Washington State requires that both contingent fee and flat fee agreements be in writing, and that contingent fee agreements be signed by the client. *Wash. State Ct. RPC 1.5 (c) and (f) (1)&(2).* A California rule dictates that if it is not a contingency fee contract, and "it is reasonably foreseeable that total expenses to a client, including attorney fees, will exceed one thousand dollars ($1,000), the contract for services in the case shall be in writing." *Cal. Bus. & Prof. Code 6148.* Wisconsin requires lawyers retained by an insurer to represent an insured to "…within a reasonable time after being retained, inform the client in writing of the terms and scope of the representation the lawyer has been retained by the insurer to provide". *Wis. SCR 20:1.2 (e).* Wisconsin also establishes a $1,000 threshold for engagement letters, which must include the scope of representation and the basis or rate of the fee and expenses. *Wis. SCR 20:1.5.* New York rules prescribe that attorneys must provide clients with written letters of engagement, or in the alternative, obtain signed written retainer agreements for virtually all attorney-client matters unless the fee to be charged is expected to be less than $3,000. *22 N.Y. Comp. Codes R. & Regs. 1215.1 & 1215.2.*

The rules of professional conduct do not compel lawyers to use engagement letters for most cases and matters, and the majority of states have not promulgated additional rules that require greater use of engagement letters. Even when ABA Model Rule 1.5 mandates a writing, the requirements are fairly minimal and mostly concern the calculation of and/or division of legal fees. Despite the fact that the rules are generally permissive with respect to engagement letters, law firms should issue them on a consistent basis. Case law highlights demonstrate that law firms issuing comprehensive engagement letters fare much better than those that do not.

CASE LAW HIGHLIGHTS

The Importance of Proper Engagement

Identity of Client

Silberberg v. Meyers, 885 N.Y.S.2d 713 (Sup. Ct. 2009)

A bankruptcy attorney met with a married couple about filing a bankruptcy for the husband. The retainer agreement referred only to the husband although the wife paid the retainer. Shortly thereafter, the bankruptcy attorney sent the husband a follow-up letter indicating that he was representing only the husband, and that the transfer of their residence from the husband to the wife could cause the bankruptcy trustee to sue the wife to recover the husband's share of the equity transferred. As predicted, the trustee sued the wife, who subsequently sued the bankruptcy attorney for legal malpractice. The bankruptcy attorney moved to dismiss, contending that no attorney-client relationship existed between him and the wife. The court granted the motion to dismiss, finding that the bankruptcy attorney's letters to the husband proved that the representation was limited to the husband. The fact that the wife paid the retainer fee on behalf of the husband did not establish that an attorney-client relationship existed between the bankruptcy attorney and the wife.

Scope of Representation

Ambase v. Davis Polk & Wardell et al., 866 N.E.2d 1033 (2007)

A New York law firm represented a client in his administrative proceeding before the IRS. The client contended that the law firm committed legal malpractice by failing to pursue third parties for liability concerning the outstanding taxes. After reviewing the engagement letter, which stated that the law firm was representing only the client in the administrative proceeding with the IRS, the court ruled in favor of the law firm.

Payment of Fees

Katz, Teller, Brant & Hild, LPA v. Farra, 2011 WL 1591286 (Ohio App. 2nd Dist. 2011)

An Ohio law firm sued its former client for fees that it was owed. The client attempted to evade payment by contending that the law firm told him that it would seek its attorneys' fees from the opposing party. The court reviewed the engagement letter between the attorney and client, which stated that it was the client's responsibility to pay the law firm's legal fees, and ruled against the former client, citing the parol evidence rule.

Legal Defense Weakened Due to Missing or Poorly Drafted Engagement Letter

Failure to Limit Scope of Representation

Avocent Redmond Corp. v. Rose Electronics, et al., 491 F.Supp.2d 1000 (W.D. Wash. 2007)

A law firm represented Company A in a merger with Company B in 2004. After the merger, the law firm sent Company A an engagement agreement in which it said that it represented Company A, a wholly owned subsidiary of Company B, and its affiliates.

In 2007, Company B sued Company C, an alleged infringer of Company B's patents. The law firm entered an appearance in the patent matter on behalf of Company C. Company B moved to disqualify the law firm due to a conflict of interest. In support of its disqualification motion, Company B presented the engagement agreement sent to Company A by the law firm. The court found the engagement letter to be a decisive evidentiary factor in granting Company B's motion for disqualification. If the law firm wanted to limit the scope of its representation to Company A, it could have expressly done so by stating that it was only representing Company A and not any of its affiliates. Instead, however, the law firm expressly stated that it was representing not only Company A but its affiliates as well.

Failure to Identify Client

Home Care Industries, Inc. v. Murray, 154 F.Supp.2d 861 (D.N.J. 2001)

A corporation sued its former CEO, seeking a declaratory judgment that the severance agreement between them was unenforceable. The former CEO filed a motion to disqualify the law firm representing the corporation due to a conflict of interest. The former CEO argued that during his tenure with the corporation, this same law firm had represented him personally in a number of incidents that led to his departure from the corporation. The corporation and its law firm countered by stating that it only represented the corporation during the former CEO's tenure and that there was no express or implied attorney-client relationship with the former CEO.

The court sided with the former CEO, determining that his belief that the law firm represented him was reasonable given the conduct of the law firm. The court further stated: "The record is clear that the [law] Firm failed to inform [the former CEO] that its client was [the corporation] and not [the former CEO]. Further, the record does not contain a copy of the retainer agreement between Plaintiffs and the [law] Firm. An explanation of the [law] Firm's position as counsel for [the corporation] exclusive of its officers would have gone a long way to avoid the position that said firm finds itself during the instant matter."

Bayit Care Corp. et al. v. Einbinder, 977 N.Y.S.2d 665 (N.Y. Sup. 2013)

The president of a healthcare corporation sued a New York law firm for legal malpractice. The law firm moved to dismiss, contending that it only represented the healthcare corporation and not the president individually. The court denied the motion, finding that the law firm's retainer letters were ambiguous as to the identity of the clients. One of the retainer letters was addressed to the president and read, in relevant part: "This retainer letter is intended to express our mutual understanding regarding our legal representation of **you**." [Emphasis added.] The court further found that the president's use of the suffix "President" when he countersigned the retainer letters was ambiguous, and not definitive in resolving whether an attorney-client relationship existed between the law firm and the president.

Failure to Identify Who Is Paying the Legal Fees

Fredrikson & Byron, P.A. v. Saliterman, 2012 WL 6652633 (Minn. Ct. App. 2012)

A law firm sued the sole shareholder of a company that the law firm represented for outstanding legal fees. The law firm had an engagement letter addressed to the sole shareholder, which stated in relevant part: "Thank you for selecting [law firm] to represent **you** in the litigation matter concerning . . . ." [Emphasis added.] The trial court ruled in favor of the law firm on a summary judgment motion.

The sole shareholder appealed the summary judgment by contending that the company, and not he personally, was liable for the legal fees owed to the law firm. The appellate court reversed and remanded the trial court's decision, agreeing with the sole shareholder that the engagement letter was ambiguous. The court reasoned that it was unclear whether the use of the word "you" in the engagement letter referred to the sole shareholder or the company. The court further noted that the law firm never represented the sole shareholder personally, that the sole shareholder retained separate counsel to represent his personal interests, and that the engagement letter did not directly state an intention to hold both the company and the sole shareholder personally and primarily liable for the legal fees.

CAREFULLY CRAFTING AN ENGAGEMENT LETTER

As the case law suggests, it is imperative that lawyers carefully craft their engagement letters to provide clarity and guidance as to how the relationship will function and to whom it applies. CNA's *Lawyers' Toolkit 3.0* may serve as a useful resource for lawyers seeking guidance on how to draft effective engagement letters. Some of the key provisions found in the *Lawyers' Toolkit*, which is located on CNA's website, include:

Identity of Client

Specifically identifying by name the party whom the attorney intends to represent must be addressed in the engagement letter. Failure to delineate the identity of the client can lead others to believe that they also are being represented. If a court finds such a belief to be objectively reasonable, the attorney may be held liable to these others as well. In this section of the engagement letter, attorneys should avoid using pronouns such as "you" and expressly list the individual(s) and/or entity(ies) that they are representing. In some circumstances, attorneys may wish to specifically state that they are not representing certain individual(s) and/or entity(ies).

Scope of Representation

Perhaps the most important provision in an engagement letter, this section should be narrowly tailored to include only those tasks which the attorney has been employed to perform for the client. As each representation is unique, law firms should carefully consider the language to include when drafting this section. The letter also should state that a separate engagement agreement will be required if the client wishes to have other legal work outside the scope of this representation performed by the law firm.

Limited Scope of Representation

Concomitant with the Scope of Representation section, and to avoid any ambiguity, attorneys may wish to delineate the tasks they are not performing, as well as when the engagement terminates. For example, a trial lawyer who does not handle appeals should state in this section that the representation terminates at the end of the trial and that the client must seek other counsel for appellate representation. Trial lawyers also should address whether the scope of representation includes or excludes post-judgment contempt or enforcement, modifications or post-trial proceedings.

Fees and Billing Statement

Law firms should specify the manner in which clients will be billed and how often the legal bills will be submitted for payment. *Lawyers' Toolkit 3.0* includes sample engagement agreements for contingent fee, flat fee, and hourly fee arrangements. For hourly fee engagements, the letter should indicate the rates for lawyers and support staff expected to work on the matter.

Expenses

The engagement letter also should discuss how expenses will be handled. For larger expenses incurred with third parties, such as expert witnesses, law firms should consider indicating that clients will be billed directly by the third parties and are responsible for payment.

File Retention and Destruction

File retention and destruction should be addressed with clients at the outset of the attorney-client relationship. The engagement letter provides an opportunity for the law firm to explain what documents will be returned to the client, what will be retained, and how long the file will be maintained until it is destroyed. Having the client consent to these terms through the engagement letter saves the law firm from acting without client consent if the client disappears or dies during or subsequent to the attorney-client relationship.

Client Review of Agreement/Countersignature

Before clients countersign an engagement letter, they should confirm that they have read the entire letter, understand its terms, and agree to abide by these terms. Clients also should be informed that they have the right to have another lawyer review the engagement letter outside the presence of the retained law firm, and prior to countersigning the letter. This section of the engagement letter also should clearly state that the attorney-client relationship does not commence unless and until the countersigned letter is received by the law firm and any corresponding retainer is paid.

Other provisions, such as "Responsibilities of Law Firm and Client" and "No Guarantee of Success" included in *Lawyers' Toolkit 3.0* may be considered for implementation into their own engagement letters. The sample engagement letters in *Lawyers' Toolkit 3.0* are provided as a convenience for use in the practice of law and include illustrative language that attorneys may wish to consider using in their own engagement letters. In addition, each sample document should be customized for every engagement and prepared in accordance with applicable professional and regulatory requirements. CNA used the ABA Model Rules of Professional Conduct as a guide in creating these sample engagement letters. However, attorneys must consult their applicable rules of professional conduct, as well as the case law and ethics opinions of the relevant jurisdictions, when drafting their own engagement letters. In matters where attorneys expect to practice in other jurisdictions under state reciprocity requirements, the relevant rules, case law and ethics opinions also must be researched, and the limitations of such representation should be addressed in the engagement letter.

CONCLUSION

Engagement letters serve important purposes. They provide guidance to clients and may offer protection to attorneys in the event of a dispute between attorney and client. To reduce their exposure to legal malpractice claims, lawyers and law firms should implement risk control protocols that require engagement letters. Resources such as the CNA *Lawyers' Toolkit 3.0* make it easier for lawyers and law firms to draft comprehensive engagement letters. Both the legal profession and those who need legal services benefit from consistent engagement letter usage.

For more information, please call us at 866-262-0540 or email us at lawyersrisk@cna.com.

Avoiding Legal Malpractice

The 2024 Avoiding Legal Malpractice Program

A benefit provided by the Pennsylvania Bar Association and USI Affinity

1

Presenters

- Robert H. Davis, Jr., Law Office of Robert H. Davis, Jr.
- Edwin A.D. Schwartz, McNees Wallace & Nurick, LLC
- Susan E. Etter, Pennsylvania Bar Association

2

PBA – Your Other Partner

Some of the work 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

3

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

4

PBA member benefits that can help you manage your risks


Pennsylvania Bar News

Pa. IOLTA, Disciplinary Board Provide Ways to Stay Compliant

Pennsylvania IOLTA noncompliance is "the No. 1 issue for which we suspend and disbar attorneys." Tom Farrell, chief disciplinary counsel, the Pennsylvania Supreme Court Disciplinary Board.

"IOLTA account mismanagement or violations are the No. 1 reason in the country that lawyers are publicly disciplined. I'm not talking about lawyers who steal, because that's a whole different world. We're talking about mismanagement."

"It's depressing how often … we find out that the attorney has not been handling the account correctly, has been commingling money, and has inaccurate records. There are gradations of violations, but we take all IOLTA mismanagement seriously."

"We discipline people after the money is lost. **We'd rather educate attorneys before they lose clients' money, instead of disciplining them afterward.**"

Read the Rules of Professional Conduct (1.15) and read this article as an important refresher.

PBI offers a live 1-hour webcast on IOLTA accounts October 26

5

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.

6

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.

7

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!**

8

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.

9

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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10

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.

11

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.**

12

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 USI Affinity are providing the information and resources you need to make the best decision for your practice. ***We are your other partners***.

13

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

Why are we are 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

15

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.

16

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."

17

A message from the D-Board…

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

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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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Succession Planning Data

released on October 19, 2022 and available on the D-Board website

Succession Planning Responses from Active Pennsylvania Attorneys

Response	Total	Percent
I have a successor attorney. My successor is an individual.	3,769	5.92%
I have a successor attorney. My successor is a law firm.	14,660	23.01%
I do not have a successor because I do not have PA clients.	31,217	49.00%
I do not have a successor and I do have PA clients.	**14,060**	**22.07%**
Total	64,491	100%

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

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Succession Planning - PBA member benefits

- There are numerous resources to help you develop succession plans available through our Law Practice Management page and the Solo and Small Firm Section.
- At least 10 documents are provided in the ALM materials web page which you received as part of your materials today - pabar.org/site/ALM
- Exclusive to PBA members, the Solo and Small Firm Section has developed a "Succession Planning Toolkit." It is available on the PBA website.
- The "Pennsylvania Handbook for Conservators for Interests of Clients" is an instructional guide for conservators and covers the practicalities of conservatorships in the format of Frequently Asked Questions. This resource is available on the D-Board website and includes a checklist of recommended and required tasks within a timetable, downloadable forms, and the governing rules for conservators.

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Avoiding Legal Malpractice Website

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

pabar.org/site/ALM

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Most requested resource after the ALM program

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

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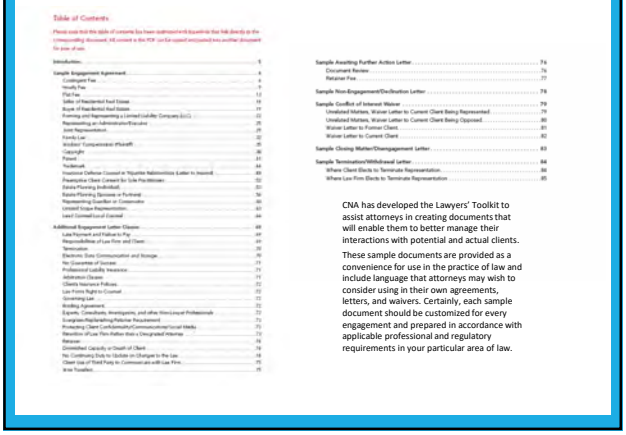

Table of Contents

Please note that this table of contents has been customized to hyperlink that link directly to the corresponding document. All content in this PDF can be copied and pasted into another document for ease of use.

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

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

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PBA member benefit … Professional Liability Insurance

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

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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 800.265.2876

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Know your policy, what coverage do you have?

CNA Policy Highlights

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

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Know your policy, what coverage do you have?

Extended Reporting Period - also called a Tail.

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

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Engagement Letters – an invaluable best practice in managing your risk

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

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Engagement Letters – an invaluable best practice in managing your risk

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

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Engagement Letters – an invaluable best practice in managing your risk

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

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

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What is "File Retention and Destruction Language" ???

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

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

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Call … sooner rather than later

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

888-200-5212

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Major Complaints Against Attorneys

- Lack of Communication
- Delay and diligence
- Misappropriation
- Fee disputes
- Ineffective Counsel

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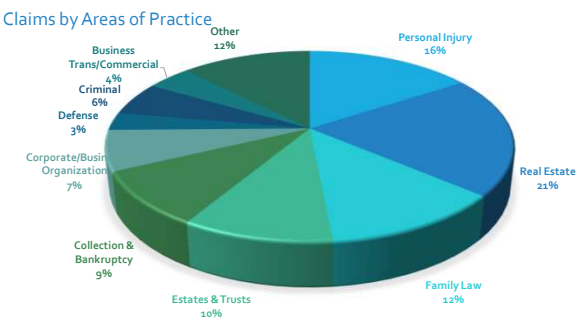

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Growing Areas of Concern for Lawyers in 2023

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

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The Malpractice "Top 10"

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

9. Allow client to have (and keep) unrealistic expectations
- "Your case is worth One Million Dollars" (with pinky raised to lips Austin Powers style)

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

7. Inappropriate relations with clients and/or their family members
- These relationships always end bad for the licensed professional
- RPC 1.8(j)
  A lawyer shall not have sexual relations with a client unless a consensual relationship existed between them when the client-lawyer relationship commenced.

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6. Puff regarding relationship with other counsel and/or court
- "We go way back"
- If the Court sees that you use your relationship with the court as a marketing tool, the relationship will be severed by the court.

5. Don't return calls, letters or e-mails
- The client who won't stop calling.
- If the client feels you don't care, then they won't care about you when they decide to file suit.

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The Malpractice "Top 10"

4. Dabble in area of law not familiar with as a favor to friend/family
- "Sure I can help with that, it's easy"
- **Never run in the dark, you never know what you may hit!**

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

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The Malpractice "Top 10"

2. Abandon your client
- If you withdraw, the client will hold you responsible for everything that happens afterward.
- Also – Be on the lookout for pre-existing problems if you are successor counsel. You may be held liable for missteps that occurred prior to your involvement if you fail to mitigate the impact of prior counsel.

1. Sue your client for fees
- Analyze the possible recovery of the outstanding fees against the loss of your deductible and the costs associated with defending a suit.

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Conclusion

REMEMBER…

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

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DANGEROUS FILE REVIEW PROCEDURE OUTLINE

FOR THE CLIENTS OF ROBERT H. DAVIS, JR.

Law Office of Robert H. Davis, Jr.
4900 Janelle Drive
Harrisburg, PA 17112
Cell: (717) 580-8941
Gmail: bobsethics45@gmail.com

DANGEROUS FILE REVIEW PROCEDURE *

A. Guiding Principles:

(1) It is better to have no system at all than to have a system which is not consistently followed and enforced.

(2) This review is too serious to allow anything but absolute candor, without retribution, and must bind the entire firm, without exception.

(3) The First Commandment of Client Satisfaction ["The Client Wants An Interested Lawyer"] must be a prime consideration in this review (as with all other areas of your practice).

B. Defining a "Bad File"

Generics are very popular lately, so I will describe five basic definitions we used at the Office of Disciplinary Counsel to identify Bad Files. Such definitions are so general that they can be utilized profitably by most law firms and practitioners.

(1) Cases with "short fuses" including statute of limitations concerns - Include cases which have action deadlines that are drawing near whether they be statutes of limitation, local rule requirements or law firm or personal targets for performance of tasks in the file.

(2) Cases in which clients call or write more frequently than normal or in which client communications hint at slipping client confidence or expressions of dissatisfaction.

(3) Cases files which have had no action taken on them in the past two or three months - not because there is necessarily anything badly wrong (there may be occasionally) but because the client needs to hear from you periodically about the case ("sell 'em paper" as a positive concept.).

(4) Cases with difficult factual or legal issues the lawyer cannot resolve - We call this "Hitting the wall" and it can happen in any one of three ways:

First, a fact wall, when you need to go get more facts in order to proceed confidently and just have not had the time to do so;
Second, the law wall, when you haven't had the time to do legal research or consult with others in order confidently to choose a particular strategy for a client; and finally
The decision wall when you have the facts and the law and still, for some reason, cannot "pull the trigger"; usually a collegial consult will help you past this wall.

(5) Where there is a "sick feeling" when the file is picked up - This is a situation in which your stomach is literally smarter than your head. The Office of Disciplinary Counsel also called this the "gut wrench test."

(6) Files sitting in your special "forgotten place" - a time/space warp in your office.

C. The File Review Meeting.

(1) When ? - At a definite, periodic time reflecting the importance of the procedure to your future and that of your firm or legal department. Establish an "all in" attitude – the time must be one in which all attorneys and staff are available.

(2) Who attends ? - All counsel involved , some others; generally anyone who spotted a bad file or who has information about how the file can be remedied. Again "all in" is the goal.

D. How Does the Review Proceed?

As a preliminary matter, you must understand that it is vital that every step listed below be followed, without exception, with regard to every file reviewed. (See Guiding Principles 1 and 2 listed above).

(1) Counsel reports why the file was identified for the review. This reason is recorded for future reference.

(2) Get out/Stay in decision is made

A mandatory step with all files reviewed. Timely withdrawal is preferable to an ethics complaint or a malpractice claim. Knowing when to withdraw is one of the great and last-learned skills of lawyering. The old DR's assumed we had to stay in; now RPC 1.16(b) allows easy withdrawal so long as requirements of RPCs 1.16(d) and 1.15 are met. Government counsel have a special duty not to proceed with frivolous or unprovable claims or prosecutions.

(3) If you stay in, plan a substantial response

a.) Determine what action will materially advance this file out of the " bad file" category - A collegial consult is a very strong tool here.
b.) The action to be taken must be specific (not "I'll do some research"). Examples: work late to meet the deadline; shift firm resources to handle the emergency; personal letter or visit to the nervous client; refer the case to an expert or consult or associate such a person.

c.) Write down a description of the specific action which will be taken.
d.) Set a deadline for action and a penalty if the deadline is not met:

i.) Deadlines should be realistic but should reflect the seriousness of the fact that a particular file has been identified as a bad file. Record the deadline in the file and on the firm's master calendar or tickler file.

ii.) Penalties must, of course, reflect the culture of your law firm and its organizational realities: The retention of a check of a large-firm partner vs. more creative self-discipline for the sole practitioner or lawyer on a corporate or government staff. Record the specific penalty in the bad file at the review.

The best penalties should be solution specific, that is, they combine a little personal displeasure with a direct benefit to the bad file; for example, giving up a Saturday afternoon golf game to come to the office and work on the bad file. The

best penalty "hurts a little and helps a lot."

E. After the Review -- Enforce Penalties Without Exception

Enforcement of penalties is, admittedly, the most difficult part of the review, once you have the basic procedure in place. However, as Corollaries 1 and 2, above, indicated, the system cannot operate dependably unless the penalties determined are enforced. It is always helpful to remind all involved with enforcement of the penalties that any penalty is infinitely more enjoyable than answering an ethics complaint or a malpractice action.

* In fairness, I must give credit for this procedure and its detail to Georgia Attorney Jeffrey Smith, a lawyer I met while practicing in Atlanta, GA back in the mid-1970's who was a professor at Vanderbilt Law School and, with Attorney Ronald Mallen, is an author of the important work *Legal Malpractice* , now five or more volumes in its latest edition.

SESSION #4

"Disability and the Law"

Presented by:
Assistant Chief Counsel
Stephanie Chapman

Pennsylvania Human Relations Commission

Disability & Reasonable Accommodation

The PHRA, ADA and ADAAA

Agenda

- Disability laws
- What is considered a disability
- Employment and Disability
  - Rights and Responsibilities
  - Individual Assessments
  - Essential job functions
  - Reasonable Accommodations
  - Undue Hardship
  - Harassment
  - Pregnancy

Disclaimer

Information, materials, and/or technical assistance are intended solely as informal guidance and are neither a determination of your legal rights or responsibilities under the PHRA and/or applicable Federal laws, nor binding on any agency with enforcement responsibility under those same laws.

This presentation is a combination of several trainings. This is intended to provide a high-level overview only. In-depth training is recommended for areas like harassment and disability/reasonable accommodation.

PHRC offers these trainings free of cost

The Laws

Disability and the PHRC

- **In 1974 the Pennsylvania Human Relations Act was amended to include disability as a protected class**
  - This was 16 years before the ADA (Americans with Disabilities Act)was signed into law
  - While employers must have 15 employees to be required to comply with ADA, PHRA only requires 4.
  - PHRA is construed broadly. While it is not the same as the ADA, the provisions are similar.
  - PHRC has a contract with EEOC to investigate cases that meet Federal jurisdiction. Those cases are "dual-filed"

Disability Defined under the PHRA

- A physical or mental impairment that substantially limits one or more of a person's major life activities (MLA)
- The record of such impairment
- Regarded as having an impairment
- Relation or Association with someone with a disability
- Use of a guide or support animal and in some areas the handling and training of a support animal

The PHRA, ADA and Fair Housing Act

- Disability is a protected class in all areas that the PHRA covers.
  - Employment
  - Housing/Commercial Property
  - Education
  - Public Accommodations
- The ADA also covers other areas outside of employment
  - Title 1: Employment
  - Title 2: Public Services: Local and state government
  - Title 3: Public Accommodations and Services Operated by Private Entities
  - Title 4: Telecommunications
  - Title 5: Miscellaneous Provisions
- The Fair Housing Act covers disability in housing

The Americans With Disability Act (ADA)

- **Signed in 1990**
  - Written with the intent to provide protections for individuals with impairments
  - Employment covered under Title 1
  - Enforced by the EEOC (contracts with PHRC)
  - Applies to private sector employers with 15 or more employees
  - Applies to all state/local government employers

ADA Continued

What is its purpose?

- Protects against disability discrimination in all employment processes
- Limits employer disability inquiry
- Requires reasonable accommodation unless there is an undue hardship

ADA Continued

- Applies to applicants or employees who:
  - Have a disability
  - Have a record of a disability
  - Are regarded as having a disability
- What is a disability?
  - A physical or mental impairment that substantially limits one or more major life activities
  - Same definition as in state law

Issues with the ADA

Issues

- Courts however interpreted what was written differently than what was intended
- Individuals were seen as not “impaired” enough to meet the ADA definition of disability but impaired enough to be considered “not qualified" for jobs or to ask for reasonable accommodations

Relevant ADA Court Cases

- **Relevant Cases:**
  - Sutton v. United Air Lines, Inc., 119 S. Ct. 2139 (1999), United required pilot applicants to have uncorrected vision of 20/100 or better. Plaintiffs failed that test, although with corrective lenses they had 20/20 vision.
  - Toyota Motor Manufacturing, Kentucky, Inc. v. Williams, 534 U.S. 184 (2002), Assembly line worker who suffered from carpel tunnel and tendonitis requested “reasonable accommodations" but was denied. The courts upheld that her impairment did not qualify as a "disability" under the ADA because her disability did not "substantially limit" any "major life activity.

Other Case Examples

- **Other case examples:**
  - A teacher whose breast cancer was in remission but was denied re-employment after a leave of absence
  - A sales associate who was denied an accommodation of two short breaks to take insulin shots for their diabetes
  - A fully qualified individual who was denied employment in a warehouse because they had a cognitive disability

The "Catch 22"

- All were not "impaired" enough to meet the ADA definition of a disability but impaired enough to be considered not qualified.
- The merit of the discrimination event itself was rarely considered as the courts paid more attention to determining if the individual had a "disability."

The Americans with Disabilities Amendment Act (ADAAA)

As a result, new legislation was passed

–ADA Amendments Act (ADAAA)

"The courts have consistently chipped away at Congress' very clear intent…virtually excluding entire classes of people even though (Congress) had specifically mentioned their impairments as objects of the law's protection." - Rep Steny Hoyer

The ADAAA

- **Signed in 2008**
- **To restore the intent and protections of the Americans with Disabilities Act of 1990:**
  - Clarified for the courts the 1990 Act's intent
  - The definition of disability stayed the same but the terms of the definition were expanded
  - More individuals now under the Federal protections

Disability Under the ADAAA

- Disability interpreted more broadly
- *Substantial limitation* of MLA ***need not*** be significant or severe
- Only one MLA needs to be impacted
- MLA also included bodily functions
- Length of impairment is not as important as severity of impairment
- *Mitigating measures* not considered
- Episodic or in remission impairment

Major Life Activities

- Caring for oneself
- Walking
- Seeing
- Communicating
- Hearing
- Speaking
- Breathing
- Reading
- Eating
- Standing
- Interacting with others
- Learning
- Performing manual tasks
- Working
- Concentrating
- Thinking
- Lifting
- Sitting
- Sleeping
- Bending

*This list continues to evolve

Major Bodily functions

- Immune System
- Normal Cell Growth
- Digestive
- Bowel/Bladder
- Special Sense Organs and Skin
- Respiratory
- Circulatory
- Neurological brain functions
- Includes the operation of an individual organ like a kidney, liver, etc.

Impairments under the ADAAA

- Cancer
- Autism
- PTSD
- Diabetes
- Epilepsy
- Multiple Sclerosis
- HIV/AIDS
- Deafness
- Blindness
- Intellectual disabilities
- Partially/completing missing limbs
- Obsessive- compulsive disorder
- Cerebral Palsy
- Major Depressive Disorder
- Schizophrenia
- Mobility Impairments requiring use of a wheelchair

All of these are easily found to be substantially limiting and should not require further or exhaustive analysis

Not All Impairments Are Obvious

Not all disabilities are obvious…

- Nonobvious disabilities are arguably the most common category of disability in the US
- Are still covered under the ADA/ADAAA but may need further analysis depending on the situation
- These are disabilities that are often misunderstood

Examples of Non-Obvious Disabilities

- Arthritis
- Mental illness
- Autism/Asperger's syndrome
- Learning disabilities
- ADD/ADHD
- Seizure Disorder
- Multiple Chemical sensitivity
- Addiction
- Diabetes, AIDS/HIV, Cancer, MS – although if known they require little analysis, sometimes these are not known and not obvious

More on Addition and Substance Abuse Disorders

- Generally, a "disability" regardless of whether it is in the present or in the past. A person still needs to meet the definition of a disability.
- Employers do not need to allow a person to show up unfit for duty however once disclosed, these individuals should be afforded the same rights and protections as any other person with a disability

More on Addition and Substance Abuse Disorders

- **An individual who is in recovery and who is no longer engaging in the current illegal use of drugs is protected as a person with a disability**

Recovery means:

- In recovery from substance abuse disorder
- Has ceased engaging in the illegal use of drugs
- Is either participating in a supervised rehabilitation program or
- Has successfully been rehabilitated

More on Addition and Substance Abuse Disorders

What is the illegal use of drugs?

- **Use of illegal drugs like cocaine and heroin**
- **Use of a controlled substance where:**
  - **Person has no prescription for it**
  - **Person has a fraudulent prescription**
  - **Person is using more than is prescribed**

A person is NOT protected if they are engaged in the illegal use of drugs

What Do You Think?

Taking into account people with both new and existing conditions, about how many adult Americans experience a mental health disorder in a given year?

A. One in ten
B. One in eight
C. One in six
D. One in four

*National Alliance on Mental Illness. Mental Illness: Facts and Numbers. (Accessed at http://www.nami.org/Template.cfm?Section=About_Mental_Illness&Template=/ContentManagement/ContentDisplay.cfm&ContentID=53155)

What Do You Think?

Taking into account people with both new and existing conditions, about how many adult Americans experience a mental health disorder in a given year?

ANSWER
One in four

*National Alliance on Mental Illness. Mental Illness: Facts and Numbers. (Accessed at http://www.nami.org/Template.cfm?Section=About_Mental_Illness&Template=/ContentManagement/ContentDisplay.cfm&ContentID=53155)

What Do You Think?

What is the leading cause of disability among people aged 15 – 44 in the US and Canada?

A. Cancer
B. Depression
C. Multiple Sclerosis
D. Seizure disorder

*"NIMH: The numbers count—Mental disorders in America." National Institute of Health. (Available at http://wwwapps.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america.shtml. [Citing 2004 World Health Report Annex Table 3 Burden of disease in DALYs by cause, sex and mortality stratum in WHO regions, estimates for 2002. Geneva: World Health Organization].

What Do You Think?

What is the leading cause of disability among people aged 15 – 44 in the US and Canada?

ANSWER
B. Depression

*"NIMH: The numbers count—Mental disorders in America." National Institute of Health. (Available at http://wwwapps.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america.shtml. [Citing 2004 World Health Report Annex Table 3 Burden of disease in DALYs by cause, sex and mortality stratum in WHO regions, estimates for 2002. Geneva: World Health Organization].

What Do You Think?

What is the most common type of disability among all age groups?

A. Arthritis
B. Cancer
C. Seizure disorder
D. Asperger syndrome/autism

*Centers for Disease Control and Prevention. Prevalence of doctor-diagnosed arthritis and arthritis-attributable activity limitation—United States, 2003–2005. MMWR 2006;55:1089–1092. Available from: http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5540a2.htm

What Do You Think?

What is the most common type of disability among all age groups?

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*Centers for Disease Control and Prevention. Prevalence of doctor-diagnosed arthritis and arthritis-attributable activity limitation—United States, 2003–2005. MMWR 2006;55:1089–1092. Available from: http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5540a2.htm

More About Non-Obvious Disabilities

What do I need to be aware of?

- Disclosure is always a choice
- Greater social stigma
- Often credibility issues are raised because the employee or applicant "looks just fine."
- Others may blame the individual for their disability

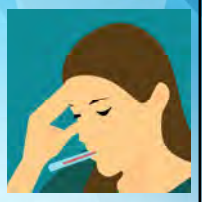
More About Non-Obvious Disabilities

Non-obvious disabilities are becoming more prevalent

- Enhanced diagnostics/screening practices
- Increased survival from illness and injury
- We are living longer
- Our population is aging
- Less shame/stigma associated with having a disability

Typically, not covered or considered impairments under the ADAAA

- The common cold, seasonal or common influenza
- A sprained joint
- A broken bone that is expected to heal completely



Employment Based Disability Information

Non-Job-Related Disabilities

- Defined as a disability which does not substantially interfere with the ability to perform the essential functions of a job
- Person must also be **QUALIFIED** for job in question – skill, experience, education, etc.
- Employer is required to provide a reasonable accommodation if requested unless if would create an undue hardship (we will discuss a little later)
- The laws cover these types of disabilities as it relates to employment

Disability Related Rights and Requirements

Consider that there are multiple stages of employment and at each stage an employer has different limitations, rights and responsibilities as does the employee or potential employee

Pre-Offer
Pre-Employment Stage

Hiring Processes

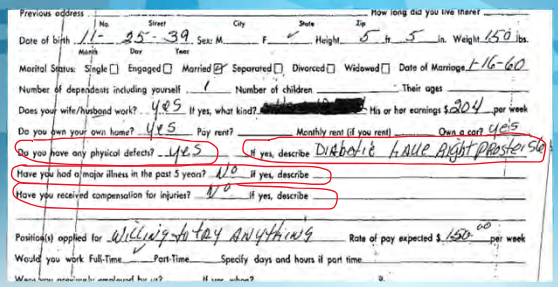
- The hiring process ***in general*** must be made accessible and the employer is required to provide a reasonable accommodation if requested unless if would create an undue hardship (we will discuss a little later)
  - Examples are applications, job sites, etc.

Disability Related Inquiries

The Employment Application

- Can only inquire about the candidate's ability to perform the specified tasks, not their disability
- Employment application may not have questions about disability or limitations
- Applications should not have questions about prior injuries or illnesses including how many sick days they took last year

Pre-Offer Inquiries



Previous address _____ How long did you live there? _____
No. Street City State Zip

Date of birth 11-25-39 (Month Day Year) Sex: M_____ F ✓ Height 5 ft. 5 in. Weight 150 lbs.

Marital Status: Single ☐ Engaged ☐ Married ☑ Separated ☐ Divorced ☐ Widowed ☐ Date of Marriage 1-16-60

Number of dependents including yourself 1 Number of children _____ Their ages _____

Does your wife/husband work? YES If yes, what kind? [redacted] His or her earnings $ 204 per week

Do you own your own home? YES Pay rent? _____ Monthly rent (if you rent) _____ Own a car? YES

Do you have any physical defects? YES If yes, describe DIABETIC LAME RIGHT LEG

Have you had a major illness in the past 5 years? NO If yes, describe _____

Have you received compensation for injuries? NO If yes, describe _____

Position(s) applied for WILLING TO DO ANYTHING Rate of pay expected $ 150.00 per week

Would you work Full-Time ✓ Part-Time _____ Specify days and hours if part time _____

Were you previously employed by us? _____ If yes, when? _____

Pre-Offer Inquiries

The Interview

- May NOT ask (directly or indirectly)
  - about the existence or history of a disability
  - if an applicant needs a reasonable accommodation for the job
- If the candidate has a visible disability, the employer may ask the candidate to describe or demonstrate how they would perform a specific task that the employer has concerns about
- The decision to not tell an employer about a disability is a choice not a lie.

Pre-Offer Inquiries

Can't ask…

- The nature or extent of the applicant's disabilities
- If anyone in their family has a disability
- Any questions about their health in general
- If they have a history of emotional problems
- If they have ever been injured
- If they have ever seen a psychiatrist
- If they have ever had a drug or alcohol problem
- If they are using any prescription drugs
- How much drugs and/or alcohol they consume

Post-Offer Pre-Employment Stage

Post-Offer Inquiries

After a conditional offer is made…

- Ok to ask more about reasonable accommodations IF the applicant requests one
- Employers can require medical examinations
  - ONLY if done for all other applicants in the same job category (no selective inquiries)
  - ONLY if such exam is job-related
- If the inquiry shows the applicant has a disability, the offer can only be rescinded if no reasonable accommodation can be made and there is a business necessity

Employment Stage

Unique Concepts to Disability

- Individual assessments
- Essential functions
- Reasonable accommodation
- Interactive Process

Individual Assessments

Needed when:

- An employee cannot perform the essential functions of their position with or without a reasonable accommodation
- The employment of a person is direct threat to health or safety of themselves or others

Individual Assessments and Direct Threats

The employer must show that:

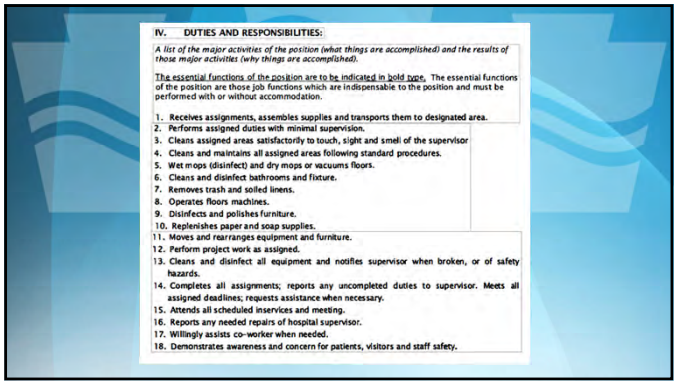
- There is significant risk of substantial harm
  - Risk must be identified
  - Risk must be current, and not speculative or remote
  - Risk assessment must be based on medical evidence
- There is no reasonable accommodation to reduce risk to an acceptable level

Essential Job Functions

- Fundamental job duties of the employment position, does not include marginal functions
- Job description is key
- Essential job functions should be clearly stated and defined
- Just because they are listed in the job description does not mean they are really essential – an analysis may be needed to determine if they are valid

Essential Job Functions - Exercise

- Consider the following situation:
- A housekeeper develops a disability. He tells his employer that he can no longer lift more than 25 pounds. He asks for a reasonable accommodation and provides medical documentation to support his request.
- This employee works on a team. There are multiple teams which do these functions on various days and shift.
- Based on the following excerpts from the housekeeping position description, do you think the employer is legally required to provide the accommodation?

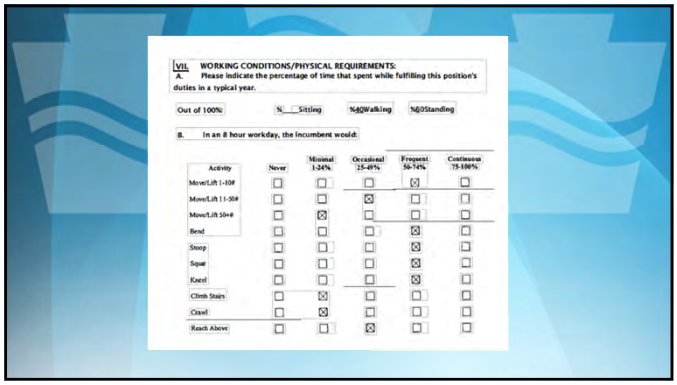


IV. DUTIES AND RESPONSIBILITIES:

A list of the major activities of the position (what things are accomplished) and the results of those major activities (why things are accomplished).

The essential functions of the position are to be indicated in bold type. The essential functions of the position are those job functions which are indispensable to the position and must be performed with or without accommodation.

1. Receives assignments, assembles supplies and transports them to designated area.
2. Performs assigned duties with minimal supervision.
3. Cleans assigned areas satisfactorily to touch, sight and smell of the supervisor
4. Cleans and maintains all assigned areas following standard procedures.
5. Wet mops (disinfect) and dry mops or vacuums floors.
6. Cleans and disinfect bathrooms and fixture.
7. Removes trash and soiled linens.
8. Operates floors machines.
9. Disinfects and polishes furniture.
10. Replenishes paper and soap supplies.
11. Moves and rearranges equipment and furniture.
12. Perform project work as assigned.
13. Cleans and disinfect all equipment and notifies supervisor when broken, or of safety hazards.
14. Completes all assignments; reports any uncompleted duties to supervisor. Meets all assigned deadlines; requests assistance when necessary.
15. Attends all scheduled inservices and meeting.
16. Reports any needed repairs of hospital supervisor.
17. Willingly assists co-worker when needed.
18. Demonstrates awareness and concern for patients, visitors and staff safety.



VII. WORKING CONDITIONS/PHYSICAL REQUIREMENTS:

A. Please indicate the percentage of time that spent while fulfilling this position's duties in a typical year.

Out of 100% | %__Sitting | %20Walking | %20Standing

B. In an 8 hour workday, the incumbent would:

Activity	Never	Minimal 1-24%	Occasional 25-49%	Frequent 50-74%	Continuous 75-100%
Move/Lift 1-10#	☐	☐	☐	☒	☐
Move/Lift 11-50#	☐	☐	☒	☐	☐
Move/Lift 50+#	☐	☒	☐	☐	☐
Bend	☐	☐	☐	☒	☐
Stoop	☐	☐	☐	☒	☐
Squat	☐	☐	☐	☒	☐
Kneel	☐	☐	☐	☒	☐
Climb Stairs	☐	☒	☐	☐	☐
Crawl	☐	☒	☐	☐	☐
Reach Above	☐	☐	☒	☐	☐

Essential Job Functions - Exercise

- **Yes! The employer should accommodate this request.**
- Only 2 of the 18 essential functions may involve moving or lifting objects.
- Lifting more than 25 pounds is only required occasionally. Per the physical requirements, up to 74% of the time, the employee would only have to lift 10 pounds.
- Unless there were no other employees that could handle these heavier tasks that occur on an occasional basis, the employer would be obligated to grant this accommodation.

Qualified Individual

- Defined as a person with the skill, experience, education, and other job-related requirements of the position who, with or without a reasonable accommodation, can perform the essential functions
- Employers are not required to hire, move or promote a person into a position for which they are not otherwise qualified

Reasonable Accommodations

- Modification of employer practices and/or policies to allow persons with disabilities to work so long as the change is reasonable
- ***This is the only time when an employee <u>should</u> be treated differently than others***

Reasonable Accommodations

Who can get accommodations?

- Applicants, full and part time employees, seasonal and temporary workers who:
  - have a qualifying disability
  - who can perform the essential functions of the job with or without reasonable accommodations

Examples of Reasonable Accommodations

- Interview at an accessible site
- Make facilities accessible
- Restricted parking
- Transfer to a vacant funded position
- Restructure job by assigning non-essential functions to others
- Work from home
- Excuse from mandatory OT
- Allow service animal
- Modify work schedules
- Modify policies
- Acquire or modify software/equipment
- Adjust or modify examinations
- Provide qualified readers or interpreters
- Allow use of leave or additional time off

**This is not an all-inclusive list

Requesting Reasonable Accommodations

- Can be done pre or post hire – should be requested as soon as an individual is aware that a workplace barrier exists
- Can begin as an informal request
  - Can be in "Plain English." Individual does not need to use the words "ADA" or "Reasonable Accommodation"
- Does not have to be in writing
  - Employer may ask individual to complete a form or submit the request in writing, but they CANNOT ignore the request

Reasonable Accommodations and The Interactive Process

- The employer and individual engage in an interactive and cooperative dialog to clarify what accommodation the individual needs and identify the appropriate reasonable accommodation. This is called the interactive process.
- Employer may ask relevant questions about the nature of the disability; the individuals work related limitations and what may be needed to accommodate their needs
- This is a two-way interaction and both parties must participate

The Interactive Process and Documentation

- The employer may ask for medical documentation
  - If both the disability and the need for the reasonable accommodation are obvious and/or the documentation has already been provided this should not be requested
- If requested, the individual must provide the documentation, or the employer may deny the accommodation. A reasonable period must be given. Be reasonable if a doctor provides something that shows the need but maybe isn't on your exact form, accept it.
- If the employer does not request any additional information such as supporting medical documentation they are considered to have accepted the validity of the disability and the request

The Interactive Process and Documentation

- The employer may require the individual to go to an appropriate health professional of the employer's choice if the individual provides insufficient information.
- If a medical exam by the employer's physician is required, it must be limited to determining the existence of an ADA disability and the work-related limitations that require a reasonable accommodation.

Family Medical Leave Act vs. The ADA

- The FMLA and ADA are NOT the same
- ADA has additional protections for disabled workers
- Even if someone has exhausted their available leave and/or their FMLA entitlement, additional unpaid time off MAY still be a reasonable accommodation
- Even if the employer uses a third-party vendor, they are still responsible to ensure that employees who are requesting time off due to a disability have additional considerations beyond what is required by the FMLA

What is Reasonable?

- The employer is not required to provide the exact accommodation that the individual requests.
- They may choose among several options as long as the reasonable accommodation is effective.
- If there is more than one option, the employer may opt for the less expensive or burdensome.

The preference of the individual with the disability should be considered but it is the employer's option to chose what best meets their business needs.

What is Unreasonable?

- Eliminating primary job responsibilities
- Lowering production standards that are applied to all employees
- Providing personal use items such as eyeglasses, wheelchairs, hearing aids etc.
- Putting an employee into a job that they did not apply for
- Maintaining a higher salary for an employee who has been moved to a lower paying job if not done for others
- Promoting an employee who is not qualified
- Asking an employer to violate a contract (union considerations)

Proving Something is Unreasonable

- A requested accommodation may be denied when it would create an undue hardship for the employer.

For example, if the accommodation would:

- be unduly costly, extensive substantial or disruptive
- fundamentally alter the nature or operation of the business

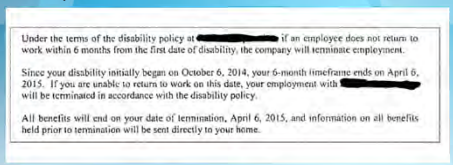
- Factors to consider:
  - cost of the accommodation
  - the employer's size
  - financial resources
  - the nature and structure of the operation

Examples of Unreasonable Requests

- A call center employee whose only job is to take customer service calls asking to not interact with the public
- A corrections officer who can only work from home
- A driver with a vision impairment asking to have an aid come to work and drive for them
- An employee asking for an indefinite leave of absence with no return date and no follow up evaluation dates
- An employee of a small business asking for something that financially the business cannot afford

Policies and Undue Hardship

- Remember, requests should not be denied simply because "*the policy says so*." An employer must show why providing this would be an undue hardship for the company. Blanket policies are often discriminatory.



Under the terms of the disability policy at [redacted] if an employee does not return to work within 6 months from the first date of disability, the company will terminate employment.

Since your disability initially began on October 6, 2014, your 6-month timeframe ends on April 6, 2015. If you are unable to return to work on this date, your employment with [redacted] will be terminated in accordance with the disability policy.

All benefits will end on your date of termination, April 6, 2015, and information on all benefits held prior to termination will be sent directly to your home.

Confidentiality

Who can be told about disabilities and reasonable accommodations?

- All medical information should be kept confidential and only shared with those in positions that are tasked with keeping this information or making these decisions
- Only co-workers directly impacted by the accommodation can be told that there will be a change, but not why
- If questioned, communicate that the change is being made to comply with the law without saying which one

Disability Related Harassment

Harassment Based on Disability

The ADA and the PHRA also prohibit workplace harassment based on disability

- Harassment is unwelcome conduct based on the employee's physical or mental disability such as:
  - Name calling
  - Hurtful jokes
  - Degrading comments
  - Tampering with an employee's work equipment or workspace
  - Physical threats or actions
  - Intimidation
  - Repeated or unnecessary questioning
  - Disclosure of confidential information

Harassment Based on Disability

Unwelcome conduct becomes unlawful harassment when:

1. Putting up with it becomes a condition of keeping your job
   - An employee with a disability complains that their team members are calling them names. The supervisor tells the employee "You will just have to figure out a way to get along with them if you want to stay on my team."
   - An employee with a disability asks for a reasonable accommodation and the supervisor says "I don't have time for people that need special treatment. Maybe you would be better suited for a different job somewhere else."

Harassment Based on Disability

Unwelcome conduct becomes unlawful harassment when:

2. It is so severe and/or pervasive it creates a hostile work environment
   - Your employer discloses your disability to your co-workers
   - Co-workers/supervisor constantly tease you/joke about your disability
   - Co-workers/supervisor talk negatively about your disability/accommodations you receive
   - Your supervisor brings up/mocks your disability in group settings like meetings
   - You are repeatedly and unnecessarily questioned about your disability/need for accommodations

Disability and Pregnancy

Is Pregnancy a Disability

Is Pregnancy considered a disability?

- Pregnancy itself is not an impairment within the meaning of the ADA and is thus never on its own a disability.
- However, some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA.

EEOC, Pregnancy Discrimination and Related Issues Webinar, October 2014

Pregnancy and Disability

Examples:

- Pelvic inflammation – may substantially limit walking
- Pregnancy-related carpal tunnel syndrome – may substantially limit lifting
- Disorders of uterus or cervix – may substantially limit reproductive function
- Pregnancy-related sciatica – may substantially limit musculoskeletal function
- Gestational diabetes – may substantially limit endocrine function
- Preeclampsia – may substantially limit cardiovascular or circulatory functions

Pregnancy and Disability

Be cautious:

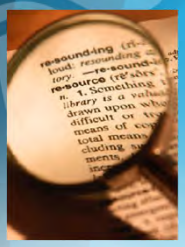
- **Regarded as Having a Disability-** Taking a prohibited action against a pregnant employee (such as termination or reassignment to a less desirable position) based on an actual or perceived impairment that is not transitory (lasting or expected to last for six months or less) and minor
  - An employer assigns a welder who is pregnant to a job in the factory tool room. The job pays much less than the welding job. The manager believed that the employee was experiencing pregnancy-related complications that could result in a miscarriage if she continued as a welder. The employee was not experiencing pregnancy-related complications, and her doctor said she could continue work as a welder.

Pregnancy and Disability

Be Aware:

- Regardless of whether a pregnant worker is disabled, an employer ***might be required*** *to* provide light duty for a pregnant worker ***if*** it provides light duty for employees who are not pregnant, but who are similar in their ability or inability to work.
- Unless there is a legitimate explanation such as limited light duty positions available
- ***Young v. United Parcel Service – decision confusing***

Resources

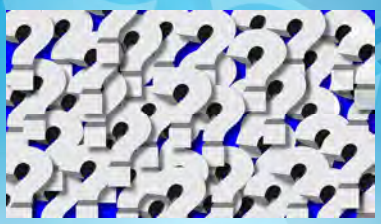


Equal Employment Opportunity Commission (EEOC)
www.eeoc.gov/laws/types/disability.cfm

Job Accommodation Network (JAN)
www.askjan.org

Mid Atlantic ADA Center
www.ADAinfo.org

Questions?



Contact Information

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Harrisburg, PA 17101
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SESSION #5

Bankruptcy Law

"Claims – How to Play Nicely in the Bankruptcy Sandbox"

Presented by:
James K. Jones, Esquire

CLAIMS

How to Play Nicely in the Bankruptcy Sandbox

Presented by
James K. Jones
Mette, Evans & Woodside
DCBA Member Benefit Compliance Session
April 10, 2024

Bankruptcy Overview

- What is a "claim" in bankruptcy?
- Why do I care about the "petition"?
- Who said you could change the definition of "secured"?
- Why is a priority claim not a priority?
- Getting a discharge does not sound desirable to me.

I. Municipal Claims

- A. Federal and state claims are handled by their respective offices. ☺

Municipal Claims

- B. Municipal Services—Municipal Claim and Tax Lien Law (53 P.S. §7101-7505) ☹

Municipal Claims

- B1. Municipal Services (water, sewer, trash, street lights, etc.)
  - a. Includes services provided by a municipality or municipal authority
  - b. Secured claim in PA by real estate served as a first lien--§7107

Municipal Claims

- B2. Taxes
  - a. Taxes assessed on real property are liens upon assessment in PA and therefore not priority unsecured claims in bankruptcy--§7102
  - b. Taxes assessed upon income (EIT) and sales are priority unsecured claims--§507(a)(8)
  - Taxes assesses that are based on considerations other than income or sales (occupational, per capita, etc.) are generally *not* priority claims

II. Domestic Claims

- A. Alimony, maintenance and support
  - 1. A "domestic support obligation" under the Bankruptcy Code is defined as being "in the nature of" alimony, maintenance or support "without regard to whether such debt is expressly so designated."--§101(14A)
  - 2. The chapter 13 plan cannot be confirmed unless the debtor is current post-petition with support payments--§1325(a)(8)

Domestic Claims

- A. Alimony, maintenance and support
  - 3. Such claims are a priority unsecured claim--§507(a)(1)(A)
  - 4. In PA, considered a secured lien for past-due support—23 Pa. C.S. §4352(d.1)
  - 5. Such claims are nondischargeable (§523(a)(5)) whether or not the issue is raised in the bankruptcy--§523(c)(1)

Domestic Claims

- B. Equitable Distribution
  - 1. Encompasses domestic claims not in the nature of alimony, maintenance and support
  - 2. Such claims are dischargeable as long as they are provided for in the chapter 13 plan--§1328
  - 3. Since estate property is involved, often need to motion the Bankruptcy Court to lift the stay to quantify the claim. Final resolution is subject to Bankruptcy Court approval.

III. General Civil Claims

- A. Personal Injury Claims
  - 1. Often require that a Motion to Lift Stay be filed to pursue the insurance claim--§541(d) [insurance proceeds are not included in property of the estate]
  - 2. Original filing of the claim may include upper limits of claim, most recent demand, or "Unknown" to be determined through litigation.
  - 3. The claim is *not* dischargeable if claim is for death or personal injury caused by debtor's operation of a motor vehicle, vessel, or aircraft if caused by debtor's intoxication from using alcohol, a drug, or other substance--§523(a)(9) AND are a priority unsecured claim--§507(a)(10)

General Civil Claims

- B. Consumer Deposits
  - 1. Bankruptcy Code grants priority status to
    - a. Claims of individuals
    - b. up to $3,350.00 per person
    - c. arising from a pre-petition deposit
    - d. in connection with the purchase, lease, or rental of property, or the purchase of services
    - e. for personal, family, or household use of such individuals
    - f. that were not delivered or promised--§507(a)(7)

General Civil Claims

B. Consumer Deposits

- B2. Any balance is a general unsecured claim.
- B3. Such claims are dischargeable unless nondischargeable under another section of the Bankruptcy Code--§1328(a)(2)

General Civil Claims

- C. Litigated Claims
  - 1. Primarily involves claims while litigation is pending.
  - 2. Similar to PI claims, these claims are often estimated.
  - 3. Since these claims need to be liquidated, or involve equitable remedies, the Bankruptcy Court may lift the stay to permit litigation in the other court to continue since it is more familiar with the claim.

General Civil Claims

- D. Wages and Commissions
  - 1. Priority unsecured status is granted to:
    - a. Claims for wages, salaries, or commissions (including vacation, severance, and sick leave)
    - b. up to $15,150.00
    - c. earned within 180 days pre-petition or date of cessation of debtor's business, whichever occurs first--§507(a)(4)
  - 2. More likely to apply in chapter 7 or 11 but may apply in chapter 13 for sole-proprietor

IV. Motor Vehicles

- A. §1322(b)(2) of the Code permits chapter 13 plans to modify the rights of holders of secured claims, other than claims secured by debtor's principal residence. Call a "cramdown" which bifurcates the claim.
- B. §1325(a)(5)(B)(ii) requires secured claims to receive at least the amount of the secured claim.

Motor Vehicles

- C. Hanging paragraph under §1325(a) limits the bifurcation of a claim secured by a motor vehicle if:
  - 1. creditor has a purchase money security interest
  - 2. creditor made the loan within 910 days (2.5 years) pre-petition
  - 3. debtor acquired the motor vehicle for personal use
  - If all 3 qualifications are met, vehicle must be paid in full

D. If cramdown permitted, plan must provide adequate protection during the term of the plan--§1325(a)(5)(B)(iii)(II)

V. Medical Bills

- A. No Surprises Act of 2021 protects patients from unexpected out-of-network medical bills from
  - 1. emergency room visits
  - 2. non-emergency care related to in-network hospitals
  - 3. air ambulance services [ground ambulances not covered but subject to further inquiry]

Medical Bills

- B. Out-of-network provider charges are limited to in-network cost-sharing (includes copays, deductibles, and coinsurance) rate provided by health insurance provider.
- C. For more information, see https://www.insurance.pa.gov/Coverage/health-insurance/no-surprises-act/Pages/default.aspx

SESSION #6

"Workers' Compensation **Law Updates"**

Presented by:
Kaleigh M. Ryder, Esquire