

Eckert Seamans presents

**LEGAL PRIMER:
2017 UPDATE**

August 3, 2017

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219
412.566.6000 – phone
412.566.6099 – fax

www.eckertseamans.com

AGENDA

7:45—8:30 a.m.	Registration and Continental Breakfast
8:30—8:45 a.m.	Welcome & Introductions <i>Professor Mark D. Yochum</i>
8:45—9:15 a.m.	Pennsylvania's New Medical Marijuana Law: What Employers Need to Know Now <i>Michael McAuliffe Miller</i>
9:15—9:45 a.m.	Protecting What is Yours <i>David V. Radack and Timothy P. Ryan</i>
9:45—10:15 a.m.	The Internet of Things (IoT) and Data Security: Examples from the Hospitality Industry <i>Gosia Kosturek</i>
10:15—10:30 a.m.	Morning Break
10:30—11:00 a.m.	50 Ways to Protest Your (Federal) Procurement: Advice for Dealing with Bid Protests <i>Matthew J. Whipple</i>
11:00—11:30 a.m.	What Color is Your Hat? <i>Jennifer L. Rawson</i>
11:30—Noon	Attorney/Client Privilege <i>Kevin P. Allen</i>
Noon—1:00 p.m.	Lunch
1:00—1:30 p.m.	Crisis Response: Managing, Protecting, and Restoring Trust and Confidence <i>Rafael M. Villalobos, Jr.</i>
1:30—2:00 p.m.	Municipal Bonds Build America <i>Jennifer M. Caron and Dacia A. Haddad</i>
2:00—2:30 p.m.	10 Hot Topics in Leasing 2017 <i>James A. Pellow, III and Eric J. Zagrocki</i>
2:30—2:45 p.m.	Afternoon Break
2:45—3:15 p.m.	Repeal and Replace? An Update on the Affordable Care Act <i>Sandra R. Mihok and Heather Stone Fletcher</i>
3:15—4:15 p.m.	Sex and Clients <i>Professor Mark D. Yochum</i>
4:15 p.m.	Adjournment

TABLE OF CONTENTS

Tab A	Pennsylvania's New Medical Marijuana Law: What Employers Need to Know Now
Tab B	Protecting What is Yours
Tab C	The Internet of Things (IoT) and Data Security: Examples from the Hospitality Industry
Tab D	50 Ways to Protest Your (Federal) Procurement: Advice for Dealing with Bid Protests
Tab E	What Color is Your Hat?
Tab F	Attorney/Client Privilege
Tab G	Crisis Response: Managing, Protecting, and Restoring Trust and Confidence
Tab H	Municipal Bonds Build America
Tab I	10 Hot Topics in Leasing 2017
Tab J	Repeal and Replace? An Update on the Affordable Care Act
Tab K	Sex and Clients



PENNSYLVANIA'S NEW MEDICAL MARIJUANA LAW: WHAT EMPLOYERS NEED TO KNOW NOW

Presented by:

Michael McAuliffe Miller

Member

Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg, PA 17101

717.237.7174
mmiller@eckertseamans.com

HARRISBURG, PENNSYLVANIA

213 Market St.
8th Floor
Harrisburg, PA 17101

P: 717.237.7174

F: 717.237.6019

mmiller@eckertseamans.com

PRACTICE AREAS:

[Labor & Employment](#)

[Municipal Law & Governance](#)

[Regulated Substances](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Eastern
District of Pennsylvania

U.S. District court for the Middle
District of Pennsylvania

U.S. District Court for the Western
District of Pennsylvania

U.S. Court of Appeals for the Third
Circuit

EDUCATION:

J.D., Duquesne University School of
Law

M.P.I.A. University of Pittsburgh,
Graduate School of Public and
International Affairs

B.A., University of Pittsburgh



Michael McAuliffe Miller

MEMBER

Michael Miller concentrates his practice exclusively on management-side employment and labor law, including employment and labor-related litigation before a variety of state and federal courts.

REPRESENTATIVE MATTERS

- Secured the dismissal of a request for an injunction made by a disappointed bidder who sought to block the City of Lebanon Authority from awarding a \$37-million-dollar contract for the reconstruction of its Waste Water Treatment Plant to bring it into compliance with the Chesapeake Bay Initiatives. Because the construction had to be complete in a short period of time in order to avoid fines, fees, and penalties, the entry of the injunction would have jeopardized the entire project and subjected the Authority to additional regulatory scrutiny. After openings, and the cross-examination of the witnesses called in the Petitioner's case in chief, was successful in convincing the judge to dismiss the request for injunctive relief from the bench without having to call a witness for the Authority.
- Chief Labor Counsel for a project in which a New Jersey for-profit corporation purchased the Meadowlands Health Center from a nonprofit health system. In so doing, negotiated successor labor agreements with four unions and transitioned 400+ employees to new employment avoiding litigation and disruptions to closing.
- Special Labor Counsel for the November 2010 successful privatization of Dauphin County's Youth Detention Center.
- Successfully defended a New Jersey Acute Care Hospital in unionization drive and secured dismissal of representation petition without a union election.
- Selected as Special Labor Counsel for Eastern Pennsylvania by the Society of County Human Resources Professionals of Pennsylvania.
- Chief labor counsel to the sponsors of a public-private partnership (P3) for the long-term lease of a third class city's parking assets.

- Represented national and regional employers in the manufacturing, construction, trucking, public utility, insurance, food, secondary and higher education, and health care industries.
- Litigated to verdict a wide variety of employment-related litigation, including claims of sexual harassment, wrongful discharge, and breach of contract as well as race, age, disability, and gender discrimination claims and sustained these results on appeal to federal and state appellate courts.
- Developed effective and efficient strategies to resolve matters before federal and state administrative agencies, including the National Labor Relations Board, Equal Employment Opportunity Commission, and Pennsylvania Human Relations Commission.
- Regularly negotiates labor agreements with the Fraternal Order of Police, International Association of Fire Fighters, AFSCME, SEIU, IBEW, the Teamsters, the Steelworkers, and the Building Trades, among other unions.
- Served (in the public sector) as special labor counsel to a number of municipal employers at the state, county, city, borough, and township level and represented those entities in collective bargaining negotiations, contract interpretation claims, discipline matters, interest arbitrations, grievance arbitrations, unfair labor practice charges, and employment-related litigation.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association Ethics, Headquarters, and Nomination Committees, Former Member
- Pennsylvania Bar Association House of Delegates, Former Member

COMMUNITY INVOLVEMENT

- The Wildcat Foundation, Board Member

AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers – Rising Star*
- Selected by *Law and Politics Magazine* as a "Top 40 Under 40" of lawyers in Pennsylvania

NEWS AND INSIGHTS

Publications:

- "Getting it Right the First Time: Holding Unions Accountable to Contractual and Statutory Time Limits," co-author, *Society of County Human Resource Professionals (SCHRPP) Quarterly*, April 2013.

- "Did the Commonwealth Court Sweep Away the Ability to Bargain Over Changes to Post-Retirement Health Benefits?" co-author, *SCHRPP Quarterly*, June 2012.
- "The Facebook Firing Case," *SCHRPP Quarterly*, January 2011.
- "A New Frontier for 1620 Rights?" *SCHRPP Quarterly*, October 2010.

Speaking Engagements:

- "Trends in Higher Education Bargaining," co-presented with Dr. Ken Mash, Joint Statewide Conference of the Pennsylvania Bureau of Mediation and the Pennsylvania Labor Relations Board, March 24, 2016.
- "Police Liability and Body Cameras," "I've Been Wronged! Dealing with Whistle-blowers," "Winning at Mediation and Arbitration," "Employment Law Checklist for Municipal Employers," "Legal Update in Labor and Employment Issues," Human Resources and Labor Management Institute, Pennsylvania State Association of Township Supervisors (PSATS), October 2015.
- "The Difficult Employee: Attendance and Performance," "The Monster Under Our Beds: Bad Language in CBAs," "The Year in Review in Labor and Employment Law," "How to Hire Without Getting Sued," and "What Arbitrators Want: A Guide to Just Cause," co-presenter, Human Resources and Labor Management Institute, PSATS, October 2014.
- "Mock Interest and Grievance Arbitrations," co-presenter, Pennsylvania State Association of Boroughs (PSAB) Annual Conference, April 2014.
- "The Year in Review in Labor and Employment Law," "Top Ten List of Classic Employment Problems," and "Getting Ready to Negotiate," co-presenter, Human Resources and Labor Management Institute, PSATS, December 2013.
- "Municipal Civil Service & Labor Law in Pennsylvania," PSAB, May 2013.
- "Developing and Updating Comprehensive, Legal Employee Handbooks and Job Descriptions," County Commissioners Association of Pennsylvania (CCAP) County Administration Conference, May 2013.
- "Coming and Going: The Right Way to Hire and Fire Your Employees," PSAB Fall Leadership Conference, October 2012.
- "Social Media," Annual PA Municipal Legal Update, PSAB, August 2012.
- "Everything You Ever Wanted to Know About Interest and Grievance Arbitrations," co-presenter, Pennsylvania Chiefs of Police Association, July 2012.
- "Three Hours with Arbitrators," Pennsylvania Chiefs of Police Association, July 2012.
- "NLRB Update: How the NLRB is Remaking Labor Relations in America," co-presenter, Eckert Seamans Human Resources Forum, May 2012.

- "Social Media in the Post-Quon World," PSAB Solicitors Section, August 18, 2011.
- "Five (Not So) Easy Pieces–Five Bad Employment Law Situations for County Solicitors," CCAP Annual Conference (Seven Springs) August 15, 2011.
- "They Did What? New Developments in Public Sector Labor Law," Society of County Human Resource Professionals of Pennsylvania (SCHRPP) Annual Conference (State College), August 5, 2011.
- "Building a Better Personnel Manual," SCHRPP Annual Conference (State College), August 5, 2011.
- "Conducting a Workplace Audit," webinar, PSATS, July 20, 2011.
- "Alphabet Soup: FMLA, ADA and Workers Compensation," webinar, PSATS, July 13, 2011.
- "Social Media and the Public Sector ," webinar, PSATS, July 6, 2011.
- "When Did I Start Working For The Style Channel? Dress Codes, the Public Sector and the Law," SCHRPP, June 29, 2011.
- "Social Media: Perks and Perils for the Legal Profession," panelist (with Judge D. Michael Fisher of the Third Circuit and Chief Judge Yvette Kane and Judge John Jones of the Middle District of Pennsylvania), Middle District of Pennsylvania Chapter of the FBA/PBA Federal Practice Committee CLE, June 1, 2011.
- "The Role of the Municipal Solicitor," co-presenter, 100th Annual Conference, PSAB, April 2011.
- Provided training on Civil Service for PSAB in Scranton and Harrisburg, March 2011.
- "OMG! Facebook, Social Media and the Public Sector," webinar, SCHRPP, October 2010.

Media Coverage:

- "Ask the Lawyer: Live Online Chat with Michael McAuliffe Miller," *The Central Penn Business Journal*, August 2014.
- "Palmyra Borough, Police Agree to New 4-Year Contract," *Lebanon Daily News*, December 19, 2013
- "Companies Fight Against Texting and Driving," *Risk and Insurance Online*, June 4, 2012.
- "New Year, New Policy Challenges," *SHRM Online*, January 11, 2011.
- "Rethink social media policies in light of NLBR complaint, lawyers say," *American Medical News*, November 2010.
- "Chilling Worker Speech on Facebook," *Human Resource Executive Online*, November 2010.

Medical Marijuana and Pennsylvania Employers

Michael McAuliffe Miller

LEGAL PRIMER: 2017 Update

August 3, 2017

So, This Happened

There are now 25 jurisdictions with laws that legalize use of marijuana for medical purposes.

Five of those jurisdictions—Colorado, Washington, Oregon, Alaska, and the District of Columbia—have gone so far as to legalize the drug for *recreational* use, with similar legislation pending or under consideration in a number of other states.

Wait, Isn't Marijuana Still Illegal?

Well, yes.

Under the federal Controlled Substance Act ("CSA"), marijuana is designated a Schedule I controlled substance. 21 U.S.C. § 802(16). (It is illegal for physicians to prescribe Schedule I controlled substances.)

The U.S. Supreme Court clarified over a decade ago that there is no exception to the CSA's prohibitions on manufacturing and distributing marijuana for medical necessity, holding that the states do not have the authority to legalize what Congress has deemed unlawful. United States v. Oakland Cannabis Buyers Co-Op, 532 U.S. 483 (2001); Gonzales v. Raich, 545 U.S. 1 (2005).

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania's Medical Marijuana Act

On April 17, 2016, Pennsylvania Governor Tom Wolf signed legislation authorizing the use of medical marijuana (the Medical Marijuana Act or MMA) in Pennsylvania.

The MMA allows patients suffering from a variety of ailments, including HIV/AIDS, autism, cancer, and post-traumatic stress disorder, to use marijuana to treat their conditions.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania's Medical Marijuana Act

The statute defines a "serious medical condition" as any one of the following:

- Amyotrophic Lateral Sclerosis
- Autism
- Cancer
- Crohn's Disease
- Damage to the nervous tissue of the spinal cord with objective neurological indication of intractable spasticity
- Epilepsy
- Glaucoma

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania's Medical Marijuana Act

- HIV (Human Immunodeficiency Virus) / AIDS (Acquired Immune Deficiency Syndrome)
- Huntington's Disease
- Inflammatory Bowel Syndrome
- Intractable Seizures
- Multiple Sclerosis
- Neuropathies
- Parkinson's Disease
- Post-traumatic Stress Disorder
- Severe chronic or intractable pain of neuropathic origin or severe chronic or intractable pain in which conventional therapeutic intervention and opiate therapy is contraindicated or ineffective
- Sickle Cell Anemia

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania's Medical Marijuana Act

Under the Medical Marijuana Act, patients **who are residents of the Commonwealth** and have a serious medical condition as certified by a physician will be able to obtain medical marijuana at approved dispensaries that are located in the Commonwealth and have a validly-issued permit from the Department.

A "caregiver" who is designated by the patient and approved by the Department will be able to obtain medical marijuana from an approved dispensary located in the Commonwealth that has a validly-issued permit from the Department in order for the caregiver to deliver medical marijuana to the patient.

Smoking marijuana is still illegal under the MMA, and marijuana may only be dispensed using alternative delivery systems such as pills, oils, topical gels, creams or ointments.

Under the new law, medical marijuana will be dispensed only to an individual (or a caregiver of an individual) who receives a certification from a medical provider and an identification card issued by the Pennsylvania Department of Health.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania's Medical Marijuana Act

The MMA prohibits employers from discharging, threatening, refusing to hire, discriminating or retaliating against employees "solely on the basis of such employee's status as an individual who is certified to use medical marijuana."

In other words, taking adverse action against an employee based solely on the individual's status as a medical marijuana cardholder would likely be considered discrimination under the MMA.

The MMA does not, however, require employers to accommodate the use of marijuana on the job "when the employee's conduct falls below the standard of care normally accepted for that position," and allows employers to discipline employees who are "under the influence" of medical marijuana at work.

The law is silent as to whether an employer can rely upon a positive drug test as a reason for an adverse employment action in itself, or as evidence of impairment.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania's Medical Marijuana Act

- An employer does **not** have to allow for an employee to be actively under the influence while at work. Employees who are impaired at work for any reason—alcohol, prescription medication or medical marijuana—are not protected.
- Under the MMA, Pennsylvania employers now may not discharge, refuse to hire, or otherwise discriminate against an employee solely on the basis of an employee's certification to use medical marijuana. 35 P.S. § 10231.2103.
- But, employers are not required to permit such certified employees to: (1) use medical marijuana on company property or any place of employment; (2) be under the influence on company property; or (3) accommodate an employee whose "conduct falls below the standard of care normally accepted for that position." *Id.*
- Additionally, Pennsylvania employers are not required "to commit any act that would put the employer or any person acting on its behalf in violation of Federal law," such as federal contractors. *Id.*

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania's Medical Marijuana Act

- The MMA provides further restrictions focused on patients' conduct. A patient may not handle certain chemicals requiring a permit under federal or state law, work with high-voltage electricity or other public utility, work at heights or in confined spaces, including mines, or work in any setting which an employer deems to be life-threatening while "under the influence" of marijuana. 35 P.S. § 10231.510.
- "Under the influence" is defined as having "a blood content of more than 10 nanograms of active tetrahydrocannabinol per milliliter of blood in serum." *Id.* This metric presents a grey area as employers may find obstacles in timely testing an employee's blood.
- However, an employee's conduct may fall below the standard of care normally accepted, indicating that he/she may be under the influence. While most of the areas of concern regarding the MMA were not expected to arise until early 2018, employers should be prepared to face these issues much sooner.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania's Medical Marijuana Act

A patient may be prohibited by an employer from performing any task which the employer deems life-threatening, to either the employee or any of the employees of the employer, while under the influence of medical marijuana. The prohibition shall not be deemed an adverse employment decision even if the prohibition results in financial harm for the patient.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

The Federal Problem

The Colorado Supreme Court recently heard the case of *Coats v. Dish Network*, in which an employee of Dish Network sued under Colorado's lawful off-duty activities law after being fired for failing a random drug test despite having a medical marijuana license.

- The plaintiff, Brandon Coats, had been a quadriplegic since his teens. Coats was hired by Dish in 2007 and ranked among the top 5 percent of Dish's telephone customer service representatives.
- In 2009, after the painkiller Coats had been using since he was 16 to treat muscle spasms triggered by his condition had lost its effectiveness, his doctor recommended marijuana. Coats got a medical marijuana license and began consuming it at home after work.
- When Dish conducted a random drug test in May 2010, Coats informed the tester that he would fail but that he had a medical marijuana license.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

The Federal Problem

Coats was terminated in June 2010 for violating the company's drug policy. He sued for wrongful termination, claiming Colorado's lawful-activities statute prohibited Dish from firing him for engaging in legal off-the-clock activity.

The company countered that the state's medical marijuana law didn't make medical marijuana use legal; it simply provided users an affirmative defense if they were criminally charged for their actions.

Dish also argued that because marijuana was still a Schedule I drug under federal law, Coats' use didn't meet the statutory definition of lawful.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

The Federal Problem

The trial court agreed with Dish on both arguments. An appellate court upheld only on the grounds that federal law made marijuana use illegal, leaving for another day the question of whether medical marijuana use is legal under Colorado law. The Colorado Supreme Court also affirmed solely on that basis.

Coates is somewhat indicative of how courts interpret a collision between the CSA, the ADA and state law—at least for right now. Even though a particular state may have legalized marijuana, either as a recreational drug or for qualifying patients, because it is still an illegal drug under federal law, the courts—the Colorado decision being indicative—have generally said you're not allowed to claim a protected status because it's illegal under federal law.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Then Massachusetts Got Involved

Cristina Barbuto vs. Advantage Sales And Marketing, LLC, Mass. Supreme Judicial Court, July 17, 2017

Massachusetts Medical Marijuana Act provides that that "there should be no punishment under state law for qualifying patients . . . for the medical use of marijuana." The question in her case was whether a qualifying patient who has been terminated from her employment because she tested positive for marijuana as a result of her lawful medical use of marijuana has a civil remedy against her employer under Massachusetts law.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Then Massachusetts Got Involved

Cristina Barbuto, was offered an entry-level position with defendant, Advantage Sales and Marketing (ASM), in the late summer of 2014, and accepted the offer. An ASM representative later left a message for Barbuto stating that she was required to take a mandatory drug test.

Barbuto told the ASM employee who would be her supervisor that she would test positive for marijuana. Barbuto explained that she suffers from Crohn's disease, a debilitating gastrointestinal condition; that her physician had provided her with a written certification that allowed her to use marijuana for medicinal purposes; and that, as a result, she was a qualifying medical marijuana patient under Massachusetts law. She added that she did not use marijuana daily and would not consume it before work or at work.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Then Massachusetts Got Involved

The supervisor told Barbuto that her medicinal use of marijuana "should not be a problem," but that he would confirm this with others at ASM. He later telephoned her and confirmed that her lawful medical use of marijuana would not be an issue with the company. On September 5, 2014, Barbuto submitted a urine sample for the mandatory drug test. On September 11, she went to an ASM training program, where she was given a uniform and assigned a supermarket location where she would promote the products of ASM's customers. She completed her first day of work the next day. She did not use marijuana at the workplace and did not report to work in an intoxicated state.

That evening, defendant, Joanna Meredith Villaruz, ASM's Human Resources representative, informed Barbuto that she was terminated for testing positive for marijuana. Villaruz told Barbuto that ASM did not care if Barbuto used marijuana to treat her medical condition because "we follow federal law, not state law."

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Then Massachusetts Got Involved

Under the Massachusetts Medical Marijuana Act, The act also provides, "Any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." ASM argued that Barbuto failed to state a claim of handicap discrimination for two reasons:

- First, they contended that she had not adequately alleged that she was a "qualified handicapped person" because the only accommodation she sought—her continued use of medical marijuana—was a Federal crime and, therefore, is facially unreasonable.
- Second, they contended that, even if she were a "qualified handicapped person," she was terminated because she failed a drug test that all employees were required to pass, not because of her handicap.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Then Massachusetts Got Involved

ASM contended that, because the prescribed medication was marijuana, which was illegal to possess under Federal law, an accommodation that would permit the plaintiff to continue to be treated with medical marijuana is per se unreasonable.

They also contended that, because such an accommodation was facially unreasonable, it owed the plaintiff no obligation to participate in the interactive process.

The SJC reasoned that, "The fact that the employee's possession of medical marijuana is in violation of Federal law does not make it per se unreasonable as an accommodation. The only person at risk of Federal criminal prosecution for her possession of medical marijuana is the employee."

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Then Massachusetts Got Involved

"Nor are we convinced that, as a matter of public policy, we should declare such an accommodation to be per se unreasonable solely out of respect for the Federal law prohibiting the possession of marijuana even where lawfully prescribed by a physician."

"To declare an accommodation for medical marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions."

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Then Massachusetts Got Involved

"In addition, even if the accommodation of the use of medical marijuana were facially unreasonable (which it is not), the employer here still owed the plaintiff an obligation under G. L. C. 151B, § 4 (16), before it terminated her employment, to participate in the interactive process to explore with her whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy. This failure to explore a reasonable accommodation alone is sufficient to support a claim of handicap discrimination."

What does Barbuto portend for the Pennsylvania Medical Marijuana Act, if anything?

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Emerging Employment Questions

- Is an employer required to accommodate the use of medical marijuana?
- What do I do when an employee fails a random drug test and then whips out a state-issued card authorizing use of medical marijuana?
- What if the employee is a Police Officer? An office worker?

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Do I Have To Accommodate The Use Of Medical Marijuana?

- Generally speaking, laws like the Americans with Disabilities Act that protect employees specifically exclude from disability any employee or applicant who is currently engaging in the illegal use of drugs. This is where the murky water starts for employers since marijuana is listed as a Schedule 1 controlled substance under the federal ***Controlled Substances Act ("CSA")***.
- So, the question of an employer's duty in Pennsylvania is a mix of federal law and the application of the MMA.
- In addition, the Drug-Free Workplace Act of 1988 requires employers to maintain a no-drugs environment in order to become a federal contractor or receive federal funding. The upshot: Federal employees and employees of companies that work with the federal government may be terminated for drug use.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Do I Have To Accommodate The Use Of Medical Marijuana?

- In states like Pennsylvania where an employer may not discharge, refuse to hire, or otherwise discriminate against an employee solely on the basis of an employee's certification to use medical marijuana, an employer needs to carefully evaluate the job before taking any action due to the use of medical marijuana.
- For instance, if an employee tests positive for marijuana, the employer should ask the worker to verify that he or she is a participant in a recognized medical marijuana program. Then the employer conducts a further evaluation of the employment situation.
- In states like Pennsylvania requiring accommodation, the employer should look at the specific demands of the job, as well as any competing regulations that may apply, in considering an employee's use of medical marijuana. By way of example, the Department of Transportation's regulations do not permit the use of marijuana.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Do I Have To Accommodate The Use Of Medical Marijuana?

- Once an employer is provided notification that an employee is a medical marijuana user, that employer needs to be especially careful how it uses that information and how far it goes in asking for more.
- This is because the employer now is likely on notice that the employee is potentially disabled under the Americans with Disabilities Act (ADA) or similar state statutes and/or has a serious health condition under the Family and Medical Leave Act.
- While the ADA itself does not require an accommodation based on marijuana use, it does require other accommodations related to a covered disability (for example, glaucoma), and affords certain protections to employees and applicants with disabilities, such as the confidentiality of medical information.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Do I Have To Accommodate The Use Of Medical Marijuana?

- While the MMA provides some protection for employers with employees in safety-sensitive positions, it creates new practical problems for Pennsylvania employers in the drug-testing process. As an initial matter, testing vendors are not generally able to distinguish between positive test results caused by smoking marijuana (illegal under the MMA) and ingesting marijuana in an approved form.
- Moreover, it is unclear how employers can determine whether an employee is "under the influence" of marijuana while at work. Observations are helpful, but do not identify the cause of the impairment; tests show recent drug use but are not very useful to assess the individual's level of impairment at the time of the test.
- Many employers use urine samples for drug tests; however, urine testing may reveal use weeks prior to testing. While saliva testing shows more recent use, the results still provide no definitive answer whether an employee was under the "influence of marijuana" on the job.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What To Do If You're An Employer

It is critical that employers disseminate their drug policies to employees and enforce them uniformly among all employees.

Ensure that all employment policies and handbooks make clear that testing positive for an illegal drug—including medical marijuana—is a policy violation, and that the employer reserves the right to take adverse action based upon such test results to the fullest extent permitted under the law.

Monitoring on-site drug use should be uniform and as fair as possible.

Ensure that justifications and safety-sensitive positions, including any task that may be deemed life threatening, are fully explained.

Have discussions with vendors regarding testing protocols and how positive marijuana tests will be handled and reported. In the event of a positive marijuana test, medical review officers should be instructed to have a discussion with an employee regarding whether he or she has a state-issued medical marijuana identification card.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What To Do If You're An Employer

Supervisors should be trained to handle issues regarding potentially impaired employees or to respond to employees' questions regarding the MMA.

HR must be trained to deal with issues related to reasonable suspicion training for those employees suspected to be impaired.

Supervisors should never make decisions based on social media, workplace chatter or belief about marijuana use, and all decisions to significantly engage in this issue should be reviewed/considered by human resources or labor counsel.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What To Do If You're An Employer

Second, even though *Coates* indicates that there is a conflict between the federal courts' view of an employer's duties to accommodate and the provisions of Pennsylvania law, an employee with a disability cannot be automatically discharged because of his disability, even though an employer uses its zero tolerance drug policy as its nondiscriminatory reason for the discharge.

Some nexus between off-site marijuana use and on-site work conduct should be established if an adverse employment action is sought.

The smart employer will closely work with their HR professionals and lawyers to avoid related issues under the ADA—such as discrimination based on an employee's recognized disability (e.g., glaucoma)—and put themselves in a better position to defend their employment decision.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What To Do If You're An Employer

Employment law is a lagging indicator. While the MMA is being implemented, Pennsylvania courts and administrative entities such as the EEOC and PHRC will be forced to refine and address their guidance as to how the CSA, the ADA and the MMA interact. And, as a result, the boundaries will become much clearer.

Employers will have to be patient, deliberate and careful in their employment decisions as well as the underlying justifications for those decision. Good facts and a reasoned approach will provide the best possible defense in an uncertain time.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW





PROTECTING WHAT IS YOURS

Presented by:

David V. Radack

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.6777
dradack@eckertseamans.com

Timothy P. Ryan

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.5990
tryan@eckertseamans.com

PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.6777

F: 412.566.6099

dradack@eckertseamans.com

PRACTICE AREAS:

[Intellectual Property](#)

[Technology & Licensing](#)

[Life Sciences](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

Supreme Court of the United States

U.S. District Court for the Western District of Pennsylvania

U.S. Court of Appeals for the Federal Circuit

U.S. Patent and Trademark Office

EDUCATION:

J.D., Cornell Law School, Cornell University, 1983

B.S., with university honors, Carnegie Mellon University, 1980



David V. Radack

MEMBER BOARD OF DIRECTORS

Dave Radack represents clients in the full spectrum of intellectual property law, including patents; trademarks; copyrights; trade secrets; technology and trademark licensing; sports, arts, and entertainment law issues; computer law; and intellectual property litigation. He has extensive experience in trademark law practice in both the courts and before the U.S. Patent and Trademark Office (USPTO). Dave's trademark law clients include and have included a major regional supermarket, a leading lawn and garden tool manufacturer, a well-known food company, a national fast-food chain, and several college and professional sports teams.

Dave serves as a member of the firm's Board of Directors.

REPRESENTATIVE MATTERS

- Represented a wide variety of clients including individuals, small and medium sized businesses, universities and colleges, and Fortune 500 companies.
- Worked closely with in-house general attorneys as well as in-house intellectual property specialists.

PROFESSIONAL AFFILIATIONS

- Pittsburgh Intellectual Property Law Association
- International Trademark Association

AWARDS AND RECOGNITION

- Selected for inclusion as *Best Lawyers* 2016 Patent Law "Lawyer of the Year" in Pittsburgh
- Selected for inclusion in *World Trademark Review* magazine's WTR 1000 (Pennsylvania)
- Selected for inclusion as *Best Lawyers* 2012 Trademark Law "Lawyer of the Year" in Pittsburgh
- Selected for inclusion in *Pennsylvania Super Lawyers*
- Selected for inclusion in *The Best Lawyers in America*

- Attained an AV® Preeminent™ rating from Martindale-Hubbell

NEWS AND INSIGHTS

Speaking Engagements:

- "Leveling the Playing Field Against Patent Trolls," co-presented at Eckert Seamans' Continuing Legal Education (CLE), August 2014.
- "Understanding the America Invents Act: Sweeping Change of U.S. Patent Prosecution Practice," co-presented at Eckert Seamans' CLE, August 2012.
- "The America Invents Act – A Discussion on The Significant Changes to Intellectual Property Law," co-presented at Eckert Seamans Teleseminar, September 28, 2011.
- "Co-Existence Agreements in the Context of U.S.P.T.O. Proceedings," webinar, *Co-Existence and License Agreements in Resolution of Trademark Disputes*, ALI-ABA, March 2010; replay December 2010.
- "Patent Marking," co-presented at Eckert Seamans' CLE, August 2010.

Media Coverage:

- ["The Lessons of March Madness: Companies would do well to pay careful attention to trademarks,"](#) *Metropolitan Corporate Counsel*, March 15, 2017.
- ["The Reason Advertisers Can't Say 'March Madness' Goes Back 75 Years,"](#) 103.5 WTOP-FM, March 6, 2017.
- ["Be Careful How you Use March Madness, Final Four, and other NCAA Tournament Terms,"](#) 90.5 WESA-FM, April 2014.

PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.5990

F: 412.566.6099

tryan@eckertseamans.com

PRACTICE AREAS:

[Appellate](#)

[Energy](#)

[Intellectual Property Litigation](#)

[Litigation](#)

[Securities Litigation](#)

[Technology & Licensing](#)

[Utilities](#)

STATE ADMISSIONS:

Pennsylvania

District of Columbia

COURT ADMISSIONS:

U.S. Courts of Appeals for the
Federal Circuit

U.S. Court of Appeals for the Third
Circuit

U.S. Court of Appeals for the
District of Columbia Circuit

U.S. Court of Federal Claims

Supreme Court of the U.S.

EDUCATION:

J.D., cum laude, Duquesne
University School of Law, 1984

B.S., with highest honors, Saint
Vincent College, 1981

Timothy P. Ryan

MEMBER

Tim Ryan focuses his practice primarily on the litigation of intellectual property and business tort disputes. He has represented a wide variety of clients in matters involving patents, trademarks, trade dress, copyrights, trade secrets, unfair competition claims, licenses and franchises. Tim is one of the attorneys who represented petitioners in the landmark *Markman* case at trial and before the Federal Circuit and the Supreme Court of the United States. The case involved the constitutional right to jury trial of disputes involving the construction of patent claim terms.

Tim also has a broad range of experience in commercial, business and regulatory litigation, involving matters such as contracts, RICO, securities fraud and toxic exposure issues. He has represented litigants and tried cases to verdict in various state and federal courts across the country and before state and federal administrative agencies.

Tim is the immediate past Chief Executive Officer of Eckert Seamans, having served on both the firm's Executive Committee and Board of Directors. During the twelve years that Tim served as the CEO, the firm experienced tremendous growth and stability, nearly doubling its size to approximately 400 lawyers with fourteen offices in ten states and the District of Columbia.

REPRESENTATIVE MATTERS

- Litigated a wide variety of intellectual property disputes.
- Represented petitioners in the landmark *Markman* case (which involved the constitutional right to jury trial of disputes involving the construction of patent claim terms) at trial and before the Federal Circuit and the Supreme Court of the United States.
- Represented a wide variety of clients in matters involving allegations of securities fraud, shareholders rights matters, SEC investigations of insider trading and forfeiture proceedings, litigation resulting from "go private" transactions and the representation of publicly-traded entities in connection with the defense of hostile takeover efforts.
- Tried cases in numerous federal and state courts across the country.
- Tried cases before administrative agencies and arbitration panels.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association, Gender Equality Task Force

- Academy of Trial Lawyers of Allegheny County
- Pennsylvania Bar Association
- American Bar Association

COMMUNITY INVOLVEMENT

- Saint Vincent College, Board Member
- Duquesne Club, Board Member
- Pennsylvania Economy League, Member
- Greater Pittsburgh Chamber of Commerce, Board Member
- Pennsylvanians for Modern Courts, Board Member
- American Inns of Court, Master, Intellectual Property Chapter

AWARDS AND RECOGNITION

- Selected for inclusion in *The Best Lawyers in America* for Intellectual Property; Commercial, Patent, and Securities Litigation
- Named *Best Lawyers'* 2014 "Lawyer of the Year for Patent Litigation" in Pittsburgh
- Named *Best Lawyers'* 2016 "Lawyer of the Year for Securities Litigation" in Pittsburgh
- Member of the Academy of Trial Lawyers of Allegheny County
- Selected for inclusion in *Pennsylvania Super Lawyers*
- Selected for inclusion in *Irish Legal 100* for 2011 through 2016
- Selected for inclusion in *Intellectual Asset Management Patent 1000 – World's Leading Patent Practitioners for Patent Litigation*
- Attained an AV® Preeminent™ rating from Martindale-Hubbell

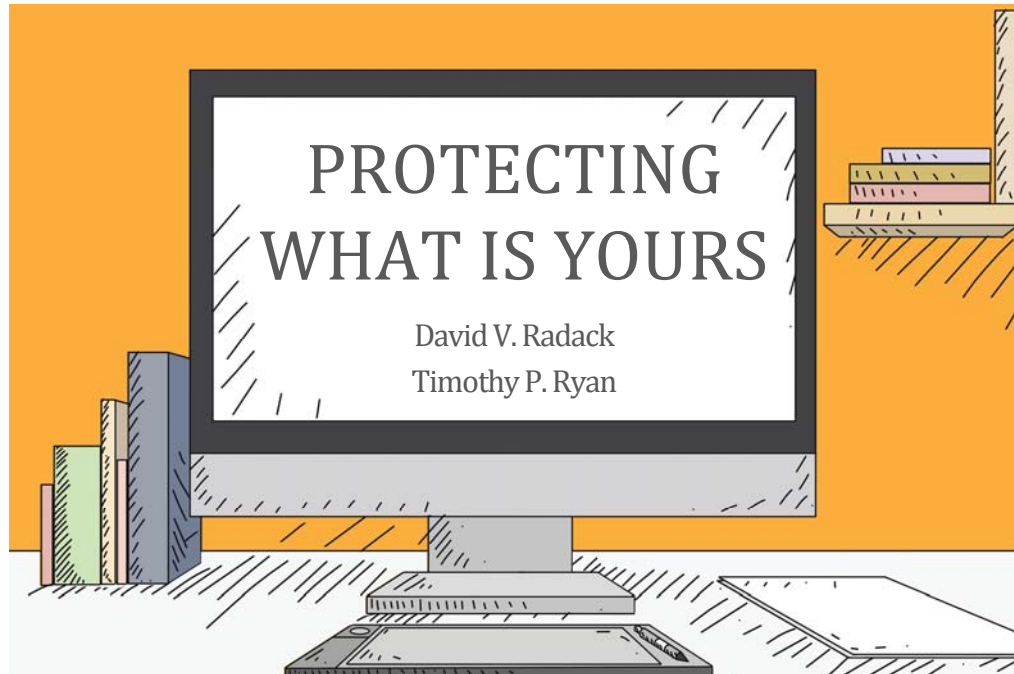
NEWS AND INSIGHTS

Speaking Engagements:

- "Alternative Billing Arrangements," co-presenter, Eckert Seamans' Continuing Legal Education, August 2010.
- "Global Aspects of IP Damages: I'm Here and the Infringer Is Over There!" panelist, ALI-ABA, September 2009.
- "In RE Seagate Technology, LLC," Pennsylvania Bar Institute, November 2007.
- "Intellectual Property Law Primer: Trade Secrets," Pennsylvania Bar Institute, October 2006.
- "Licensing Trademarks," Pennsylvania Bar Institute, August 2005.

Media Coverage:

- "Big Law Feeling Freer to Advertise Medical Marijuana Practices," *The Legal Intelligencer*, December 2016.
- "New Lawyers Find Strong Job Market," *Pittsburgh Business Times*, February 17, 2015.
- "Markman Case Makes Mark," *Pittsburgh Business Times*, November 13, 2015.
- "Law Firms Have Reined in Partner Board Memberships," *The Legal Intelligencer*, August 10, 2015.
- "Pittsburgh Legal Market Shedding Partners, Wrestling With Change," *The Legal Intelligencer*, June 18, 2015.
- "Big firms, big growth," *Pittsburgh Business Times*, January 18, 2013.
- "Large area firms look outside area for experienced lawyers," *Pittsburgh Business Times*, January 23, 2012.
- "A Delicate Balance," *Pittsburgh Business Times*, January 23, 2012.
- Appeared on WPXI-TV's *Our Regions' Business*, August 14, 2011.
- "Law Firms Predict More Layoffs Among Non-Equity Partners, Support Staff," *The Legal Intelligencer*, June 23, 2010.
- "Pittsburgh Law Firms Feel Price Pressure From All Sides," *Pittsburgh Business Times* and *Houston Business Journal*, June 11, 2010.
- "Lateral moves on the rise for established Pittsburgh lawyers," *Pittsburgh Business Times*, May 28, 2010.
- "Do you allow employees to do fundraising in the office?" *Pittsburgh Business Times*, February 12, 2010.
- "Pittsburgh-area law firms tweak fees for 2010," *Pittsburgh Business Times*, December 11, 2009.
- "Recession? What Recession?" *The Legal Intelligencer*, September 25, 2009.
- "For One Law Firm, Canceled Summer Associate Program Is Old News," *ABA Journal*, August 21, 2009.



LEGAL PRIMER: 2017 Update

August 3, 2017

Overview

- Protection of intellectual property is critical to most businesses.
- Approximately 80% of the value of equity stocks represented by the S&P 500 Index correlate to innovation and commercialization of intellectual property.

Overview

- Number of mechanisms to protect intellectual capital:
 - Patents
 - Trademarks
 - Copyrights
 - Trade Secrets

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Overview

- Our focus today is on the interplay between obtaining patent rights on an invention and maintaining information as trade secrets.
- There is an inherent tension between seeking patent protection or maintaining the information as a trade secret.
- Patents have been and will likely remain the most powerful method of protecting innovation and technological advance.
- Unprecedented changes in existing protection mechanisms for intellectual capital.
- Because of recent developments it is critical that companies owning intellectual assets consider whether maintaining innovations as trade secrets may be appropriate.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Causes of Disruption

- The realignment in the roles of intellectual property protection devices is being driven by a multitude of causes.
 - Supreme Court – Extremely activist in recent years
 - Congress/Executive Branch (PTAB)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Causes of Disruption: Supreme Court

- 8 intellectual property cases last term alone
- Examples:
 - *Samsung v. Apple* – Supreme Court limited damages for design patent infringement.
 - *Life Technologies v. Promega* – Supreme Court limited the scope of domestic patent infringement for components shipped overseas.
 - *TC Heartland v. Kraft Food* – Supreme Court placed new restrictions on the patent venue statute greatly limiting where patent infringement suits can be filed.
 - *Impression Products v. Lexmark* – Supreme Court severely limited the ability of a patent owner to control the use of a patented product after its first sale by expanding the doctrine of patent exhaustion.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Causes of Disruption: Supreme Court

- These cases add to an existing trend of the Supreme Court to reshape patent rights exemplified by *Alice v. CLS Bank* decided in June 2014 which redefined patent eligibility rules.
- *Alice* generally holds that an abstract idea incorporated into a method or process does not become patentable subject matter because the method or process is implemented with a computer.
 - Patents relating to computer related inventions, including e-commerce oriented inventions, are especially affected.
 - Post *Alice*, approximately 70% of validity challenges predicated on patent eligibility on those types of inventions have succeeded.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Causes of Disruption: Congress/Executive Branch (PTAB)

- **America Invents Act and Inter Partes Review**
 - Inter Partes Review (“IPR”) was enacted on September 16, 2011 as part of the America Invents Act.
 - IPR process allows a challenge before the Patent Trial and Appeal Board (“PTAB”) to the validity of one or more claims of a U.S. patent based on prior art consisting of patents or printed publications. The PTAB is part of the U.S. Patent and Trademark Office.
 - If a petition is filed seeking to invalidate one or more claims of a U.S. patent, the PTAB must make an initial decision as to whether to institute a trial on the IPR proceeding.
 - It is generally accepted that the PTAB has been receptive to patent claim challenges pursued in IPR proceedings. In this context, the PTAB has been labeled the “patent death squad” and the “patent killing field.”

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Causes of Disruption: Congress/Executive Branch (PTAB)

□ **America Invents Act and Inter Partes Review (cont.)**

- Evidence supports the conclusion that patent owners have not fared well in IPR proceedings.
 - In 2016, only 18% of patents challenged in IPR proceedings reaching a final written decision survived with all claims upheld. Between 2012 and 2016, total vindication for patent owners was 14%.
 - The mid-year statistics for IPR filings in 2017 indicate an increase in the number of proceedings instituted this year as compared to 2016. In 2016, a total of 1565 IPR petitions were filed with the PTAB. The PTAB is on pace this year to receive 1992 petitions, an increase of about 22%.
- If acting upon a petition, the PTAB institutes a trial of the challenged claims, the patent owner faces the prospect that there is about an 86% chance that the PTAB will find some or all of the claims unpatentable.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Causes of Disruption: Congress/Executive Branch (PTAB)

□ **America Invents Act and Inter Partes Review (cont.)**

- The coming Supreme Court term may prove to be eventful in the IPR area.
 - *Oil States Energy Services* – The Court will decide whether the Inter Partes Review process authorized by the America Invents Act is unconstitutional. Oil States argues that authorizing an executive branch tribunal such as the PTAB to invalidate patents is an unconstitutional delegation of the exclusive authority of federal courts to rule a patent invalid. This case pits private vs. public rights.
 - Tremendous uncertainty may be created with respect to patents already subject to IPR proceedings if the IPR process of the America Invents Act is held to be unconstitutional by the Supreme Court.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Causes of Disruption: Congress/Executive Branch (PTAB)

□ **Defend Trade Secrets Act**

- Federalization of trade secret law with the passage of the Defend Trade Secrets Act (“DTSA”) effective on May 11, 2016. The DTSA allows trade secret owners to sue in federal court for the misappropriation of trade secrets so long as the trade secrets relate to interstate commerce.
- Goal to harmonize inconsistent state laws protecting trade secrets and to provide a federal cause of action for trade secret misappropriation.
- Advantages for trade secret owners include access to nationwide discovery and enhanced remedies over those available under most state laws, for example, the ex parte seizure of property in order to prevent disclosure of stolen trade secrets.
- Federal courts often seen as better equipped to handle international trade secret theft (and corresponding, often complicated, discovery issues) than are state courts.
- A uniform body of law interpreting and applying the statute is developing.
- There has been a tremendous increase in cases filed under the DTSA in the last 6 months.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Causes of Disruption: Congress/Executive Branch (PTAB)

□ **STRONGER Patents Act**

- Proposed pro-patent legislation
 - Seen as limiting the scope of challenges through IPR proceedings. The legislation would require in an IPR proceeding that challengers, in order to succeed in having a patent claim adjudicated invalid, prove unpatentability by clear and convincing evidence (the applicable standard in Federal Court) rather than the preponderance of the evidence standard currently applied by the PTAB.
 - Only a party sued or threatened to be sued on a patent could initiate an IPR proceeding. Presently, any party can petition for an IPR.
 - Will limit the number of times a patent claim can be challenged.
 - Lowers the applicable legal standard for obtaining injunctive relief.
- Unlikely that proposed legislation will get traction anytime soon.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Litigation Considerations: Patent Litigation

□ Patent Litigation

- 2016 saw a continued downward trend in patent cases being filed. There was a 9% decline in patent complaints filed in 2016 from the prior year. Significant decline followed a drop of about 2% in 2014 over 2013.
- Reduction in complaints filed in 2016 was experienced irrespective of the fact that the number of patents granted by the PTO in 2016 increased by 4%.
- Damage awards in patent cases continued to decline. The 2016 median damages award was \$6.1 million, a material decrease from the 2015 median award of \$10.2 million in patent cases.
- The cost of patent infringement litigation is often a material consideration in deciding whether to bring a case. According to the most recent survey of the American Intellectual Property Law Association, the total median costs (including disbursements and expert expenses) broken down by the amount in controversy, are as follows:

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Amount in Controversy	End of Discovery	Through Trial
Under \$1 million	\$442,000	\$873,000
\$1 million - \$10 million	\$1.1 million	\$2.2 million
\$10 million - \$25 million	\$2.1 million	\$3.5 million
Over \$25 million	\$3.7 million	\$6.3 million

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Litigation Considerations: Patent Litigation

□ Patent Litigation (cont.)

- The median costs of Inter Partes Reviews before the PTAB are significantly lower than patent infringement litigation in federal court:
 - through filing petition \$ 80,000
 - through end of motion practice \$200,000
 - through PTAB hearing \$275,000
 - through appeal \$350,000

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Litigation Considerations: Trade Secret Litigation

□ Trade Secret Litigation

- Filings under the DTSA continue to rise.
- The median cost of trade secret misappropriation litigation is materially lower than patent infringement litigation. The total median costs (including disbursements and expert expenses) broken down by the amount in controversy, are as follows:

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Amount in Controversy	End of Discovery	Through Trial
Under \$1 million	\$302,000	\$516,000
\$1 million - \$10 million	\$721,000	\$1.2 million
\$10 million - \$25 million	\$1.2 million	\$2.0 million
Over \$25 million	\$2.6 million	\$4.0 million

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Litigation Considerations: Trade Secret Litigation

- Trade Secret Litigation (cont.)
 - Preliminary relief is frequently more readily available in trade secret cases than in suits for patent infringement.
 - Irreparable harm for purposes of obtaining a preliminary objection is often easier to demonstrate in trade secret cases than in patent cases because trade secrets are impossible to regain once disclosed.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Balanced Intellectual Property Protection

- Preferred method of protecting intellectual property in the U.S. since the original Patent Act of 1790 has been and, we believe, will remain the securing of patent rights.
- Erosion of certain aspects of the protections afforded by patents and the often significant investment necessary to pursue enforcement actions mandates that companies consider using trade secret protection mechanisms in appropriate circumstances to augment intellectual property portfolios.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Balanced Intellectual Property Protection

- Opting for trade secret protection may be heavily influenced in certain circumstances:
 - The innovation does not meet the statutory requirements necessary for patent protection (e.g., customer lists or is an abstract idea for a method or process implemented with a computer, i.e., Alice).
 - The technology has a very short shelf life, for example under two years, the average time that it takes to secure patent rights. In most of these situations, the intellectual asset is in an industry experiencing rapid innovation.
 - The cost of obtaining a patent on the innovation is prohibitive.
 - The owner may not want to make a public disclosure of the information because there is a belief that the intellectual asset will continue to have value beyond the 20 year term of a patent.
 - The asset cannot be easily reverse engineered.
 - There are legitimate concerns that some or all patent claims which may ultimately be granted will be met with a credible IPR petition.
 - There are anticipated needs for speed in obtaining a remedy for the misappropriation of intellectual assets.
 - There are cost constraints involved in terms of resources available for anticipated enforcement litigation.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Balanced Intellectual Property Protection

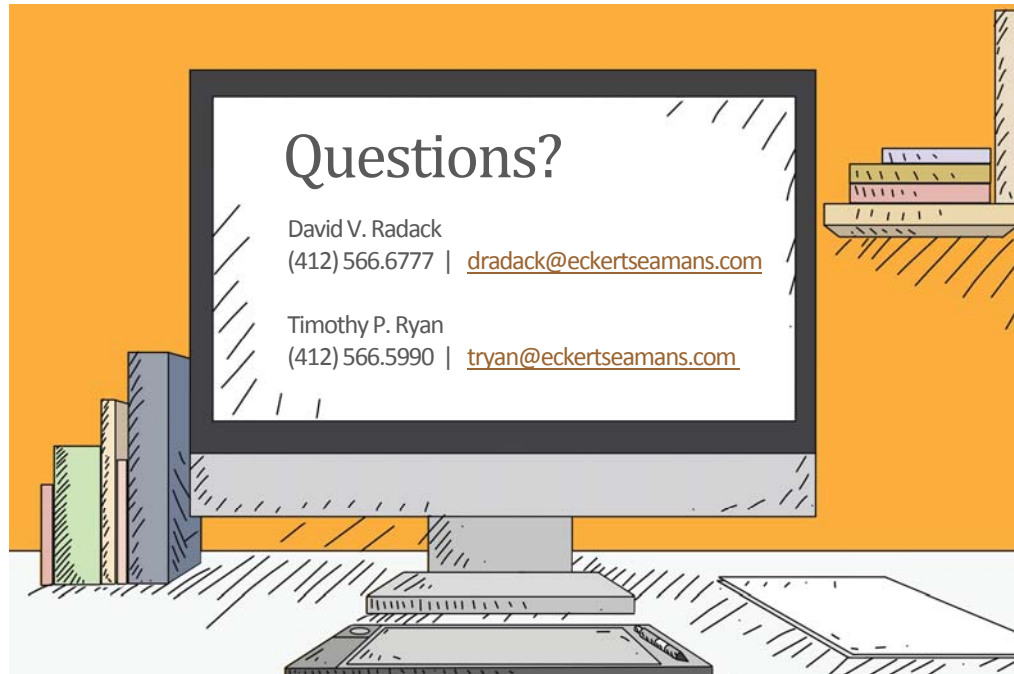
- There may be a “middle of the road” option available in certain circumstances involving a “non-publication request” in a patent application at the PTO.
 - A patent application under ordinary circumstances will be published 18 months after the earliest priority date of the application.
 - A procedure is available at the PTO to avoid the publication of the application until such time as the application is granted as a patent.
 - The “cost” or trade off of utilizing this procedure is that a patent applicant cannot pursue this option unless it is agreed that no related patent application will be filed outside the U.S.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Balanced Intellectual Property Protection

- Maintaining information as a trade secret, while often having lower up front costs as compared to patent prosecution expenses, is not without significant costs and efforts. In order to properly maintain the information as a trade secret, reasonable efforts must be taken to keep it secret including:
 - The identification of all trade secret information;
 - the establishment of policies and procedures designed to protect trade secret information and train employees on the importance of maintaining the secrecy of such information;
 - protecting access to electronic forms of the information through encryption and passwords;
 - labeling documents, both physical and electronic, as containing trade secrets which are “confidential,” “secret,” and “proprietary;”
 - physically restricting access to the areas where the trade secrets are maintained and used;
 - utilizing appropriate confidentiality and non-disclosure agreements for employees, suppliers and customers which make clear the existence of trade secret information and the duty to not disclose such secrets; and
 - enforcing rights upon learning of a misappropriation of trade secrets.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW





THE INTERNET OF THINGS (IOT) AND DATA SECURITY: EXAMPLES FROM THE HOSPITALITY INDUSTRY

Presented by:

Gosia Kosturek

Associate

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.6180
gsturek@eckertseamans.com

PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.6180

F: 412.566.6099

gkosturek@eckertseamans.com

PRACTICE AREAS:

[Hospitality](#)

[Business Counseling](#)

[Data Security & Privacy](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Western
District of Pennsylvania

EDUCATION:

J.D., summa cum laude, Duquesne
University School of Law, 2010;
Associate Recent Decision Editor,
Law Review

B.A., magna cum laude, University
of Pittsburgh, 2006



Gosia Kosturek

ASSOCIATE

Gosia Kosturek focuses her practice on corporate transactions within the hospitality industry. Her practice is devoted to representing real estate development companies, investors, and hotel management companies in all aspects of acquisition, disposition, development, management, licensing, and finance of real estate and hotel assets in the United States and throughout the world. On behalf of these clients, Gosia handles the drafting, review and negotiation of various agreements including hotel management agreements (third party and brand managed), asset management agreements, franchise agreements, various financing documents, technical services agreements, consulting services agreements, and purchase and sale agreements. In addition, Gosia regularly advises hotel clients on operational matters and property-level agreements, including data security and privacy matters.

REPRESENTATIVE MATTERS

- Represents third party hotel management companies, brand management companies and hotel owners in the negotiation and drafting of hotel management agreements (third party and brand managed), asset management agreements, purchase and sale agreements, joint venture agreements, leases, franchise agreements, loan agreements, subordination agreements, financing related agreements, technical services agreements and consulting services agreements for hotels located in the United States, Asia, South America, Africa and Europe.
- Advises hotel management companies and hotel owners with a variety of operational issues and agreements including space leases, employment agreements, services agreements, filming agreements, group sales agreements and coordination of counsel on employment, liquor and tax matters.
- Advises clients in the response to thefts of personal information and electronic data security breaches including fulfilling state law requirements for notification to state agencies and affected individuals.

- Served as hospitality counsel in the connection with the acquisition of several large portfolios of hotels by real estate investment trusts (REITs), including portfolios of 52 hotels and 40 hotels, by providing counsel on financing, acquisition, liquor and transition of operations matters in addition to negotiating hotel management agreements, franchise agreements and other related documents.
- Assisted third party management company in the acquisition of 10 hotels, including negotiating operating agreements, operating leases, financing documents, franchise agreements and hotel management agreements.
- Managed the due diligence process and assisted in the preparation of closing documents for the sale or acquisition of several hotel management companies, several manufacturing companies and the financing of a large retail real estate portfolio.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association
- Duquesne Law Alumni Association

COMMUNITY INVOLVEMENT

- Big Brothers Big Sisters of Greater Pittsburgh

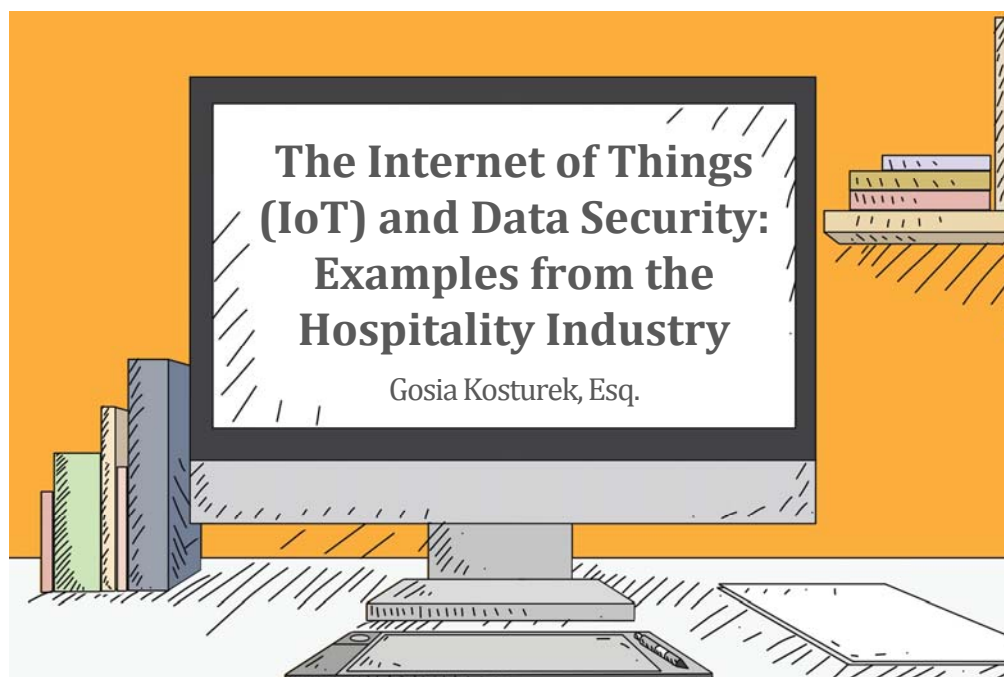
AWARDS AND RECOGNITION

While in law school, Gosia won the ABA-BNA Award for Excellence in the Study of Labor and Employment Law and received the CALI Excellence for the Future Awards for Employee Benefits; Property; Bankruptcy; Employment Discrimination; and Advanced Legal Writing; Writing in Law Practice.

NEWS AND INSIGHTS

Speaking Engagements:

- "Table Top War Game Exercise – Managing a Crisis," co-facilitator at Hospitality Law Conference, April 26, 2017.
- "The Unique Challenges of Data Security for the Hospitality Industry," co-presenter at Hospitality Law Conference, April 24, 2017.
- Presenter, "Data Risk: Threats, Response and Preparedness," Annual Prospera Hospitality Leadership Meeting, Cranberry, Pennsylvania, September 2016.



LEGAL PRIMER: 2017 Update

August 3, 2017

What are IoTs?

- ❑ From the FTC: IoT refers to “devices or sensors – other than computers, smartphones, or tablets – that connect, communicate or transmit information with or between each other through the internet.” (FTC Staff Report, Jan. 2015)
- ❑ Everyday examples: Fitbit, Nest, Alexa, Simplisafe
- ❑ By 2020, experts estimate that there will be 50 billion connected devices. By 2018, the data collected by these devices will exceed 15 exabytes each month (about 750,000 years’ worth of DVD-quality video!). (FTC Staff Report, Jan. 2015)

How does the hotel industry use IoTs?

- Right now:
 - Alexa/Siri/iPad – General Information, Control Lighting/Heating/Curtains, Order Room Service/Housekeeping
 - Mobile Devices as Room Keys
 - RFID Tracking – Inventory, Security, Personalized Service (i.e., Disney’s Magic Band)
 - Hotel Systems Automation & Monitoring – Energy Consumption, Predictive Maintenance
- In the future?
 - Holograms as property guides
 - Electro-responsive fibers in bedding/pillows
 - Robot Butler
 - Interactive walls or mirrors

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Things Can Go Wrong

- February 2017 - A smart key system at a luxury hotel in Austria was hit by a ransomware attack. Hotel guests were locked out of their rooms and guests could not be checked in until a ransom was paid.
- October 2016 –Distributed Denial-of-Service (DDoS) Attack on Dyn causing worldwide slowdowns to Twitter, Amazon, Spotify, Airbnb and other websites.
 - Hackers attacked Dyn, a major Internet infrastructure company, using an “army” of IoT devices such as baby monitors, DVRs and security cameras to overwhelm Dyn’s systems.
 - The “army” was created by using Mirai malware that searched for IoT devices protected only by default factory user names and passwords and weak or nonexistent security protections.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

IoT Devices Can Be More Vulnerable

- ❑ Highly Networked – An IoT device may be used as an entry point for a bigger target.
- ❑ Highly Standardized – Each IoT device will likely have the same security features.
- ❑ Emerging Technology – Focus on developing the product versus security.
- ❑ Software Updates - IoT devices often designed without this capability or may be cumbersome.
- ❑ Data Collection - Large volume of raw data collected by companies that may have little or no experience in collecting, securing and protecting data and without the knowledge or consent of consumers for either the collection or subsequent use.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

IoT Data Security/Privacy – Applicable State Laws

- ❑ Depends on what information is collected.
- ❑ Data breach notification laws may not be triggered in the event of breach.
- ❑ However, more states are focused on regulation of biometric data including:
 - Adding biometric data such as fingerprints to the definition of “Personal Information” under data breach notification statutes. Therefore, for example, a combination of a person’s name and fingerprint would be considered “Personal Information” in those states.
 - Regulation of companies that collect, use, share and store biometric information about users of their products. Legislation under consideration in Connecticut, Alaska and New Hampshire.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

California Proposed IoT Legislation (S.B. 327)

- Would require manufacturers to:
 - Add reasonable security features that would depend on the nature of the device and the information collected.
 - Design the device so that consumers know when the device is collecting information.
 - Provide a disclosure to the consumer describing what data is being collected.
 - Directly notify consumers of security updates.
- Would require retailers to:
 - Provide disclosures to the consumer at the point of sale describing what data is being collected.
 - Provide instructions on where to find the privacy policy applicable to the device.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Federal – Just Recommendations for Now

- No federal legislation yet.
- Department of Commerce and National Telecommunications and Information Administration issued a green paper “Fostering the Advancement of the Internet of Things” (January 12, 2017) with recommendations for manufacturers.
- Federal Trade Commission issued “Internet of Things: Privacy & Security in a Connected World” Staff Report in January 2015 with recommendations for IoT devices for consumers in following categories:
 - Security
 - Data Minimization
 - Notice and Choice

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

FTC Enforcement Actions

- Recent actions against IoT device manufacturers based on alleged unfair or deceptive acts or practices under §5 of the FTC Act, 15 U.S.C. §45(a).
- **FTC v. ASUSTeK Computer, Inc. (Settlement 2/13/16)**
 - ASUSTeK's routers and cloud services were marketed with claims that the company could "protect computers from any unauthorized access, hacking, and virus attacks" and "protect [the] local network against attacks from hackers."
 - Serious flaws in technology that allowed hackers to gain access to almost 13,000 consumers' connected storage devices through the routers in February 2014.
 - Settlement would require ASUSTeK to establish and maintain a comprehensive security program for 20 years including notifications to consumers of security issues and patch and independent audit.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

FTC Enforcement Actions (con't)

- **FTC v. D-Link Corporation (Complaint Filed 7/5/17)**
 - D-Link makes routers and IP cameras that are used by consumers to monitor the security of their home while away by using a mobile application.
 - The complaint alleges that D-Link failed to take steps to provide adequate security including addressing the following security flaws:
 - "hard-coded" login credentials integrated into D-Link camera software -- such as the username "guest" and the password "guest" -- that could allow unauthorized access to the cameras' live feed;
 - a software flaw known as "command injection" that could enable remote attackers to take control of consumers' routers by sending them unauthorized commands over the Internet;
 - the mishandling of a private key code used to sign into D-Link software, such that it was openly available on a public website for six months; and
 - leaving users' login credentials for D-Link's mobile app unsecured in clear, readable text on their mobile devices, even though there is free software available to secure the information.
 - In addition, the complaint also alleges that D-Link made multiple misrepresentations about the product's security features to consumers.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

FTC Enforcement Actions (con't)

- **FTC (along with the New Jersey AG) v. VIZIO, Inc. (Settlement 2/16/17)**
 - VIZIO Smart TVs automatically tracked what consumers were watching second-by-second on their smart TVs and connected streaming devices and then transmitted that data back to its servers.
 - In addition, VIZIO then sold IP addresses to data aggregators to connect specific demographic information to the viewing data, such as sex, age, income, marital status, household size, education level, home ownership, and household value.
 - No notice or consent to consumers other than marketing of “Smart Interactivity” feature, which was supposed to “enable program offers and suggestions” to the users.
 - Settlement requires VIZIO to:
 - Stop authorized tracking, to disclose its TV viewing collection practices and to get express consent before collecting and sharing viewing information.
 - Delete the majority of the data already collected and put a privacy program in place.
 - Make \$1.5 million payment to the FTC and an additional civil penalty of \$700,000 to NJ.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

EU has a stronger stance on data

- **General Data Protection Regulation (GDPR) effective May 25, 2018:**
 - Consumers must be informed on what data is being collected and for what purpose.
 - Personal data may not be use for a purpose different than the one originally disclosed to the consumer.
 - Processing and storage of data is required to be kept to a minimum.
 - Data should not be stored for longer than necessary.
 - Consumers have the right to access any personal data that has been collected concerning them.
 - Consumers have the right to have the data controller erase or stop using the data.
 - These laws applicable even if the data controller is outside the EU as long as the IoT device is being used in the EU. (Opinion 8/2014 on the Recent Developments on the IoT issued by the Article 29 Working Party)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Alexa/Siri: A Case Study

- A hotel would like to put Alexa or Siri enabled devices in their hotel rooms to allow their guests to:
 - Listen to music
 - Search general information on the internet (i.e., weather, nearby restaurants, etc.)
 - Make requests from housekeeping (i.e., ironing board, extra towels, etc.)
 - Order room service
- The hotel finds a start up company that has partnered with Amazon or Apple to develop software that would be pre-loaded on Alexa or Siri enabled devices.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Things to consider

- Capital Investment – Are the devices usable without the software?
- Data - What data is being collected? How? Who owns that data?
- Security of the Software – Does the software have any security features? How will the software and the devices be updated?
- Data Incident Monitoring/Response
- Cyber Insurance/Indemnification
- Connection to Other Hotel Systems or the Guest's Devices
- Consent/Notification to Guests
- Other laws may be applicable such as wiretapping laws

**ECKERT
SEAMANS**
ATTORNEYS AT LAW





50 WAYS TO PROTEST YOUR (FEDERAL) PROCUREMENT: ADVICE FOR DEALING WITH BID PROTESTS

Presented by:

Matthew J. Whipple

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.6116
mwhipple@eckertseamans.com

PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.6116

F: 412.566.6099

mwhipple@eckertseamans.com

PRACTICE AREAS:

[Construction](#)

[Litigation](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Western
District of Pennsylvania

EDUCATION:

J.D., William & Mary School of Law,
2007; Member of the Editorial
Board, *Law Review*; Graduate
Research Fellow

B.A., summa cum laude, University
of Pennsylvania, 2004; Phi Beta
Kappa Honor Society; Benjamin
Franklin Scholar



Matthew J. Whipple

MEMBER

Matthew J. Whipple is a skilled civil litigator, having spent nearly a decade prosecuting and defending client interests in federal court, state court, and private arbitrations. He has extensive experience in all stages of litigation, including pleadings, written and electronic discovery, prosecuting and defending depositions, dispositive motions practice, trial, pre-trial, and post-trial motions, and appellate advocacy. Matthew frequently litigates construction-related disputes on behalf of companies at all points in the owner-contractor-subcontractor chain. He has particular expertise in federal procurement matters, including disputes under the Federal Acquisition Regulation (FAR) and agency supplements. He draws on this experience to assist clients in developing bids, and to assist in both bid protests and the claims process.

In addition to his litigation work, Matthew frequently serves in a counseling and advisory role to clients. This includes contract evaluation and negotiation, risk management, and the development of internal policy regarding the contracting process. He also conducts on-site training for clients, to assist company personnel in developing internal best practices regarding contract formation and negotiation.

REPRESENTATIVE MATTERS

- Represents construction clients, including owners, contractors, and sub-contractors, involving claims for project delay and acceleration, differing site conditions, defective specifications, and recovery of home office and field office overhead.
- Regularly advises clients regarding federal procurement and construction projects under the Federal Acquisition Regulations (FAR).
- Frequently advises construction clients regarding issues of contract drafting, negotiation, and risk management.
- Conducts in-house training seminars for clients regarding best practices in construction contract negotiation and legal issues that arise during project activities.
- Successfully represented a dismantling contractor in a week-long jury trial.

- Represented a national contracting company in a payment dispute involving two state-of-the-art landfill gas power plants.
- Represented multiple material suppliers in prompt payment act claims against upstream contractors that failed to make timely payment.
- Represented both public and private owners regarding claims for defective and delayed work against general contractors.
- Defended a manufacturer and designer of waste water treatment systems regarding design defects and warranty claims.
- Represented a national snack food manufacturer in multiple disputes with independent business operators, including allegations that independent contractors were misclassified as employees.
- Represented multiple clients at all stages of trade secret misappropriation disputes, including preliminary injunctions, motions practice, trial, and appeal.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association, Council Member of the Construction Law Section

COMMUNITY INVOLVEMENT

- SAMS-USA Board of Trustees
- Jonah's Call, an Anglican Church, Vestry Member

NEWS AND INSIGHTS

Publications:

- "Advice for federal contractors during the new administration," *Eckert Seamans' Construction Law Update*, Spring 2017.
- "New executive orders for federal procurement: Caution to federal contractors and to subcontractors," *Eckert Seamans' Construction Law Update*, Spring 2016.
- "*Gongloff Contracting v. L. Robert Kimball & Associates*: Pennsylvania clarifies law regarding negligent misrepresentation claims against design professionals," *Eckert Seamans' Construction Law Update*, Fall 2015.
- "Timing Is Key to Claims on Federal Construction Projects," *Construction Executive Magazine*, January 2014; Allegheny County Bar Association's Construction Law Section Newsletter, Winter 2015.
- "The F.A.R. Side," *Eckert Seamans' Construction Law Update*, Fall 2014.

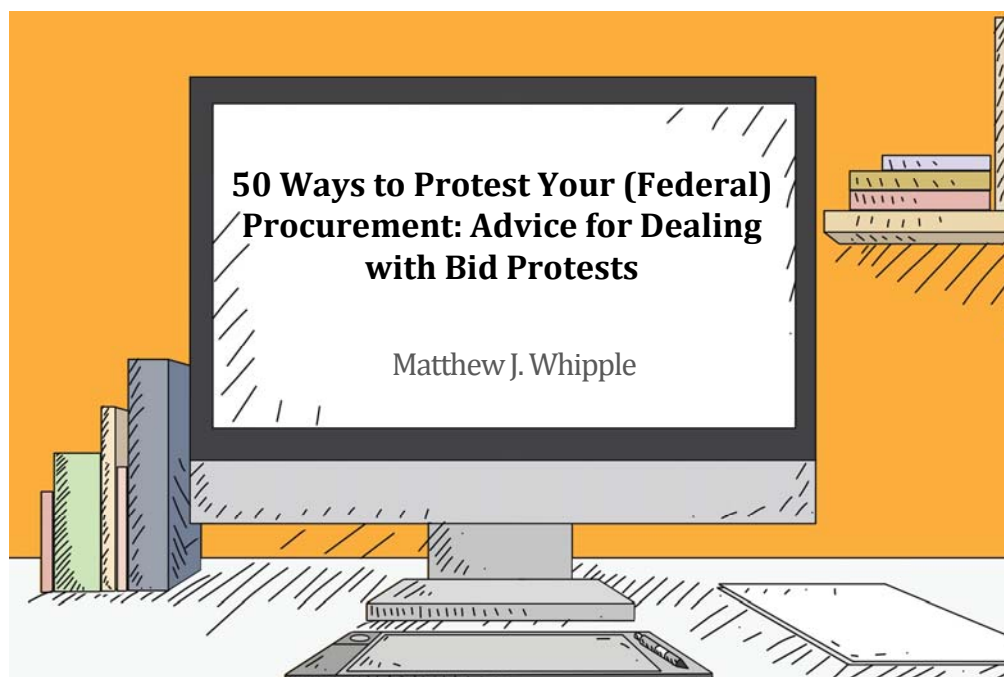
- "Atlantic Marine Construction Company: Supreme Court revises law regarding forum selection clauses, but presumption of enforceability remains the same," *Eckert Seamans' Construction Law Update*, Spring 2014.
- "An REA by any other name: Recognizing the differences between claims and requests for equitable adjustment in federal construction projects" and "Supreme Court to address enforcement of contractual forum selection clauses," *Eckert Seamans' Construction Law Update*, Fall 2013.
- "Damages, Remedies, and Alternative Dispute Resolution Under Pennsylvania Law," co-author, book chapter in *Pennsylvania Construction Law: Project Delivery Methods, Execution, and Completion* (The Pennsylvania Bar Institute, January 2013).
- "*In re: Rust of Kentucky, Inc.*: Bankruptcy court offers relief to a subcontractor victimized by differing site conditions," *Eckert Seamans' Construction Law Update*, Fall 2012.
- "That's a pretty big matzo ball hangin' out there: Third Circuit issues pay-if-paid decision that is highly favorable to general contractors, but is there hope for subcontractors in a footnote?" *Eckert Seamans' Construction Law Update*, Spring 2012.
- "Be mindful of who you hire: New GAO decision underscores potential conflict of interest problems with retaining former federal agency employees," *Eckert Seamans' Construction Law Update*, Fall 2011.
- "The *Todd Construction Trilogy*: A potential remedy for contractors on federal projects receiving unfair performance evaluations," *Eckert Seamans' Construction Law Update*, Spring 2011.
- "Advice for federal construction projects: Take the time to provide notice of differing site conditions," *Eckert Seamans' Construction Law Update*, Fall 2010.
- "*In re Electric Machinery Enterprises, Inc.*: Be sure that all of your project contracts are speaking the same language," *Eckert Seamans' Construction Law Update*, Spring 2010.
- "Pennsylvania Decision Provides New Incentive for Prompt Payment," *Construction Executive Magazine*, March 2010.
- "Early contractor involvement in Federal construction projects: new opportunities for capable contractors," *Eckert Seaman's Construction Law Update*, Fall 2009.
- "Avoiding Disputes Over Price Fluctuations," co-author, *Legal Intelligencer*, August 2009.
- "How to Avoid Breach of Contract Problems," co-author, *Commercial Builder*, Fall 2008.
- "Building Green May Cost you Green," *ACBA Construction Group Newsletter*; *Eckert Seamans' Construction Law Update*, Fall 2008.

Speaking Engagements:

- "Damages, Remedies, Disputes, Avoidance & ADR," co-presenter, PBI Construction Law CLE, October 2016.
- "[Using Performance Standards to Mitigate Customer Disputes](#)" Building Association of Metropolitan Pittsburgh's 2016 Housing Professional Education Conference, March 2016.
- "Choose Your Own Adventure: Claims Under The Contract Disputes Act," CLE presentation for the Allegheny County Bar Association's Construction Law Section program "Nuts and Bolts of Federal Contracting," January 2016.
- "Recent Developments in Construction Law," co-presenter, Eckert Seamans' annual Continuing Legal Education (CLE), August 2010.
- "Price Fluctuation Clauses in Construction Contracts," co-presenter, Allegheny County Bar Association Construction Law Section CLE, June 2009.
- "Essentials of Copyright Law for the Construction Industry," Eckert Seamans' CLE August 2008.
- "Essentials of Copyright Law for the Construction Industry," ACBA Construction Law Section CLE, December 2007.

Media Coverage:

- "[Chaos Reigns: Executive Orders Wreak Havoc on Federal Contractors](#)," *Constructor Magazine*, July/August 2016.



LEGAL PRIMER: 2017 Update

August 3, 2017

Federal Procurement Generally, Lee

- The U.S. government - largest single procurer of goods & services in the world
 - Annual federal procurement budget > \$500 billion
 - As of 2015, no hard data on number of contractors
- Multiple Procurement Types, Often “Best Value”
 - Adjectival rating system based on enumerated factors
- Procurement Governed by Array of Legal Requirements
 - Statutory - Competition in Contracting Act (“CICA”);
 - Regulatory - Federal Acquisition Regulations (“FAR”);
 - Executive Orders
 - Agency-specific requirements – *i.e.*, DOD, USACE supplements, specific procedures of GAO, etc.

Federal Procurement Generally, Lee

- ❑ Contractors entitled to fair consideration of offers consistent with solicitation terms and governing law
- ❑ The primary tool available to challenge agency's action/check on agency discretion is the bid protest
- ❑ FY 2016, GAO received 2,621 new bid protests
- ❑ "Sustain" rate in teens or low twenties, but "effective" rate significantly higher

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Where to File, Kyle?

- ❑ Three main forums for contesting the award of a contract:
 - the procuring agency (agency-level bid protest resolved by the Contracting Officer ("CO") or at a level above the CO),
 - the Government Accountability Office ("GAO"),
 - the U.S. Court of Federal Claims ("COFC")
- ❑ Can escalate, cannot backtrack
- ❑ Some agency exemptions (USPS, FAA, etc.)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Who Can Complain, Jane?

☐ Interested Parties

- An actual or prospective offeror whose direct economic interest would be affected by the award of the contract
 - ☐ Pre-Award Protest: Successful protest would allow the potential contractor to participate as a bidder or offeror going forward
 - Not required to submit a bid, but may do so as precaution
 - ☐ Post-Award Protest: Original award first runner-up, “direct economic interest”
 - ☐ Original award second runner-up may have “direct economic interest” depending on relief (re-evaluate all offers, best value tradeoff)
 - ☐ Subcontractors, no “direct economic interest”

☐ Interveners

- Awardee(s) - if the award has been
- If no award has been made, offeror(s) who have a substantial prospect of receiving an award if the protest is denied
- Onus is on government to defend award, interveners along for the ride

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What Can Be Protested, Fred?

Pre-Award Protests

- ☐ Vague or Ambiguous Solicitation
- ☐ Overly Restrictive Provisions
- ☐ Solicitation clauses deviate from the FAR
- ☐ Insufficient time to respond
- ☐ Conflicts of Interest
- ☐ Improper use of set-aside competitions
 - May need to go to Small Business Administration

Protests must be filed before bid opening or the closing date for receipt of proposals

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What Can Be Protested, Ned?

Post-Award Protests

- Two categories of protest grounds
 - Award does not comply with applicable statutory or regulatory requirements
 - Award evaluation or determination inconsistent with terms of solicitation
- Protester must demonstrate “competitive prejudice,” “mere disagreement” not good enough
 - Contracting officers have wide discretion, so long as evaluation has reasonable basis and is not arbitrary
- Per GAO, most common grounds for successful bid protests:
 - Unreasonable cost or price evaluations
 - Unreasonable past performance evaluations
 - Unreasonable technical evaluations
 - Failure to follow evaluation criteria/improper weighing of factors

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

When Should I Act, Jack?

- Timing is critical, “Late is late”
- Agency or GAO:
 - Within 10 days of award or from date contractor knows or should have known basis for protest (whichever is earlier)
 - “Debriefing” temporarily stays this timeframe
 - Designed to encourage debriefings and to discourage “defensive” or “blind” protests
 - Automatic CICA Stay of award or performance requires filing within 10 days of award or 5 days after debriefing
 - Automatic Stay is a powerful protest tool
- COFC
 - No set timeframe (maybe 6 year statute of limitations)
 - Sleep on rights, less chance of success
 - No automatic stay

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Agency Level, Neville

- See FAR 33.103, agency supplements
- Advantages:
 - Least formal, least costly, fastest for a decision (generally 35 days), automatic stay
- Disadvantages:
 - No discovery, lack of transparency, asking agency to admit mistake
- Protest grounds should be simple and straightforward:
 - Pre-award protests against solicitation terms
 - Post-award protests relating to the timely receipt of bids, bid responsiveness, mistakes in bids
- Potential strategy for multi-part contracting, set yourself for another contract or task order
 - Least public forum, least likely to offend agency customer

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

To The GAO, Joe

- See 31 USC § 3551; 4 CFR § 21.0; FAR 15.505
- Relatively informal; send letter, not complaint; filing by e-mail; e-mail communication among parties
- Decisions issued by attorneys in the Office of General Counsel
 - Very experienced in government procurement law
 - Deferential to prior CAFC, COFC, GAO decisions
- Quick resolution
 - Decisions must be issued within 100 days of filing, timelines rarely extended
 - Rigid schedule: agency report in 30 days, 10 days for any comments
 - Discovery available but limited
- Agencies represented by Agency counsel
- Corporate protestors may appear *pro se*, though relatively uncommon
- Decisions are “recommendations” but usually followed

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Court of Claims, Shane

- See 28 U.S.C. § 1491(b); Court of Claims Rules, esp. Appendix C
- Filing Complaint, relatively quick (status conference within a week, agency record within 2 weeks)
- Decisions issued by COFC Judges
 - Knowledgeable in government procurement law
 - Bound to SCOTUS, CAFC and COFC rulings
- Most costly forum
 - Essentially federal district court litigation
 - No time limit to when COFC decisions must be issued, although often 8-10 weeks
- No automatic stay, although injunctive relief available
- Agencies represented by DOJ
- If unsuccessful at GAO, allows for second “de novo” bite at the apple
- Best for large, complex procurements or if protestor slept on rights

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Strategies – What’s The Plan, Stan?

- Early Objectives (GAO Protest)
 - Request debriefing if not automatic (post-award protest)
 - Get Automatic Stay
 - Be timely
 - Protest should be concise and clearly state legally sufficient grounds of protest
 - Request early Document Production if appropriate (don’t wait for Agency Report)
- Achievement of early objectives may lead to corrective action

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

No Need To Be Coy, Roy

- ❑ Post Agency Report Strategies
 - Mandatory comments (Reply) to Agency Report (or automatic dismissal)
 - Raise any supplemental protest grounds
- ❑ Challenge Agency Statement of Facts and Memorandum of Law
 - Many repeat players, don't question ethics or invent conspiracies, but do be firm on good grounds
- ❑ Object to Agency Document Production/Redaction Issues
- ❑ If intervening, make sure to file "me too" comment

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Hush, Gus (Protective Orders)

- ❑ Protective Orders issued in the vast majority of bid protests
 - Allows protestor's counsel to learn the details of procurement, assess strengths and weaknesses, while protecting proprietary and confidential information
- ❑ GAO likely issue one on its own, but any party can request
- ❑ Standard format, only attorneys can be admitted under Protective Orders
 - Pro Se protestors out of luck
 - Cannot share protected material with client or attorneys not admitted under PO
- ❑ Public redacted versions can be challenged

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What Relief Can I Get, Violet?

- Any combination of the following remedies:
 - Refrain from exercising options under the contract
 - Terminate the contract
 - Re-compete the contract
 - Issue a new solicitation
 - Reimbursement of protester's fees and costs
- GAO can't award you contract
- Corrective Action - unilateral
 - Agency make take corrective action any time before the protest is decided
 - Usually before Agency Report due to avoid payment of protestor costs
 - Corrective action prompts GAO dismissal even if action not fully described

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



LEGAL PRIMER: 2017 Update

August 3, 2017



WHAT COLOR IS YOUR HAT?

Presented by:

Jennifer L. Rawson

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.6784

jrawson@eckertseamans.com

PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.6784

F: 412.566.6099

jrawson@eckertseamans.com

PRACTICE AREAS:

[Estates & Trusts](#)

[Nonprofits](#)

STATE ADMISSIONS:

Pennsylvania

Ohio

COURT ADMISSIONS:

U.S. District Court for the Southern
District of Ohio

U.S. District Court for the Western
District of Pennsylvania

U.S. Tax Court

EDUCATION:

L.L.M., Capital University School of
Law, 1993

J.D., cum laude, Case Western
Reserve University School of Law,
1992

B.B.A., summa cum laude, Ohio
University, 1989



Jennifer L. Rawson

MEMBER

Jenn Rawson has advised individuals with respect to their estate planning since 1993 and has represented individual and corporate clients in all aspects of estate and trust administration. She also handles various proceedings in the Orphans' Court, including will contests, will and trust construction, and reformation proceedings and contested accountings. In addition to her estates and trusts practice, Jenn has considerable experience in advising and representing nonprofit organizations regarding the process of organizing and obtaining tax-exempt status as well as ongoing operational matters.

REPRESENTATIVE MATTERS

- Counsels clients with respect to both simple and complex estate planning for a variety of needs that range from those of the single individual to complicated second marriages and succession planning for small business owners.
- Utilizes such planning tools as wills and revocable trusts, life insurance trusts, charitable trusts, Grantor Trusts, Qualified Personal Residence Trusts, family limited partnerships, limited liability companies, and private foundations.
- Advises clients as to the various elections and methods of designating beneficiaries for individual retirement accounts, qualified plan benefits and 403(b) plans, and advises plan beneficiaries as to their options.
- Counsels clients as to the formation of exempt organizations including public charities, private foundations, business leagues, and other social welfare organizations.
- Assists exempt organizations with state and federal compliance matters including charitable solicitation registrations, Form 990 series, unrelated business income tax, lobbying and small games of chance, and private foundation excise taxes.
- Counsel exempt organizations concerning corporate restructuring, creation of subsidiary organizations, acquisitions, mergers, and dissolutions.
- Advises exempt organizations on governance matters

including applications of and revisions to bylaws, membership rights, endowment management policies, conflicts of interest, and other matters.

PROFESSIONAL AFFILIATIONS

- American College of Trust and Estate Counsel, Fellow
- Pennsylvania Bar Association – Real Property Probate & Trust Law Section, Probate Trust Division, Chair; Charitable Organizations Committee, Member
- Allegheny County Bar Association, Exempt Organizations Committee
- Allegheny Tax Society, Former Member
- American Bar Association, Former Member
- Pittsburgh Planned Giving Counsel, Former Member
- Ohio State Bar Association – Federal Taxation Section, Estates and Trusts Subsection, Former Chair and Executive Committee Member

NEWS AND INSIGHTS

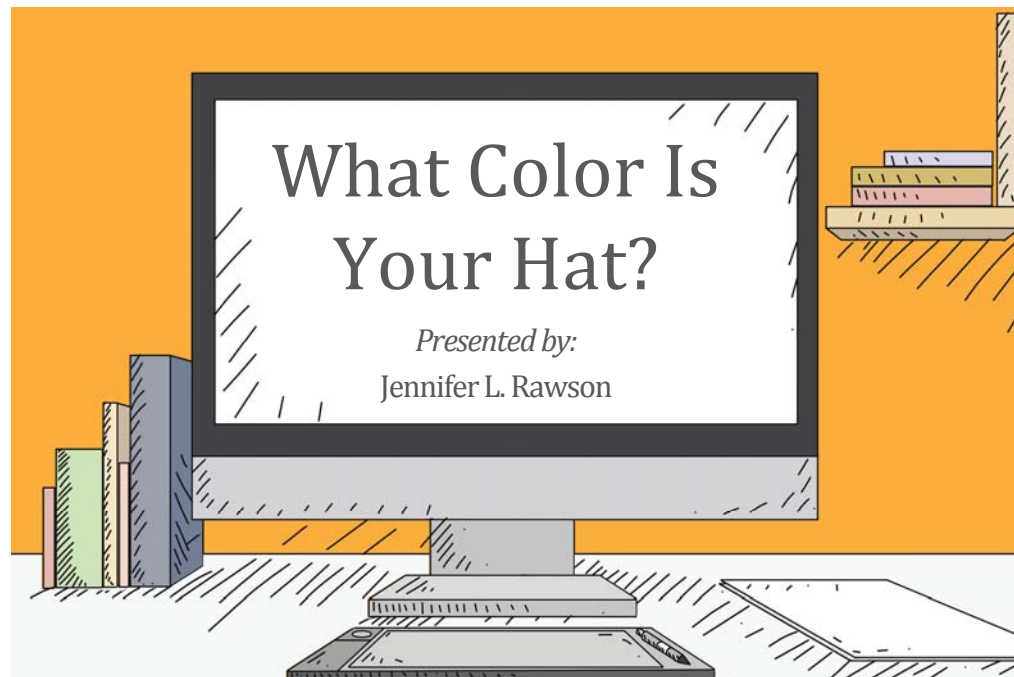
Publications:

- "Probate & Trust Law Division Report," Real Property, Probate & Trust Law Section Newsletter, Pennsylvania Bar Association, Winter/Spring 2016; Summer/Fall 2015; Winter/Spring 2015.
- "How Will the Economic Growth and Tax Relief Reconciliation Act of 2001 Affect Individual Taxpayers?" co-authored with Molly E. Few, July 2001.

Speaking Engagements:

- "Death and Taxes" presenter, Pennsylvania Bar Institute CLE, February 2017.
- "How To Prepare the Pennsylvania Inheritance Tax Return," panelist, Pennsylvania Bar Institute CLE, 2015.
- "Basic Real Estate for Estate Attorneys," faculty member, Pennsylvania Bar Institute, June 2014.
- "Act 95 – The New POA Law," faculty member, Pennsylvania Bar Institute, September 2014.
- "Looking Under the Hood: Drafting Better Trusts to Accomplish Your Client's Estate Planning Goals," Pennsylvania Bar Institute, 2014.
- "Fundamentals of Estate Planning," Pennsylvania Bar Institute, 2014.
- "Estate Planning — What is it and why do you need it?," Consol Energy Pre-Retirement Seminar, 2014.
- "Charitable Bequests," Pennsylvania Bar Institute seminar "Death & Taxes," January 2013.

- "How to Write a Will and Other Essential Estate Planning Documents," faculty member, Pennsylvania Bar Institute, January 2008 and January 2013.
- "PA Uniform Trust Act, Pitfalls and Solutions," Pennsylvania Bar Institute, December 2012 and December 2014.
- "What Color is Your Hat?," Eckert Seamans' Continuing Legal Education Seminar, August 2012.
- "Closing the Estate," 18th Annual Estate Law Institute, November 2011.
- "The New Estate Tax-How it Will Affect Charities and Nonprofits," Pittsburgh Planned Giving Counsel, March 2011.
- "Real Estate Issues in Estates," Pennsylvania Bar Institute, 2011.
- "Contested Claims," 17th Annual Estate Law Institute, November 2010.
- "Contested Claims and Creditor Claims Against Decedents' Estates," Estate Law Institute, 2008 and 2009; Estate & Elder Law Symposium, February 2010.
- "Wills v. Trusts – A Primer for the Right Tool for your Clients," moderator, Pennsylvania Bar Institute, 2010.
- "Probate Process and Non Probate Issues," *Fundamentals of Estate Administration*, Pennsylvania Bar Institute, September 2009.
- How2Practice Estates, planning committee and panelist, October, 2007.



LEGAL PRIMER: 2017 Update

August 3, 2017

General Fiduciary Duties of Directors

Duty of Care – A Director must act with the care a person in a like position would reasonably believe to be appropriate under similar circumstances.

Duty of Loyalty – A Director must act in good faith and in a manner that the director reasonably believes to be in the best interests of the organization.



Mother May I?

“The Model Rules of Professional Conduct do not prohibit a attorney from serving as a director of a corporation while simultaneously serving as its legal counsel, but there are ethical concerns that a attorney occupying the dual role of director and legal counsel should consider.”

ABA Formal Ethics Opinion 98-410 (Feb. 27, 1998)

Endorsed by PBA Committee on Legal Ethics and Professional Responsibility

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

The Risks

- ❑ Loss of Independent Professional Judgment
- ❑ Conflicts of Interest
- ❑ Potential loss of privilege
- ❑ Role Confusion on the part of other directors
- ❑ Inadvertent creation of attorney-client relationship
- ❑ Heightened exposure to liability



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Ethical Considerations: Loss of Independence

Where the organization is a client of the attorney/firm, is there a material risk that the dual role will compromise the attorney's independent professional judgment?

Inherent conflict: Attorney/Firm asked to advise the organization in matters involving actions of directors

■ Considerations (Model Rule 1.7, Comment 35):

- Frequency of potential conflict
- Potential intensity of conflict
- Effect on organization of attorney's resignation from the Board
- Need for organization to seek legal advice elsewhere



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Ethical Considerations: Conflicts of Interest

Duty of loyalty

- Conflict between organization and
 - Attorney-Director's law firm (e.g., fee dispute)
 - An existing client of Attorney-Director's law firm
 - Prospective client of Attorney-Director's law firm
- Decisions regarding the hiring of outside counsel



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

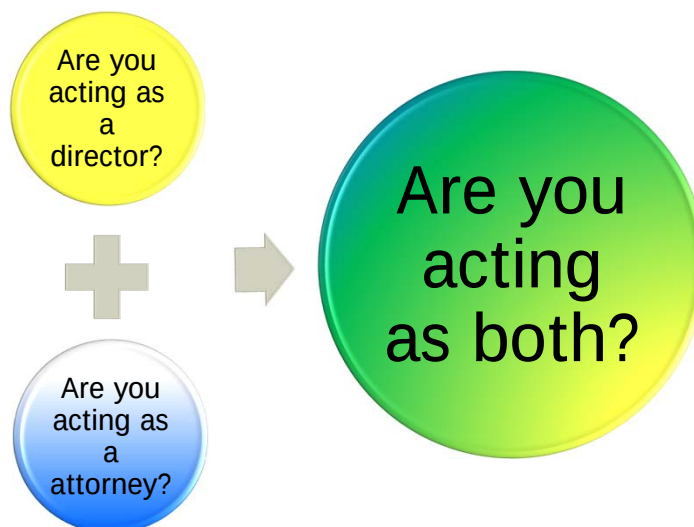
Ethical Considerations: Loss of Attorney-Client Privilege

- ❑ Attorney's duty to maintain confidentiality (Model Rule 1.6)
- ❑ Purely legal advice is generally protected
- ❑ Communications made in the capacity of a attorney
- ❑ Communications made in the capacity of a director
- ❑ Communications made in a mixed capacity
- ❑ Will legal advice given by an Attorney-Director be presumed to be incidental to the business advice and not protected by the privilege?



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Role Confusion



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Role Confusion, con't

Do your co-directors on the board know in which capacity you are acting?

- ❑ Danger of unwarranted, unspoken deference in reliance of your words
- ❑ Danger of dilution of importance of legal advice



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Inadvertent Creation of Attorney-Client Relationship

“[a]bsent an express contract, an implied attorney-client relationship will be found if:

- 1) the purported client sought advice or assistance from the attorney;
- 2) the advice sought was within the attorney's professional competence;
- 3) the attorney expressly or impliedly agreed to render such assistance; and
- 4) it is reasonable for the putative client to believe the attorney was representing him.”

Cost v. Cost, 450 Pa.Super. 685, 677 A.2d 1250, 1254 (1996)



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Potential Heightened Exposure to Liability

Duty of Care

- General Rule applied to board members: business judgment rule
- Ordinary prudent person ... like position ... similar circumstances
- Attorneys may be held to higher standard



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Heightened Exposure to Liability, con't

Competency to provide opinion in area of law in which Attorney-Director
does not regularly practice

- Executive Compensation/Reimbursement
- Gift Acceptance Policies
- IRS Compliance (Form 990)
- State Compliance: Charitable Solicitation Rules/Gambling
- Public Availability of Documents



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Heightened Exposure to Liability, con't

- Reliance defense if board relies on opinion of Attorney-Director
- Vicarious liability of law firm (where Attorney-Director is an agent of the firm)



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Heightened Exposure to Liability, con't

Insurance

- D&O insurance covers wrongful acts by the insured in his or her capacity as a director
- Professional liability insurance covers wrongful acts by the insured in his or her capacity as a attorney
- Where it is not clear in which capacity the insured participated in the wrongful act, risk of both insurers denying coverage

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Set the Ground Rules at the Start

At the outset, the attorney should reasonably assure that:

- management and the other board members understand the different responsibilities of legal counsel and director;
- understand that in some circumstances matters discussed at board meetings with the attorney in her role as director will not receive the protection of the attorney-client privilege; and
- understand that conflicts of interest could arise requiring the attorney to recuse herself as a director or to decline representation of the corporation in a matter.

ABA Formal Ethics Opinion 98-410

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Reasonable Care

During service on the Board, the attorney should exercise reasonable care:

- to protect the corporation's confidential information; and
- to confront and resolve conflicts of interest that arise.



ABA Formal Ethics Opinion 98-410

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Summing Up

- ❑ Inform management and the board about your role and the issues regarding attorney-client privilege up front.
- ❑ Identify in what capacity you are communicating (make sure it's accurately reflected in the minutes).
- ❑ Refrain from voting on material financial transactions with your law firm or clients of the firm.
- ❑ At all times when rendering legal advice, exercise the independent professional judgment required of a attorney (e.g., advising against illegal action even if favored by the board).
- ❑ Diligently perform your duties as counsel, within the limits of applicable law, once an action has been approved by the board even if you disagreed with the action as a director.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



LEGAL PRIMER: 2017 Update

August 3, 2017

ABA Formal Op. 98-410

American Bar Association Formal Ethics Opinion 98 - 410

American Bar Association

LAWYER SERVING AS DIRECTOR OF CLIENT CORPORATION

February 27, 1998

Copyright (c) by the American Bar Association

The Model Rules of Professional Conduct do not prohibit a lawyer from serving as a director of a corporation while simultaneously serving as its legal counsel, but there are ethical concerns that a lawyer occupying the dual role of director and legal counsel should consider. The lawyer should reasonably assure at the outset of the dual relationship that management and the other board members understand the different responsibilities of legal counsel and director; understand that in some circumstances matters discussed at board meetings with the lawyer in her role as director will not receive the protection of the attorney-client privilege; and understand that conflicts of interest could arise requiring the lawyer to recuse herself as a director or to decline representation of the corporation in a matter. During the dual relationship, the lawyer should exercise reasonable care to protect the corporation's confidential information and to confront and resolve conflicts of interest that arise. From the discussion of these ethical concerns, the Committee derives general guidelines that a lawyer, once having agreed to serve on the board of a corporate client, should follow in order to minimize the risk of violations of the Model Rules.

The Committee addresses in this opinion the propriety of a lawyer serving on the board of directors of a corporation that she or her firm represents as counsel ^[FN1]. Although some commentators have urged that the practice be prohibited, ^[FN2] the Model Rules of Professional Conduct (1983) (amended 1997) contain no such prohibition, but only a cautionary Comment that states:

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the two roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment while acting as counsel, the lawyer should not serve as a director. ^[FN3]

The Committee is aware that it is common for lawyers to be invited to serve on the boards of directors of their clients. As the Rule 1.7 Comment suggests, ethical problems can arise when a lawyer serves as a member of the board of directors of a client. Because the Comment does not offer detailed guidance, the Committee in this Opinion discusses the problems a lawyer faces when serving in this dual role and suggests some measures that a lawyer should take in order to minimize the risk of Model Rules violations.

We emphasize that not every lawyer will confront the same ethical challenges when serving as a member of a client's board of directors. The issues to be faced will differ depending on the nature of the legal services to be provided by the lawyer-director or her firm, the nature of the client's business, and the nature of the representation which could range from serving as general counsel to handling a few discrete transactions. Thus, the advice that follows is general in nature and does not attempt to reflect the specific facts of every contemplated dual relationship. ^[FN4]

The issues raised when a lawyer serves concurrently as corporate director and counsel are analyzed ^[FN5] here in the following sections: (1) Advising the corporate management and board when the dual role commences; (2) Protecting confidences and

the attorney-client privilege; and (3) Confronting and resolving conflicts and other ethical issues that arise in the course of the dual relationship. This analysis is followed by a Summary where good practice guidelines are enumerated.

I. Advice to Clients Regarding the Dual Role

There are several broad categories of ethical concerns that exist when corporate counsel agrees to serve as director of her corporate client: (1) concerns that conflicts of interest will arise, causing reasonable parties to question the lawyer's professional independence and sometimes requiring the lawyer-director to decline representation in a matter or resign as a director; ^[FN6] (2) concerns that the lawyer, other directors, and management will be confused whether the lawyer's views on a matter are legal advice or are expressed as the business or practical suggestions of a board member; and (3) concerns with protecting the confidentiality of client information, especially protecting the attorney-client privilege. While these concerns are real, many of the problems can be cured, or at least ameliorated, by full, free and frank discussions by the lawyer with the corporation's executives and the other board members. Ideally this discussion will occur before the lawyer becomes a board member. It is at this stage that the ethical lawyer should reasonably assure herself that those in authority understand the ethical and practical pitfalls that lie along the way. When in-house corporate counsel employed as a corporate executive is available, a discussion with him often will suffice. In other situations, the lawyer should take the time to explain the risks to the executive officers and other board members herself.

The explanation should describe the potential for conflicts of interest and how they might disable the lawyer from acting as either a director or a lawyer at some particularly critical time or require safeguards, such as engaging the services of counsel other than the lawyer or her firm. Similarly, the lawyer also should reasonably assure herself that the possible threat to the attorney-client privilege and consequent disclosure of confidential information are understood, either by discussions with employed corporate counsel or with the executive officers and other board members. ^[FN7] In situations where a substantial likelihood exists that a disabling conflict of interest will arise or that the attorney-client privilege will be lost in a pending matter, the lawyer should offer to continue as counsel, attend board meetings and preserve her role solely as corporate counsel until the risk abates.

If there is reasonable assurance that the client is informed of the potential issues that might arise and still wishes the lawyer to serve as a director, and if the lawyer concludes that no current disqualifying conflict of interest or other ethical impediment bars the dual role, then the lawyer may accept the directorship. This initial decision about the continuing role of lawyer as lawyer and lawyer as director must nevertheless be revisited as situations arise that call for further consultation with the client, and the lawyer may have to consider withdrawing from one position or the other if necessary. *See infra* Part III.

Because of the need for the lawyer and the corporation's management and board to give ongoing attention to potential conflicts, attorney-client privilege protection and other issues that may arise as a result of the dual role, the lawyer-director should consider providing a written memorandum in addition to an oral explanation. A written memorandum is of particular assistance in describing the lawyer's role as counsel for the corporate entity and not for its constituent officers or directors and in explaining the differences between serving as a director and serving as counsel. It is, of course, imperative that any standards specified in such a written memorandum be followed in practice. ^[FN8]

II. The Lawyer-Director Must Exercise Reasonable Care to Protect the Corporation's Attorney-Client Privilege

Lawyers serving as directors have the same obligation as other lawyers to maintain confidentiality and avoid compromising the attorney-client privilege of the corporation. A lawyer's duty of confidentiality under Model Rule 1.6 ^[FN9] is consistent with a director's duty of confidentiality that arises from her role as a fiduciary for the corporation, although the scope of these two duties is not precisely the same.

A problem arises, however, as the result of the inconsistent responsibilities of director and lawyer in the application of the attorney-client evidentiary privilege. ^[FN10] Because the lawyer-director provides the management and board with business advice as well as legal assistance, the lawyer, management and board members could find themselves forced to testify about conversations that would not be involuntarily disclosed if the lawyer-director had been acting only as a lawyer.

Several cases analyzing the attorney-client privilege in the corporate context strictly limit the subject matter protected by the

privilege to purely legal advice even when other considerations affect management's decision, such as financial issues or corporate policy. ^[FN11] The fact that the lawyer is a director also increases the chances that the privilege may be lost even for purely legal advice. ^[FN12] More appropriately, other cases have analyzed the privilege applied to lawyer-director's communications according to whether business or legal advice was sought. In these cases, a claim of privilege has been rejected only when the communications related to the provision of purely business advice. ^[FN13]

Given the stricter limitations applied by some courts on the privilege for communications with a lawyer-director, it is vital that the lawyer who also serves as a director be particularly careful when her client's management or board of directors consults her for legal advice. The lawyer-director should make clear that the meeting is solely for the purpose of providing legal advice. The lawyer should avoid the temptation of providing business or financial advice, except insofar as it affects legal considerations such as the application of the business judgment rule. When appropriate, the lawyer-director should have another member of her firm present at the meeting to provide the legal advice. ^[FN14]

These procedures not only will provide the best support for a claim of privilege for the conversations, but also will alert board members who otherwise might mistakenly believe the lawyer-director is giving them business advice. The procedures also alert all involved to treat the information with the utmost care that normally is associated with confidential attorney-client communications.

The lawyer-director also should bear in mind that, although only the client (or a lawyer acting with the client's express consent) can waive the attorney-client privilege, the lawyer, because she also is director, may be found to have waived the privilege on behalf of the corporation without need of any further client consent. In *Vehicular Parking*, *supra* note 13, for example, the court found that a lawyer-director's voluntary disclosure of memoranda to the government in an antitrust case effected a waiver of the lawyer-client privilege because he produced the documents in his role as a "business manager" and not while "wear[ing] his lawyer suit."

Finally, a director, who also is the corporation's lawyer, may be under a duty to disclose information to third parties (such as in response to an auditor's request) that in her role as legal counsel to the corporation she could not disclose without specific consent. ^[FN15] Acts of a lawyer-director and her knowledge as a director may prove inseparable from the lawyer's acts and knowledge as member of a law firm. The director's fiduciary obligations as a director and her professional obligations as a lawyer cannot "be placed in convenient separate boxes." ^[FN16] The knowledge of a corporate director and officer, with respect to transactions in which she is authorized to act, is imputed to the corporation. Similarly, the knowledge of a partner in a law firm gained during confidential relationships with clients is imputed to the other partners in the law firm. There is a risk in some circumstances that the files and work processes of the law firm could become as available for discovery as are the files and records of the corporation itself. ^[FN17]

III. The Lawyer-Director Must Confront and Resolve Ethical Issues that Arise During the Dual Role

The lawyer-director must be alert to ethical issues that can arise during the course of the dual relationship. The potential issues addressed here are: (a) serving as counsel in a matter that she opposed as a director; (b) opining on past board actions in which the lawyer-director participated; (c) acting as a director in corporate actions affecting her as a lawyer or her law firm; and (d) representing the corporation in certain types of litigation.

A. Conflict in Pursuing Client Objectives that the Lawyer, as a Director, Opposed.

An ethical issue arises when a lawyer-director is asked to represent the corporation in an undertaking that she, as a director, has unsuccessfully opposed. Should the lawyer undertake the representation? If the lawyer should not, may other lawyers in her law firm represent the corporation in the matter? Are there circumstances when the lawyer and her firm are precluded under the Model Rules from representing the corporation?

In this situation, the lawyer must determine whether her representation of the corporation may be "materially limited" by her opposition to the action the corporation has decided to undertake, such that Model Rule 1.7(b) applies. ^[FN18] Generally, when a lawyer counsels any client against a given course of action, but the client rejects that advice, the client's decision once made must be accepted by the lawyer. See Model Rule 1.13 Comment [3]. A lawyer by representing a client does not endorse "the

client's political, economic, social or moral views or activities." Model Rule 1.2(b). And even after offering an opinion on such matters, it may be easy for a lawyer to conclude that, once the client has decided to pursue its chosen course, the lawyer can remain the lawyer for the client.

However, for the lawyer-director, who is required as a director to make a business judgment, this calculus may be different, a fact the lawyer should recognize before she undertakes representing the corporation in the matter. ^[FN19] When a lawyer has participated in the decision-making as a client, there may be an increased risk that she will be tempted to "pull her punches" as she represents the corporation in going forward, or may be perceived by others as providing less than diligent representation. See Model Rule 1.3.

If representation of the corporation may be materially limited by these factors, the lawyer then must also determine whether she reasonably believes the representation will not be adversely affected. See Model Rule 1.7(b). If she reaches that conclusion, which applies objectively, and the client consents after consultation, then the lawyer is not disqualified from the representation. Even so, if the lawyer continues to believe that the corporation's chosen course of action is imprudent, she may be unwise to undertake the representation personally; another lawyer in her firm would be permitted to represent the corporation under Model Rules 1.7(b) and 1.10(a). ^[FN20]

If, however, the lawyer-director concludes that under Rule 1.7(b) she personally is disqualified, her conflict is imputed under Model Rule 1.10(a) to the rest of her firm's lawyers, who also are disqualified from the representation. This could occur, for example, were she to conclude that she will face personal liability as a result of the course chosen by a majority of the directors over her objection. If so, she should consider resigning from the board if necessary for self-protection. Whether or not she resigns, the situation may create a nonconsentable conflict of interest under Rule 1.7 (b) because the representation would be adversely affected, thus disqualifying her law firm as well as herself from the representation. This would be true even if the corporation's actions are not criminal or fraudulent, see Model Rule 1.2(d), and do not violate a legal obligation owed by the directors or management to the corporation that is likely to result in substantial injury to it, see Model Rule 1.13(b).

B. Conflict in Opining on Board Actions in which the Lawyer-Director Participated.

A lawyer who serves as a director could be disabled from rendering opinions or offering her best legal judgment with respect to a specific matter because of her role as a director. For example, when the lawyer-director is asked to provide advice to the corporation on matters involving prior actions of the board, such as whether an incentive pay arrangement is lawful, she may in effect be advising on the legality of actions in which she herself has participated as a director. Under these circumstances, it may prove difficult for the lawyer to speak independently as counsel to the corporation in light of her own interest as a director. See Rule 1.7(b). Moreover, seeking a waiver of the potential conflict is problematic because the very directors who would need to provide the waiver are themselves directly concerned by the question that is being raised. Finally, if the opinion is sought in order to justify an action the board currently has before it, the advice-of-counsel defense to a later lawsuit may be undermined by the lack of independence of the lawyer-director and her firm. In some cases these concerns can be mitigated by the participation of other counsel to advise on the issue, without compelling the complete withdrawal of the lawyer-director as counsel. ^[FN21]

C. Conflict Regarding Corporate Actions Affecting Lawyer or Her Firm.

A conflict issue may also arise when a matter comes before the board of directors that will significantly affect the corporation's use of lawyers. For example, the corporation might consider a major purchase or merger, an initial public offering, or launching a new product that requires major regulatory approval. Is the lawyer-director able to exercise sound business judgment as a director when participating in the board's decision in circumstances where it is clear, *e.g.*, that (i) her firm will be engaged to perform the legal services, or (ii) her firm will be a candidate to do so, or (iii) another firm will be engaged to perform the services?

The analysis here differs from the conflict regarding legal advice discussed above in Part IIIB. To the extent that the lawyer is taking action as a director, the question here is whether she is able to exercise independent judgment *as a director* when the board's decision could significantly affect the director's law firm. The lawyer-director should consider whether, under the

law of corporate governance, she should recuse herself as a director from consideration of the matter, or remove her firm from consideration to perform the legal services, or both, or whether she may participate after noting to the other board members (or to employed corporate counsel) her personal interest and its potential effects.

To the extent the lawyer is acting as a lawyer, the law governing lawyers applies. The Association of the Bar of the City of New York Professional Ethics Committee has said:

The lawyer may not “tak[e] advantage of his or her position [as director] to procure professional employment for the lawyer or the lawyer’s law firm,” N.Y. State 589 (1988), or participate in the board’s decision to retain the lawyer, N.Y. City 611 (1942). Indeed, the lawyer-director may not participate “in any decision of the [board] that will or reasonably may affect the lawyer’s own personal or financial interests as counsel.” N.Y. State 589 (1988). Finally, the lawyer-director must exercise his or her independent professional judgment “solely for the benefit of [the corporation] and free of compromising influences and loyalties,” EC 5-1, that may arise out of his or her role as director (such as a desire to be re-elected to the board or concern for the lawyer’s personal liability as a director). ^[FN22]

Formal Op. 1988-5 (under the N.Y. Code of Professional Responsibility). We do not believe that New York’s blanket prohibition should apply to the situations just described. Nevertheless, the prudent lawyer should at a minimum abstain from voting as a director on issues which directly involve the relationship of the corporation with her law firm, such as issues of engagement, performance, payment or discharge.

If the lawyer-director’s firm has been pre-selected to perform the services that will be necessary if the course of action is approved, the lawyer-director also should consider abstaining as a director from voting on the action, although the law of corporate governance requires to validate the corporate action only disclosure of such a conflict of interest, following which the director may participate. ^[FN23] If the board is closely divided on a matter of serious consequence to the corporation, however, the lawyer-director’s recusal as a director could interfere with the corporation’s selection of the best course to follow. In such a case, the lawyer-director may decide to withdraw her firm from consideration as counsel in the matter and participate fully in the board’s decision-making process. We emphasize that, in our opinion, no violation of any Model Rule would result if the lawyer participates in corporate action as a result of which she or her firm is employed to perform legal services.

D. Conflicts in Representing the Corporation in Litigation.

Ethical issues also may arise when the corporation, its directors and its officers find themselves all named as defendants in litigation and they desire to be defended by their long-standing law firm, the one whose partner sits on the board of directors.

First, the corporation and its directors obviously need independent representation in any controversy between the corporation and its lawyers, *see* Model Rule 1.7(a). The same ordinarily is true when representation of the corporation is required regarding a lawsuit involving the directors, one of whom is a lawyer in the corporation’s law firm, if the corporation may assert a cross claim against the lawyer-director or a third party claim against her law firm. ^[FN24] Separate representation also would be required if the claims were derivative or there existed other potential conflicts between the corporation and its directors. ^[FN25]

Second, indirectly conflicting interests involving Model Rule 1.7(b) also may generate a need for independent representation. If independent representation is required under Rule 1.7(b), the law firm whose member is a defendant cannot represent the corporation, at least without independent co-counsel also serving. ^[FN26]

Third, prior representation of the corporation may prevent the firm from representing its own member under Model Rules 1.9(a) and 1.10(a), even if Rule 1.7(b) does not. Finally, as a general proposition, it is often awkward for a firm to represent one of the firm lawyers. Indeed, some professional liability carriers insist that law firms hire different counsel to represent them. ^[FN27]

SUMMARY

The Committee acknowledges that lawyers will continue to be asked and many will accept engagements as directors of client

business entities and that it is not unethical for them to do so. It nevertheless is essential that lawyer-directors and their clients continue to be sensitive to the issues discussed in this opinion.

Though a lawyer serving in the dual role of corporate counsel and director is not subject to discipline absent a violation of a specific Rule, the following suggestions, derived from the foregoing discussion, should help to avoid a disciplinary infraction. The lawyer-director should:

1. Reasonably assure that management and the board of directors understand (i) the different responsibilities of legal counsel and director; (ii) that when acting as legal counsel, the lawyer represents only the corporate entity and not its individual officers and directors; and (iii) that at times conflicts of interest may arise under the rules governing lawyers' conduct that may cause the lawyer to recuse herself as a director or to recommend engaging other independent counsel to represent the corporation in the matter, or to serve as co-counsel with the lawyer or her firm.
2. Reasonably assure that management and the board of directors understand that, depending upon the applicable law, the attorney-client evidentiary privilege may not extend to matters discussed at board meetings when the lawyer-director is not acting in her corporate counsel role and when other lawyers representing the corporation are not present in order to provide legal advice on the matters.
3. Recuse herself as a director from board and committee deliberations when the relationship of the corporation with the lawyer or her firm is under consideration, such as issues of engagement, performance, payment or discharge.
4. Maintain in practice the independent professional judgment required of a competent lawyer, recommending against a course of action that is illegal or likely to harm the corporation even when favored by management or other directors.
5. Perform diligently the duties of counsel once a decision is made by the board or management, even if, as a director, the lawyer disagrees with the decision, unless the representation would assist in fraudulent or criminal conduct, self-dealing or otherwise would violate the Model Rules.
6. Decline any representation as counsel when the lawyer's interest as a director conflicts with her responsibilities of competent and diligent representation, for example, when the lawyer is so concerned over her personal liability as a director resulting from the course approved by management or the board that her representation of the corporation in the matter would be materially and adversely affected.

[FN1]. The opinion has been prompted by the work of the Task Force on the Independent Lawyer of the Section of Litigation, which has been studying the role of lawyers serving as directors of their clients. See *The Lawyer-Director: Implications for Independence* (TASK FORCE ON THE INDEPENDENT LAWYER, A.B.A. SEC. LITIGATION, March 1998). See also Report of the Commission on Professionalism to the Board of Governors and the House of Delegates of the American Bar Association, *In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism*, reprinted at 112 F.R.D. 243, 280-81 (1986) (identifying three areas of special concern for the legal profession and recommending further analysis by the bar, including lawyers serving on their clients' boards, lawyers investing in their clients' businesses and transactions, and lawyers' ancillary business activities).

[FN2]. See, e.g., Dennis R. Block, George F. Meierhofer Jr. & Daniel L. Wallach, *Lawyers Serving on the Boards of Directors of Clients: A Survey of the Problems*, PRENTICE HALL LAW & BUS. INSIGHTS, April 1993, at 3 ("an outright prohibition on the practice would be appropriate"); Monroe Freedman, *You CAN Do It, But You Shouldn't*, AMERICAN LAWYER, Dec. 1992, at 43; Martin Riger, *The Lawyer-Director - "A Vexing Problem,"* 33 BUS. LAW. 2381 (1978); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 738-40 (1986) ("[a]t least the practice of serving as both counsel and director for a large corporate client is unsound and should be prohibited by law"). But see Craig C. Albert, *The Lawyer-Director: An Oxymoron?*, 9 GEO. J. LEGAL ETHICS 413 (1996) (concluding that prohibiting dual service in all circumstances is detrimental to clients' interests and both unwise and unnecessary).

[FN3]. Model Rule 1.7 Comment [14]. See also RESTATEMENT OF THE LAW GOVERNING LAWYERS §216, Comment d (Proposed Final Draft No. 1, March 29, 1996) (The dual relationship is permissible. "However, when the obligations or personal interests as director are materially adverse to those of the lawyer as corporate counsel, the lawyer may not continue

to serve as corporate counsel without the informed consent of the corporate client. The lawyer may not participate as director or officer in the decision to grant consent.”) During consideration of the Model Rules, the Kutak Commission viewed the dual role with ambivalence, initially approving lawyers’ service on clients’ boards only upon consent of all those having an interest in the enterprise. See January 25, 1979 Kutak Interim Revised Draft, Rule 1.12(e). The next draft allowed service as a director by lawyers who also are counsel for the corporation only (1) with approval of “all persons having an investment interest in the organization,” and (2) when there was no “serious risk of conflict between the lawyer’s responsibilities as general counsel and those as a director”, apparently exempting from these requirements a lawyer whose “representation is occasional or limited to specific matters.” See January 30, 1979 Kutak Discussion Draft, Rule 1.9(f) and Comment.

[FN4]. The Committee notes that law other than the Model Rules also may govern service of lawyers on boards of directors, including the laws relating to agents and fiduciaries, principles of corporate governance, stock exchange regulations, and rules of the Securities and Exchange Commission. Moreover, while it is permissible under the Model Rules for a lawyer to serve on her client’s board of directors, additional risks may, depending on the circumstances, be associated with the dual relationship, especially in the case of public companies. The lawyer and her firm should consider the following risks: (1) possible exclusion of lawyer-directors from D&O policy coverage, except when acting solely as a corporate director; (2) possible exclusion from professional liability coverage, except when acting solely as legal counsel; (3) possible loss of indemnification under some statutes in minority shareholder and derivative actions; (4) possible exposure of the lawyer’s firm to vicarious liability resulting from the lawyer’s actions as a director, especially in securities offerings; and (5) increased likelihood of disqualification from representing the corporation in litigation. See Karen L. Valihura and Micalyn S. Harris, *Avoiding Pitfalls That Might Arise When Your Outside Counsel Serves as a Director* and Attorneys Liability Assurance Society, Inc., *Entrepreneurial Activities*, both reprinted in *The Lawyer as Director of a Client*, A.B.A. SEC. BUS. LAW (August 4, 1997); Albert, *supra* note 2, at 449-471. These risks are likely to be increased substantially when the lawyer-director serves also as an executive officer of her corporate client, or where the lawyer serves as an executive officer, but not as a director of her corporate client.

[FN5]. The analysis assumes that, while serving as corporate counsel, the lawyer is asked to join the corporate board, but substantially the same analysis must be made when a lawyer-director who never has performed legal services for the corporation is asked to do so.

[FN6]. Independence concerns beyond those found in all lawyer-client relationships and governed by Model Rule 5.4 applicable to lawyer conduct generally are seen by some commentators on the lawyer-director role as the proper province, not of disciplinary rules, but of corporate law and SEC rules. See, e.g., Robert H. Mundheim, *Should Code of Professional Responsibility Forbid Lawyers to Serve on Boards of Corporation for Which They Act as Counsel*, 33 BUS. LAW. 1507, 1510 (1978).

[FN7]. See N.Y. State Bar Assoc. Comm. on Prof. Ethics, Op. 589, 1988 WL 236147 (1988) (lawyer-director must disclose to the client the risk of loss of the attorney-client privilege that results from the lawyer’s involvement in the corporation’s business decisions).

[FN8]. For a sample of the issues that a memorandum might discuss, see Susan R. Martyn, *Lawyers as Directors: Who Serves and Why?*, 1996 SYMPOSIUM ISSUE OF THE PROFESSIONAL LAWYER, 1996 A.B.A. CTR. FOR PROF. RESP. 113-114.

[FN9]. Rule 1.6 states:

[FN10]. The privilege exists:

[FN11]. See, e.g., *United States v. Wilson*, 798 F. 2d 509, 573 (1st Cir. 1986) (no privilege because lawyer offered business advice); *Garner v. Wolfenbarger*, 430 F. 2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971) (narrowing scope of privilege of a corporation’s management vis-a-vis its shareholders); and *Georgia Pacific Corporation v. GAF*, 1996 U.S. Dist. Lexis 671 (S.D.N.Y. 1996) (denying privilege to in-house counsel about his recommendations to change contract provisions made to his client’s officers under circumstances where, as a negotiator of environmental provisions in a contract, most courts would apply the privilege to outside counsel.)

[FN12]. For example, a few cases have held that when the lawyer becomes a director the privilege essentially evaporates. See *Federal Savings & Loan Ins. Corp. v. Fielding*, 343 F. Supp. 537, 546 (D. Nev. 1972) (“When the attorney and the client get

in bed together as business partners, their relationship is a business relationship, not a professional one, and their confidences are business confidences unprotected by a professional privilege.”); *In re Robinson*, 125 N.Y.S. 193 (N.Y. App. Div. 1910) (“When the corporation made him a director...[it] removed him from the relation of attorney or counsel to its officers, so far as the corporate affairs were concerned.”).

[FN13]. See, e.g., *United States v. Vehicular Parking Ltd.*, 52 F. Supp. 751 (D. Del. 1943) (no attorney-client privilege where memorandum from lawyer-director-promoter was essentially business advice).

[FN14]. Of course the customary measures to protect the privilege also should be taken. Corporate personnel outside the management group and all outsiders not essential to the legal advice should be excused from the meeting room. If regular minutes are prepared, they should reflect that the lawyer-director was consulted on a legal matter in executive session. Any minutes of the executive session should, along with all notes made by anyone present, be retained only in separate files marked “attorney-client privilege” and kept in a secure place. When written advice is to be protected, the memorandum should be limited to legal advice and be marked “attorney-client privilege.”

[FN15]. A law firm normally responds to auditors asserting, in accordance with Auditor’s Letter Handbook, *Statement of Policy Regarding Lawyers’ Responses to Auditors’ Request for Information*, 31 BUS. LAW. No. 3 (April 1976), that its engagement has been limited to specific matters and that there may exist other matters that could have a bearing on the company’s financial condition with respect to which the firm has not been consulted. As the guidelines state:

[FN16]. *Marco v. Dulles*, 169 F. Supp. 622, 631 (S.D.N.Y.) *app. dismissed*, 268 F.2d 192 (2d Cir. 1959).

[FN17]. See, e.g., *Deutsch v. Cogan*, 580 A.2d 100 (Del. Ch. 1990) (because of firm lawyer’s directorship, firm owed fiduciary duty to minority shareholders claiming injury in merger in which firm represented company).

[FN18]. Rule 1.7(b) states:

[FN19]. As Illinois State Bar Assoc. Comm. on Prof. Ethics Op. 86-14, 1987 WL 383872, makes clear:

[FN20]. Rule 1.10(a) states:

[FN21]. The RESTATEMENT, *supra* note 3, Illustration 3, finds rendering opinions in these circumstances permissible with the informed consent of the corporation’s authorized agents, presumably the board of directors.

[FN22]. Comm. on Prof. Ethics of the Assoc. of the Bar of the City of New York, Op. 1988-5 (1988) (under the N.Y. Code of Professional Responsibility).

[FN23]. See *Albert*, *supra*, note 2 at 443.

[FN24]. See, e.g., *Harrison v. Keystone Coca-Cola Bottling Co.*, 428 F. Supp. 149 (M.D. Pa. 1977) (lawyer-director’s firm must not represent corporation in litigation if the lawyer also is a defendant).

[FN25]. See Model Rule 1.13, Comment [11] and N.Y. Ethics Opinion 589, *supra* note 7.

[FN26]. Model Rule 3.7 (Lawyer as Witness) also may preclude the lawyer-director’s firm from representing the corporation in litigation as a result of the existence of a conflict of interest under Rule 1.7 or 1.9 when the lawyer-director is to be a necessary witness. See Comment [5].

[FN27]. Other types of representation of a corporation by a lawyer-director or her firm have the potential for conflicts of interest to arise. This is particularly true when the representation involves regulatory agencies in connection with public securities offerings or financial institution investigations. See *supra* note 15 and accompanying text; *Alpert*, *supra* note 2 at 433-35, 445-49, 457-62.

ABA Formal Op. 98 - 410



ATTORNEY/CLIENT PRIVILEGE

Presented by:

Kevin P. Allen

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.6866
kpallen@eckertseamans.com



PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.6866

F: 412.566.6099

kpallen@eckertseamans.com

CHARLESTON, WEST VIRGINIA

214 Capitol St.
Charleston, WV 25301

P: 304.720.5533

kpallen@eckertseamans.com

PRACTICE AREAS:

[Litigation](#)

[Appellate](#)

[Securities Litigation](#)

[Telephone Consumer Protection
Act \(TCPA\)](#)

STATE ADMISSIONS:

Pennsylvania

West Virginia

COURT ADMISSIONS:

U.S. District Court for the Western
District of Pennsylvania

U.S. District Court for the Middle
District of Pennsylvania

U.S. District Court for the Southern
District of West Virginia

U.S. District Court for the Central
District of Illinois

U.S. Court of Appeals for the Third
Circuit

U.S. Court of Appeals for the
Federal Circuit

U.S. Supreme Court

EDUCATION:

J.D., University of Pittsburgh School
of Law, 1995

B.A., Yale University, 1992

Kevin P. Allen

MEMBER

Kevin Allen concentrates his practice on commercial litigation with an emphasis on contractual disputes and business torts, as well as First Amendment and defamation disputes. In commercial cases, he represents a wide range of clients in contractual disputes, shareholder and securities cases, and matters involving alleged business torts. In defamation cases, Kevin's experience includes the defense of a senior corporate executive accused of slander, in addition to the prosecution of a libel case on behalf of an individual against a foreign media company and a local individual. He frequently appears before state and federal courts in western Pennsylvania. In addition to his first-chair bench and jury trial experience, Kevin has argued appellate cases before the Third Circuit, the Federal Circuit, and Pennsylvania's Supreme, Superior, and Commonwealth Courts.

In addition to his litigation practice, Kevin also counsels clients from various industries when legal questions intersect with clients' business issues. Kevin has experience working with clients who are manufacturers, suppliers, and distributors and in industries that include energy, telecommunications and Internet, beauty care, food manufacturing, financial, insurance, funereal, marketing and branding, and hospitality.

Kevin is also the author of the treatise, *The Attorney-Client Privilege and Work-Product Doctrine in Pennsylvania*, now in its fifth edition. Kevin has served as a court-appointed special discovery master to address privilege and work-product issues. He also advises clients and in-house legal departments on best practices for establishing and preserving the attorney-client privilege.

REPRESENTATIVE MATTERS

COMMERCIAL LITIGATION

- Represented Pittsburgh-based manufacturer in injunction proceedings where court blocked competitor's \$58 million acquisition of manufacturer's distributor. The Pennsylvania Superior Court affirmed the preliminary injunction. *York Group v. Yorktowne Caskets, Inc.*, 924 A.2d. 1234 (Pa. Super. Ct. 2007).

- Represented Pittsburgh-based paint manufacturer in three-week federal trial involving multi-million dollar claims of breach of contract, defamation and breach of covenant not to compete. Court declared the manufacturer the “prevailing party” and awarded more than \$900,000 for reimbursement of attorneys’ fees and costs. *PPG Industries, Inc. v. Zurawin*, C.A. No. 95-2078 (W.D. Pa.). The United States Court of Appeals for the Third Circuit affirmed, 52 Fed. Appx. 570, 2002 WL 31289285 (3d Cir. 2002).
- Represented landowner in successful defense against proposed condemnation of private property, essentially nullifying on constitutional grounds a centuries-old Pennsylvania statute. *In re O’Reilly*, 100 A.3d 689 (Pa. Commw. Ct. 2014), *appeal denied* (Pa. 2015).
- Obtained, from the Allegheny County Court of Common Pleas, summary judgment and a damage award of more than \$4,600,000 on behalf of an industrial corporation deprived of contractually-guaranteed royalty payments.
- Represents energy company in cases involving alleged violations of Telephone Consumer Protection Act.
- Represented leading life insurance company in numerous federal and state actions involving claims of fraudulent sales practices.
- Represented defendant in precedent-setting case establishing that no right to a jury trial exists under Pennsylvania’s Consumer Protection Law. See *Ihnat v. Povar*, 26 PLW 979 (2003).

DEFAMATION-FIRST AMENDMENT

- Represents both plaintiffs and defendants in defamation actions and also advises subjects of and publishers of alleged defamatory statements regarding their rights and options concerning those statements.
- Represented publicly held corporation in a federal court action and appeal involving alleged defamatory statement by a senior executive of the corporation.
- Represented a plaintiff in a state court defamation action that drew national and international attention where defendants were a prominent media entity and an individual defendant.
- Obtained a jury verdict in favor of a schoolteacher who was defamed in the workplace.
- Obtained a jury verdict in favor of a forensic investigative firm accused of malicious prosecution following the firm’s investigation of a suspicious fire.

SECURITIES AND SHAREHOLDER LITIGATION

- Represented corporate officer and director in actions where minority shareholders claimed damages from officer's multi-million dollar sale of stock. See *Pitterich v. Styling Technology Corp.*, 148 P.L.J. 244 (2000) (dismissing claims based on defendant's alleged conduct as a corporate director or officer).
- Obtained, in a related proceeding, a complete defense verdict in a court-mandated federal arbitration where claimant sought in excess of one million dollars in damages from selling shareholder.
- Obtained summary dismissal of federal securities and RICO claims directed against former bank president.
- Represented corporate officer and director in action by debt security holder which alleged that officer/director abused office for personal gain. Obtained summary dismissal of action in federal court. The U.S. Court of Appeals for the Third Circuit affirmed that decision, holding that there are no fiduciary duties owed to debt security holders.

COMMUNITY INVOLVEMENT

- Pittsburgh History & Landmarks Foundation, Board of Trustees – Vice-Chair
- Yale Alumni Club of Pittsburgh, Board of Governors

AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers*

NEWS AND INSIGHTS

Publications:

Attorney-Client Privilege

- "Federal Court Endorses 'Functional Equivalent' Doctrine for Purpose of Pennsylvania's Attorney-Client Privilege," ACBA's *Lawyers Journal*, May 12, 2017
- "Carefully Guard the Confidentiality of Privileged Communications," PBI Now, March 21, 2017.
- *The Attorney-Client Privilege and Work-Product Doctrine in Pennsylvania*, Fifth Edition (PBI Press 2016).
- "In-house Attorney-Client Privilege and 'Lawyerly Things,'" *Corporate Counsel*, January 2015.
- "Insurance Counsel and the Attorney-Client Privilege: Who is the Client?" *The Legal Intelligencer*, February 28, 2013; *Eckert Seamans' Legal Update*, Spring 2013.
- "In re Teleglobe: The Attorney-Client Privilege and In-House Counsel," Washington Legal Foundation, November 30, 2007.

- "White Collar Crime Policy on Legal Fee Payment Implicates Civil Liberties," Washington Legal Foundation, June 8, 2007.
- "The Attorney-Client Privilege and the 'Complete Lawyer': More than Mere Legal Advice," Law.com, March 6, 2007.
- "Attorney-Client Privilege: Everyday Rules from a High-Profile Case," Law.com, October 3, 2006.

Defamation

- "The Right to Remain Anonymous – Should Anonymous Speech Be Protected in the Age of the Internet," *Pennsylvania Lawyer*, July/August 2011 issue.
- "Delimiting Defamation: Pennsylvania Supreme Court Protects Reputation From Freedom of Speech Defense," *Philadelphia Lawyer*, Summer 2008.
- "Is the 9th Circuit Reining in the CDA?" Law.com, September 11, 2007.
- "Federal Law Protects Internet Companies from Blame for Content," Law.com, July 3, 2007.
- "Multiple Hits, Single Publication," Law.com, June 15, 2007.
- "The Oddity and Odyssey of 'Presumed Damages' in Defamation Actions under Pennsylvania Law," *42 Duq. Law Review* 495 (Spring 2004).

Miscellaneous

- "[Intangible Concrete- Spokeo, Inc. v. Robins and Constitutional Standing](#)," co-author, *Internet Telephony*, September 6, 2016.
- "Rules of the Game: Tortious Interference With Contract," *The Legal Intelligencer*, October 30, 2013.
- "Contractual Fee Shifting Clauses – How to Determine 'Prevailing Party' Status," *Pennsylvania Bar Assoc. Quarterly*, LXXIV, No. 4 at 178 (October 2003).

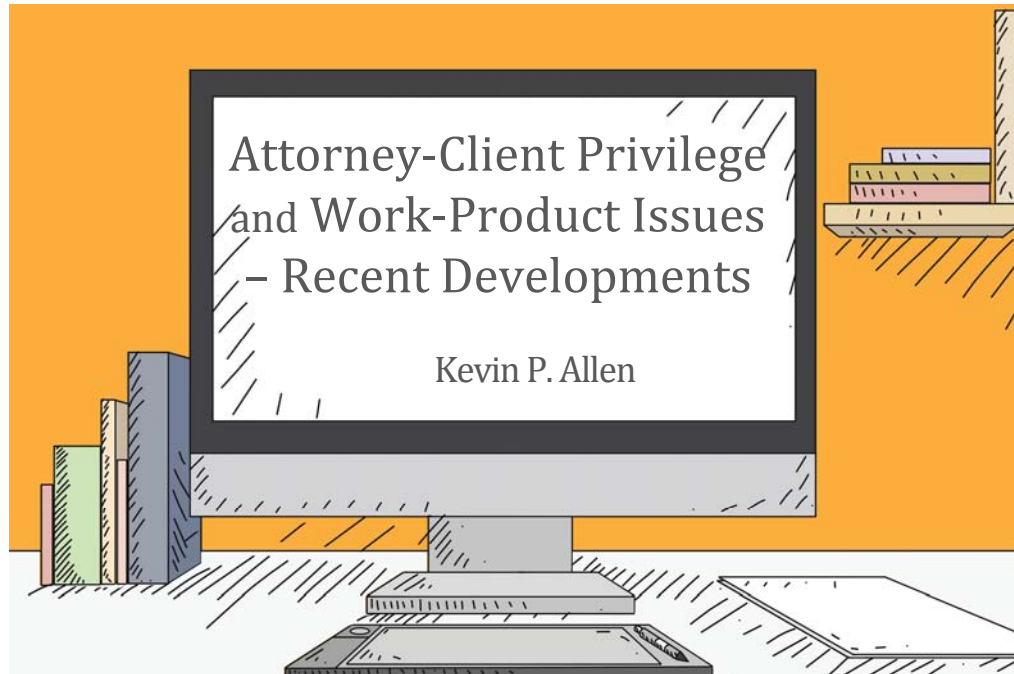
Speaking Engagements:

- "[Attorney-Client Privilege and Work Product Issues for Corporate Counsel](#)," presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2016.
- "The Attorney-Client Privilege and the Work-Product Doctrine in Pennsylvania," Pennsylvania Bar Institute 21st Annual Employment Law Institute, April 2015.
- "Preparing a Witness to Testify," Pennsylvania Bar Institute, March 30, 2015.
- "Pennsylvania Attorney-Client Privilege and Work-Product Doctrine," Pennsylvania Bar Institute Continuing Legal Education, December 2014.
- "Attorney-Client Privilege and Work-Product Issues for Corporate Counsel and Clients," presented at Eckert Seamans' Continuing Legal Education Seminar, August 2014.

- "Tortious Interference with Contract: Walking or Crossing the Line Between Vigorous Competition and Unfair Business Conduct," CLE seminar for in-house counsel presented by *The Legal Intelligencer*, June 2012; presenter at the Philadelphia Bar Institute 16th Annual Business Lawyers Institute, November 2010; Seminars for in-house counsel and corporate executives in Philadelphia, May 2010, and in Pittsburgh, October 2009.

Media Coverage:

- "First Amendment Violation? Facebook's Arguments on Alleged TCPA Violations May Fall Flat, Say Experts," *Communications Daily*, November 7, 2016.
- "Pennsylvania court rules against owner of landlocked plot seeking road across neighbor's land," *FoxBusiness.com*, August 29, 2014.
- "Court Eyes Discovery of Attorney-Expert Communication," *The Legal Intelligencer*, May 28, 2013.



LEGAL PRIMER: 2017 Update

August 3, 2017

What's the purpose?

- Why do we have an attorney-client privilege?

Restatement (Third) Law Governing Lawyers

☐ Elements

- a communication
- made between privileged persons
- in confidence
- for the purpose of obtaining or providing legal assistance for the client

Restatement § 68; *In re Grand Jury*, 705 F.3d 133
(3d Cir. 2012)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

“Privileged Person”

- ☐ Client
- ☐ Lawyer
- ☐ Agents of either who facilitate communications
- ☐ Agents of lawyer who facilitate the representation

Restatement § 70

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Functional Equivalent Doctrine

Courts may treat independent contractors as employees of a corporate/entity client for purposes of the attorney-client privilege if the particular contractor acted as the “functional equivalent” of an employee.

Endeavor Energy v. Gatto & Reitz, 2017 WL 1190499 (W.D. Pa. Mar. 31, 2017); but see BouSamra v. Excela Health, 2017 PA Super 235 (July 19, 2017).

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Endeavor Energy v. Gatto & Reitz, 2017 WL 1190499 (W.D. Pa. Mar. 31, 2017).



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

BouSamra v. Excelsa Health,
2017 PA Super 235 (July 19, 2017).



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Work Product

- ❑ Pennsylvania's rule (4003.3) is wildly different from the Federal rule (26(b)(3))
- ❑ Pennsylvania – Work Product Is Generally Discoverable
- ❑ Federal – Work Product Is Generally Protected from Discovery
- ❑ Pennsylvania has no “anticipation of litigation” requirement for attorney work product

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Estate of Paterno v. NCAA, 2017 PA Super 247 (July 25, 2017).



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania Has Different Treatment for Attorney Work Product and Non-Attorney Work Product



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Pennsylvania Has Different Treatment for Attorney Work Product and Non-Attorney Work Product

- Broader protection for attorney work product
- Very narrow protection for non-attorney work product
 - “Safety hazard” example

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



LEGAL PRIMER: 2017 Update

August 3, 2017

LAWYERS JOURNAL

Federal court endorses ‘functional equivalent’ doctrine for purposes of Pennsylvania’s attorney-client privilege

By Kevin P. Allen

Communications with an independent contractor working for a client can receive attorney-client privilege protection under Pennsylvania law provided that the independent contractor qualifies as the “functional equivalent” of an employee of the client. That was the holding in a recent decision from the U.S. District Court for the Western District of Pennsylvania in *Endeavor Energy Resources, L.P. v. Gatto & Reitz, LLC*, C.A. No. 13-cv-542, 2017 WL 1190499 (Mar. 31, 2017) (Cercone, J.).

In *Endeavor*, Don Estill was a “contract landman” for Endeavor Energy. Estill was an independent contractor, not an Endeavor employee. The discovery issue in *Endeavor* was whether the attorney-client privilege protected Estill’s communications with Endeavor’s lawyers. The opposing party argued that the attorney-client privilege did not apply because Estill, as an independent contractor, was not a client of Endeavor’s lawyers.

Endeavor conceded that Estill wasn’t an employee. Endeavor argued, however, that Estill was the “functional equivalent” of an Endeavor employee and that, consequently, the privilege protected Estill’s communications with Endeavor’s lawyers to the same extent that the privilege would protect an Endeavor employee’s communications with Endeavor’s lawyers.

The court noted that, while other federal courts had adopted the “functional equivalent” doctrine, the Pennsylvania state appellate courts had not yet weighed in on the issue. Thus, because *Endeavor* was a diversity action, the Endeavor court had to endeavor to predict if the Pennsylvania Supreme Court would adopt the “functional equivalent” doctrine.

The district court predicted that it would. The Endeavor court began with a fairly sweeping conclusion that “on a micro level the difference between independent contractors and employees as to the application of the attorney-client privilege is minimal at best.” Then, the court drew on treatises, other federal decisions and analogous Pennsylvania state court decisions to conclude that it’s more important to consider the purpose of the communications at issue than to focus on whether the nonattorney participant in those communications is an employee, agent or independent contractor of the client.



Kevin P. Allen

According to the court: the proper boundaries of the [attorney-client] relationship necessarily have to extend to those individuals who the corporation vests with the requisite authority to effectuate its legal interests and conduct its legal affairs. A rigid formula defining the individuals who can fall within the proper exercise of this authority would verge on an unworkable exercise in arbitrary line-drawing. We see no sound basis for engrafting such a requirement into Pennsylvania’s attorney-client privilege jurisprudence. ... [T]he functional-equivalent doctrine provides a fact-based inquiry that (1) is in line with current business trends, (2) is consistent with the established precedent, and (3) protects the purposes sought to be advanced

by the privilege without unduly extending its application.

The court then concluded that Estill “easily” qualified as the “functional equivalent” of an Endeavor employee because Estill “performed the same and similar tasks to those performed by Endeavor’s ‘landman’ employees.” Consequently, the court held that Estill would be treated as an Endeavor employee for purposes of evaluating whether the privilege would apply to a particular communication.

The court’s decision in *Endeavor* is consistent with a trend toward adoption of the functional equivalent doctrine. The decision and the trend, however, introduce uncertainty into the contours of the attorney-client privilege.

For instance, what should go into the “fact-based inquiry” needed to determine if an independent contractor is the “functional equivalent” of a client’s employee? In *Endeavor*, the Court held that Estill easily qualified as a “functional equivalent” because he “routinely performed the same type of work as Endeavor’s employees who worked in the land department.” What if Endeavor always had outsourced the landman function, or what if, at one point, Endeavor had internally employed landmen but later fully outsourced that job? In those circumstances, the outsourced landman would not be performing the same type of work as an employee because no employee would be doing that job at all. Would that make a difference in the fact-based inquiry for the functional equivalent doctrine?

Similarly, what if a client used only an outside accountant rather than an internal finance department? Or, what if a

company, rather than having an inside sales force, used only independent sales representatives? In that scenario, the outside accountant or independent sales representative would not be performing the same type of work as internal employees because the client/employer opted not to have anyone perform those functions internally. Would the functional equivalent doctrine nonetheless apply to those nonemployees? If not, how would that be logically consistent with the Endeavor decision and the court's focus there on the purpose of – and not the label applied to a participant in – the communication at issue?

And, must the communications with a functional equivalent of an employee be for the purpose of *obtaining* legal advice, or can legal advice be *disseminated* to a nonemployee contractor without waiving the privilege? Recently, in *Bousamra v. Excelsa Health*, No. 1637 WDA 2015, 2017 PA Super. 66, 2017 WL 959488 (Mar. 13, 2017), the Pennsylvania Superior Court held that a client waived the privilege by sharing with an outside public relations firm legal advice that the client had previously received. There, the argument was made (but was rejected) that the public relations firm should have been deemed the functional equivalent of an employee. Some companies have internal marketing and public relations employees. A client could share previously obtained legal advice with an internal public relations employee without waiving the privilege. Why then, under the Endeavor court's logic, should the client be precluded from sharing that advice with an outside public relations consultant, just as Endeavor was able to allow its outside landman to participate in privileged communications just like an employee landman?

The “functional equivalent” doctrine remains an unsettled matter in Pennsylvania. Lawyers and clients should not treat Endeavor as *carte blanche* to allow nonemployees access to privileged communications. Without proper caution, communications that client and counsel may consider protected from disclosure ultimately may wind up being subject to production and discovery by a future opposing party. ■

Kevin P. Allen is a partner in the litigation division of Eckert Seamans Cherin & Mellott, LLC. He is the author of “The Attorney-Client Privilege and Work-Product Doctrine in Pennsylvania” (PBI Press 2016), now in its fifth edition.

A recent decision from the Pennsylvania Superior Court serves as a reminder that lawyers and clients must guard carefully the confidentiality of privileged communications. If client or counsel is cavalier with the privilege, the protection from discovery that privileged communications enjoy can be lost irretrievably. See *Bousamra v. Excelsa Health*, No. 1637 WDA 2015, 2017 PA Super. 66, 2017 WL 959488 (Mar. 13, 2017).

Bousamra was a cardiologist with privileges at one of Excelsa Health's hospitals. Excelsa came to suspect that Bousamra was performing medically unnecessary procedures. Excelsa investigated and then publicly announced its findings, specifically naming Bousamra as a doctor who allegedly performed unnecessary procedures.

Bousamra sued Excelsa, claiming that the accusations were pretextual and made in retribution and for anti-competitive purposes after Excelsa attempted unsuccessfully to acquire Bousamra's practice.

The attorney-client privilege dispute arose because, prior to the public announcement at issue, Excelsa shared with its outside public relations firm ("PR Firm") legal advice that Excelsa had received.

Foster served as Excelsa's outside counsel. Foster issued an opinion letter to Excelsa regarding the propriety of identifying Bousamra in Excelsa's public announcement of its findings.

Excelsa had also hired the PR Firm to provide advice regarding the media implications of Excelsa's investigation and findings. Excelsa's in-house general counsel forwarded to the PR Firm a copy of Foster's legal opinion letter.

When Bousamra learned of the existence of Foster's opinion letter and that it had been shared with the PR Firm, Bousamra moved to compel production of the opinion letter arguing that any privilege had been waived. The trial court agreed, holding that Excelsa waived the privilege by forwarding Foster's opinion letter to the PR Firm.

Excelsa appealed.

Excelsa did not contest that it had provided Foster's letter to the PR Firm. Excelsa argued instead that doing so did not amount to a waiver of the privilege.

Excelsa relied on the principle that the privilege is not waived when a lawyer or a client communicates with a non-lawyer third party so long as the purpose of the third party's involvement is to help the lawyer provide legal advice to the client. For instance, if a lawyer, in order to provide sound legal

advice to a client needs to communicate with an outside accountant, the lawyer's or the client's communications with the accountant for that purpose should still be privileged and protected from disclosure because such communications are part and parcel of the lawyer's provision of legal advice to the client.

On appeal, the Superior Court agreed with the principle. The Court, however, held that the principle, while valid, did not provide any refuge for Excela. The Court emphasized that the privilege only applies in those circumstances when the third party's work is to assist the lawyer in providing legal advice to the client.

The Bousamra Court reviewed the record and found nothing to indicate that the PR Firm's work was undertaken to assist Excela's lawyers in providing legal advice. Instead, Foster provided legal advice, and the PR Firm provided public relations advice. The PR Firm's work did not assist Foster in formulating her legal advice. The PR Firm simply implemented Excela's decision to publicly identify Bousamra as an alleged malefactor. While that decision was based on and consistent with Foster's advice, the PR Firm did not assist Foster in the formulation of that advice:

[The PR Firm] was not an agent of the attorney, Ms. Foster. Ms. Foster did not seek advice or help from [the PR Firm] in rendering her legal opinion. [The PR Firm] was a separate legal entity, a media consulting firm, hired by Excela. Excela simply fails to establish . . . that [the PR Firm] was involved in the process of Ms. Foster's tender of legal advice.

The Court also dismissed out of hand any suggestion that the PR Firm could be treated as a part of Excela's organization, and thus within the protection of the privilege, because the Court found no factual support in the record for that proposition.

Because the PR Firm was an agent of neither counsel nor client in connection with the client's request for and receipt of legal advice, the PR Firm was not within the umbrella of the privilege. Therefore, Excela's disclosure to the PR Firm of what was initially a privileged document – Foster's opinion letter – constituted a waiver of the privilege and rendered the document discoverable.

In light of Bousamra, the critical question for lawyers is: Can I share this confidential communication with a person or entity who is not my client without waiving the privilege? The answer to that question frequently enough is "No, I cannot," such that significant caution must be exercised in all such instances. Lawyers must likewise educate, counsel, and remind clients not to disseminate privileged communications to third parties, or risk the result that befell the client in Bousamra.

* [Kevin P. Allen](#) is a partner in the litigation division of [Eckert Seamans Cherin & Mellott, LLC](#). He is also the author of *The Attorney-Client Privilege and Work-Product Doctrine in Pennsylvania* (PBI Press 2016), now in its fifth edition.



CRISIS RESPONSE: MANAGING, PROTECTING, AND RESTORING TRUST AND CONFIDENCE

Presented by:

Rafael M. Villalobos, Jr.

Member

Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102

215.851.8468
rvillalobos@eckertseamans.com



**PHILADELPHIA,
PENNSYLVANIA**

50 S 16th St.
22nd Floor
Philadelphia, PA 19102

P: 215 851 8468

F: 215.851.8383

rvillalobos@eckertseamans.com

PRACTICE AREAS:

[Health Care](#)

[Health Insurance Portability &
Accountability Act – HIPAA](#)

[Labor & Employment](#)

[Litigation](#)

[Nonprofits](#)

[Professional Liability](#)

[Regulated Substances](#)

[White Collar Defense & Internal
Investigations](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Eastern
District of Pennsylvania

EDUCATION:

J.D., Widener University Delaware
Law School, 1993

B.A., The American University, 1989

Executive MBA, Jack Welch
Management Institute (in progress)

Rafael M. Villalobos, Jr.

MEMBER

Rafael M. Villalobos, Jr., has dedicated his career to the representation of hospitals, health systems, physicians, and other health care providers. He focuses his practice in the areas of health law, medical staff issues, employer consulting, governance, internal investigations, physician misconduct and transactions on behalf of hospitals, health care systems, and physician groups.

Prior to joining Eckert Seamans, for over a decade, Rafael was the Chief Legal Counsel, Senior Vice President, and Director of Insurance and Claims for Aria Health System. He was responsible for all legal affairs and personally handled health law, transactions, employment issues, litigation management, corporate governance, risk avoidance, risk mitigation, dispute resolution, crisis management, physician misconduct, compliance, and internal investigations.

Rafael has returned to private practice and applies his knowledge and experience on behalf of clients in the health care segment. He focuses his practice on health law, employment law, physician misconduct, risk avoidance, risk mitigation, internal investigations, crisis management, litigation, conflicts of interest, corporate governance, corporate transactions, labor disputes, merger and acquisition activities, and dispute resolution. Utilizing advanced understanding of the pressures and competing interests within the health care segment, he provides practical, efficient, real world solutions to problems as well as nuanced guidance and proven judgment. He is admitted to practice in the Supreme Court of Pennsylvania and the U.S. District Court for the Eastern District of Pennsylvania.

As Chief Legal Counsel for Aria Health, Rafael was personally responsible for managing the legal affairs for a three hospital system, with roughly 500 licensed beds and over 4,000 employees in Philadelphia and Bucks Counties. He ensured compliance with laws and regulations. He provided counsel and guidance to avoid or mitigate risk. He regularly reviewed and negotiated contracts with service providers and physicians. Rafael was responsible for litigation management of professional and general liability cases as well as directors and officers and employment practices litigation. He was closely involved in the governance process and worked closely with and counseled the Board of Directors and the

executive team on a regular basis. Rafael was routinely called upon to assist with credentialing matters, employee relations, and drafting bylaws, policies and procedures. He lectured to the medical staff, medical residents, nursing staff and Board regarding various topics.

During his tenure, Rafael was involved with disaffiliation from a large system, re-branding, land acquisition, due diligence related to mergers and acquisitions, anti-trust analysis, ACO analysis, reductions in force, voluntary early retirement programs, and crisis management. He also sat on and actively participated in a number of hospital and board committees. Rafael also had significant administrative responsibility and oversight of various departments including Compliance, Internal Audit, Insurance and Claims, Risk Management, Human Resources, Security and Legislative Affairs.

Prior to his roles at Aria Health System, Rafael was a professional liability trial attorney for 13 years, representing hospitals, health systems, and physicians in catastrophic loss cases throughout the Philadelphia region.

PROFESSIONAL AFFILIATIONS

- American Health Lawyer Association
- Delaware County Bar Association
- Greater Philadelphia Chamber of Commerce
- Hispanic Bar Association
- Hospital Association of Pennsylvania
- Pennsylvania Bar Association
- Philadelphia Bar Association

NEWS AND INSIGHTS

Publications:

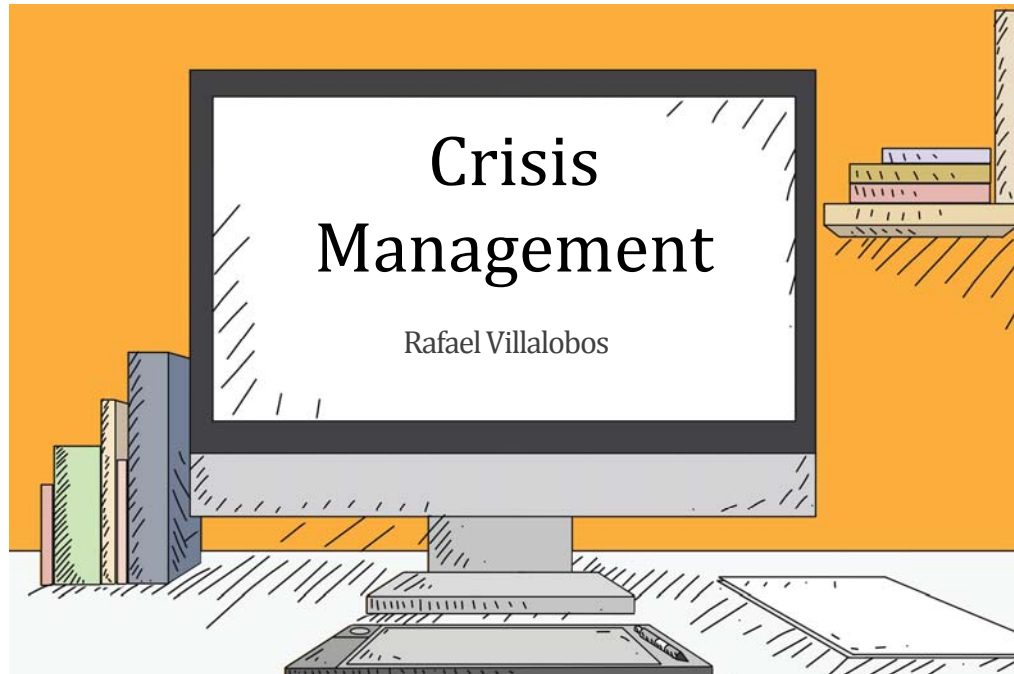
- "Best practices in compliance with highly regulated Suboxone treatment," *Becker's Hospital Review*, November 2016.

Speaking Engagements:

- "Trial of a Medical Malpractice Case" – Pennsylvania Bar Institute
- "Proving Damages" – Pennsylvania Bar Institute
- "Reduction in Force in Health Care Setting" – Delaware Valley Chapter of the Association of Corporate Counsel

Media Coverage:

- "[The Regulatory Challenges of Population Health Management](#)," *For The Record*, January 2017.
- "[How physician misconduct affects a hospital's bottom line: 4 thoughts from healthcare litigator Rafael Villalobos](#)" *Becker Hospital Review*, October 2016.
- "Eckert Seamans Hires Former Aria Health Chief Counsel" *The Legal Intelligencer*, September 7, 2016.



LEGAL PRIMER: 2017 Update

August 3, 2017



Staff at Aria Health's Frankford campus violated hospital policy by not checking on Joaquin Rivera before he died in the emergency room in November, a top hospital official said yesterday at a City Council hearing held to probe the school guidance counselor's death.



Aria: We didn't follow procedures

"The policy was in place but not adhered to," Linde Finsrud Wilson, chief operating officer of Aria Health, said during the three-hour session.

Attorney Thomas Kline, who has been retained by Rivera's family to file a civil lawsuit against Aria Health System, said that Rivera, 63, was a victim of medical negligence.

"There were blatant and flagrant violations of policies and procedures," Kline said after his testimony. "We need to judge Aria on its deeds to date, not its words."

According to a report released last month by the state Department of Health, Rivera, a musician and Olney High School counselor, died of a heart attack and was unattended for more than 40 minutes. The state report said hospital staff made extensive errors before, during and after Rivera's death.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Dying man robbed in Philadelphia ER waiting room

A school counselor suffering an apparent heart attack died in a Philadelphia emergency room after waiting nearly 80 minutes for help - and a trio of homeless drug addicts nearby stole his watch instead of seeking aid, police said.

By [MARYCLAIRE DALE](#)

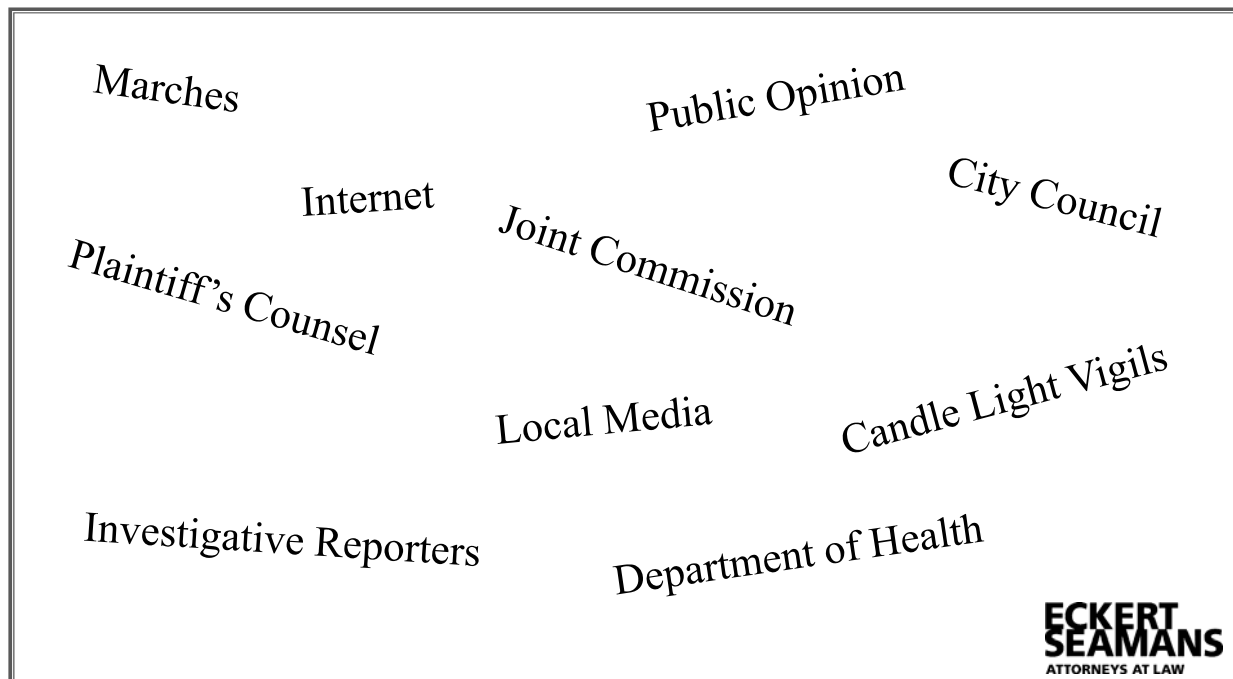
Associated Press

A school counselor suffering an apparent heart attack died in a Philadelphia emergency room after waiting nearly 80 minutes for help - and a trio of homeless drug addicts nearby stole his watch instead of seeking aid, police said.

Joaquin Rivera, 63, died before seeing a triage nurse at Atria Health's Frankford Campus over the weekend, police said.

Rivera, a musician and activist in the city's Latino community, had spent more than 30 years working as a bilingual counselor at an inner-city high school.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW





Lessons
Learned

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Get Out Front

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Public Relations



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Prepared Statement



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Board of Directors



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Story Morphs

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Accountability Not Blame



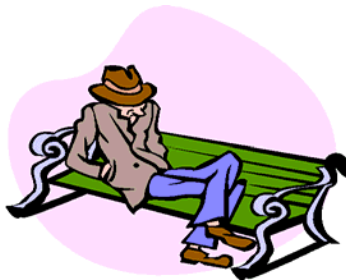
**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Triage Nurse



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Homeless



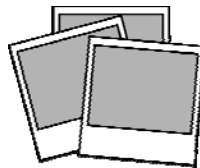
**ECKERT
SEAMANS**
ATTORNEYS AT LAW

911

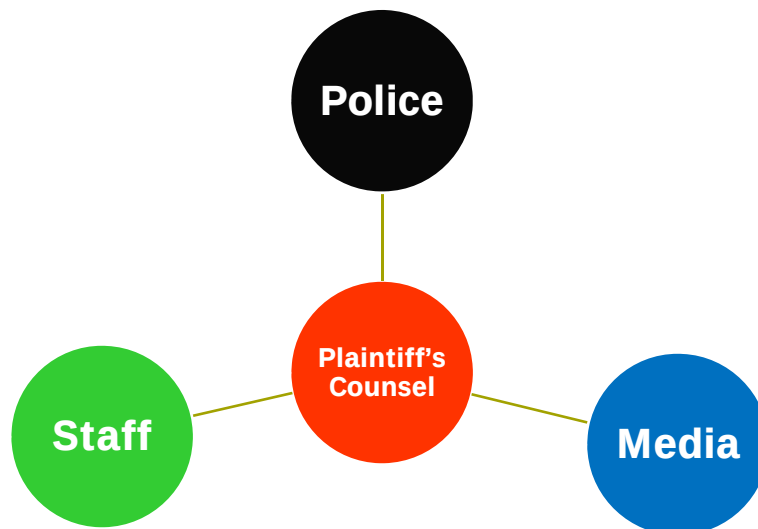


**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Videos & Photos



**ECKERT
SEAMANS**
ATTORNEYS AT LAW



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Internal Politics

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

EAP

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Internal Investigation



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Privilege

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

News Cycle



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Next Big Story



**ECKERT
SEAMANS**
ATTORNEYS AT LAW

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



LEGAL PRIMER: 2017 Update

August 3, 2017



MUNICIPAL BONDS BUILD AMERICA

Presented by:

Jennifer M. Caron

Member

Eckert Seamans Cherin & Mellott, LLC
213 Market Street, 8th Floor
Harrisburg PA 17101

717.237.6079
jcaron@eckertseamans.com

Dacia A. Haddad

Member

Eckert Seamans Cherin & Mellott, LLC
Two Liberty Place
50 South 16th Street, 22nd Floor
Philadelphia, PA 19102

215.851.6621
dhaddad@eckertseamans.com

HARRISBURG, PENNSYLVANIA

213 Market St.
8th Floor
Harrisburg, PA 17101

P: 717.237.6079

F: 717.237.6019

jcaron@eckertseamans.com

PRACTICE AREAS:

[Municipal Law & Governance](#)

[Public Finance](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Middle
District of Pennsylvania

EDUCATION:

J.D., The Dickinson School of Law
of The Pennsylvania State
University, 2005; The Woolsack
Society; Corpus Juris Society

B.A., summa cum laude, Dickinson
College, 2002



Jennifer M. Caron

MEMBER

Jennifer Caron concentrates her practice in the area of public and municipal finance. She serves as bond counsel in transactions involving the issuance of municipal securities by or on behalf of Pennsylvania counties, cities, townships, boroughs, school districts, and municipal authorities, and represents municipal securities underwriting firms, banking institutions, and corporations engaged in the municipal securities industry.

Prior to joining the firm, Jennifer practiced public and municipal finance and public utility law for several years at another private law firm in Harrisburg. Before entering private practice, she was a prosecuting attorney for the Commonwealth of Pennsylvania Office of General Counsel, Department of State, in the Bureau of Professional and Occupational Affairs, where she handled an array of administrative law matters for various licensing Boards in the Commonwealth. Jennifer also served as a judicial intern for the Honorable George Hoffer, President Judge of the Court of Common Pleas in Cumberland County, Pennsylvania.

REPRESENTATIVE MATTERS

- Serves as bond counsel for general obligation and revenue bonds for general government purposes.
- Serves in financings through the U.S. Department of Agriculture, the Pennsylvania Infrastructure Investment Authority, and bank municipal lending and leasing programs, in addition to bond market financings.
- Serves as underwriters' counsel to underwriting firms.

PROFESSIONAL AFFILIATIONS

- Dauphin County Bar Association
- Pennsylvania Bar Association
- National Association of Bond Lawyers
- Pennsylvania Association of Bond Lawyers
- Pennsylvania Municipal Authorities Association

COMMUNITY INVOLVEMENT

- American Heart Association, Capital Region, Go Red for Women Luncheon, "Personalities" Committee member
- Women in Public Finance, Member of the Mid-Atlantic (Ladies First) Chapter

NEWS AND INSIGHTS

Speaking Engagements:

- "The SEC Disclosure Rule, MCDC Initiative and Future Compliance" Co-Presented at the County Commissioners Association of Pennsylvania Fall Conference, November, 2015.
- "The SEC Disclosure Rule, MCDC Initiative and Future Compliance" Co-Presented at the Pennsylvania Municipal Authorities Association 73rd Annual Conference and Trade Show, August, 2015.
- "Post-Issuance Tax Compliance and Continuing Disclosure," Co-Presented at the Pennsylvania Bar Institute's CLE Program *Trends in Municipal Finance*, December 2012.



**PHILADELPHIA,
PENNSYLVANIA**

50 S 16th St.
22nd Floor
Philadelphia, PA 19102

P: 215.851.6621

F: 215.851.8383

dhaddad@eckertseamans.com

PRACTICE AREAS:

[Public Finance](#)

[Health Care](#)

STATE ADMISSIONS:

Pennsylvania

New Jersey

EDUCATION:

J.D., with honors, Rutgers
University School of Law, 2000

M.P.A., Rutgers University Graduate
School of Public Policy and
Administration, 2000

B.A., with honors, Rutgers
University, 1996

Dacia A. Haddad

MEMBER

Dacia Haddad focuses her practice on municipal and public finance matters. She represents issuers, banks, investment banks, borrowers, and interest rate swap providers in all aspects of public finance transactions. She provides advice with respect to structuring, re-structuring, offering, selling or placing, and issuing tax-exempt and taxable bonds, derivatives, and post-issuance tax and securities law compliance. Dacia works on virtually all types of public finance transactions for clients across a variety of industries and sectors such as health care (including hospitals and continuing care providers), energy and utilities, education, higher education, infrastructure, and multi- and single-family housing.

REPRESENTATIVE MATTERS

- Served as bond counsel and swap counsel to the City of Philadelphia in connection with the issuance of \$313,285,000 Revenue Refunding Bonds for its municipally-owned utility consisting of five series of revenue refunding bonds and related interest rate swap transactions.
- Regularly serves as bond counsel to a state housing finance agency in connection with the issuance of multi-family and single-family bonds, including for example, in connection with the issuance of \$66,800,000 of tax-exempt conduit revenue bonds, the proceeds of which were used to finance the rehabilitation, construction, and equipping of a condominium unit consisting of multi-family residential rental units and related retail improvements. The financed condo unit is a portion of a larger project consisting of the conversion of an unused department store into a mixed-use complex that will include multi-family low income and market-rate living units, arts and cultural center for the state university, and a grocery store and other retailers on the ground level. The bonds were a portion of the capital stack that financed the total project, which also included residential and commercial tax credits from the state, Section 42 tax credits, and developer equity. The financing structure used in this transaction was the first of its kind in the state.

- Represented a nonprofit senior living organization in connection with borrowing the proceeds of \$40,320,000 of revenue bonds issued by an industrial development authority and, concurrently with the issuance of the bonds, negotiated with an existing lender to accept a parity obligation under the master trust indenture.
- Served as bond counsel to a railroad in connection with the issuance of multiple series of bonds secured and payable solely from certain grant receipts paid to the railroad under the Federal Transit Administration Section 5307 Urbanized Area Formula Funds, Section 5309 Fixed Guideway Modernization Formula Funds Programs, and Section 5337 State of Good Repair Formula Funds.
- Served as underwriter's counsel on the issuance of \$477,245,000 Federally Taxable Revenue Bonds (Qualified School Construction Bonds – Direct Subsidy) and (Qualified Zone Academy Bonds – Direct Subsidy) issued by a state education financing agency in a pool deal structure with 31 underlying state school district borrowers.

PROFESSIONAL AFFILIATIONS

- National Association of Bond Lawyers
- Pennsylvania Association of Bond Lawyers, President
- Ladies First, Mid-Atlantic Women in Public Finance Forum, Vice President and President-Elect

COMMUNITY INVOLVEMENT

- Alice Paul Institute, Volunteer and Former Member of the Board of Trustees

AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers – Rising Stars*

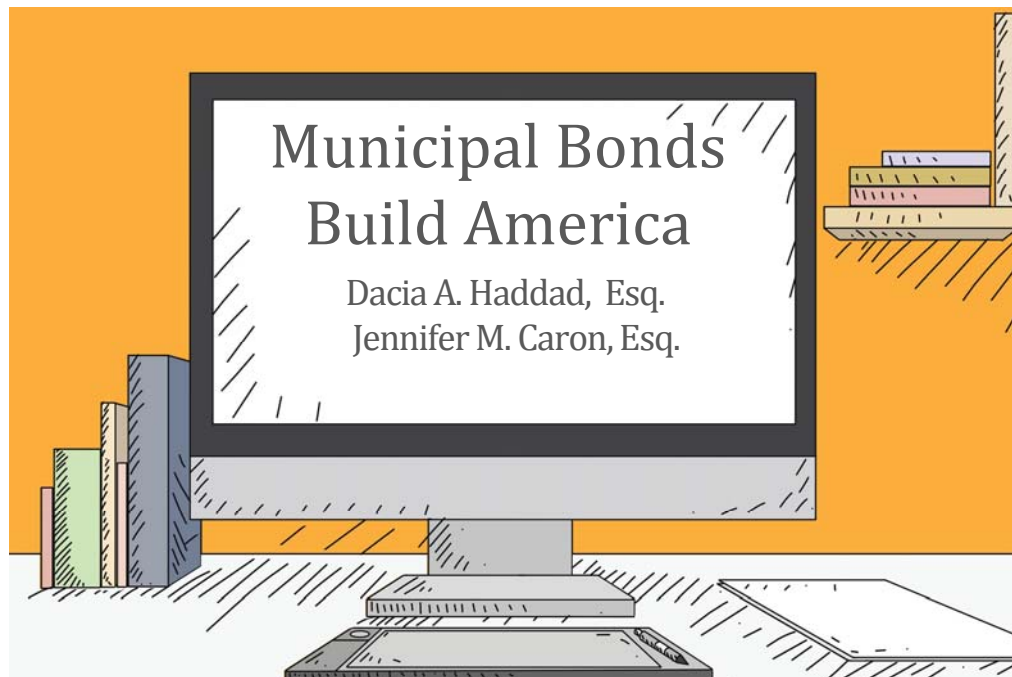
NEWS AND INSIGHTS

Publications:

- "Public Finance Law—Building America," co-authored chapter in *Lawyers as Economic Drivers: The Business Case for Legal Services*, 2012.

Media Coverage:

- "Stern, Stein, Tuteur, Haddad and Benzing — The Legal's Top Lateral Hires of 2014," *The Legal Intelligencer*, February 24, 2015.



LEGAL PRIMER: 2017 Update

August 3, 2017

What do Municipal Bonds Build?

- ☐ Schools (public and private)
- ☐ Roads
- ☐ Bridges
- ☐ Airports
- ☐ Sewer and Water Systems
- ☐ Solid Waste Facilities
- ☐ Multifamily Housing
- ☐ Charter Schools
- ☐ Hospitals and Senior Living Facilities
- ☐ Museums and Cultural Venues
- ☐ Sports Stadiums

What is a Municipal Bond?

- Debt instrument issued by a state or local governmental issuer on its own behalf or on behalf of certain qualified entities to finance capital projects or certain cash flow needs or to refund existing obligations
- Tax-Exempt or taxable
 - Federal and, in many cases, state and local tax exemptions
- General Obligation or Revenue Bonds
- Public benefit: generally, lower cost of borrowing for state and local governments equals lower taxes and/or rates

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What is a Municipal Bond – Continued

- General Obligation Bonds
 - Backed by the full faith, credit and taxing power of the issuing jurisdictions
 - Local governments (city, townships, boroughs and school districts) – ad valorem property taxes
 - State governments – occasionally real estate, but mostly sales and income taxes
 - “Full faith and credit” means all sources of revenue, unless specifically dedicated to another purpose, will be used to pay debt obligations
- Examples of General Obligation Bond Issues:
 - \$821,745,000 School District of Philadelphia General Obligation Bonds (Bond Counsel)
 - \$6,185,000 Huntingdon County General Obligation Bonds (Bond Counsel)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

What is a Municipal Bond - Continued

- Revenue Bonds
 - Generally issued to finance a specific revenue-generating project and are usually payable solely from the revenues generated by that project
 - Can also be secured by a mortgage on the project (if for a non-governmental issuer or borrower) or some other form of collateral
 - Revenue Bonds are generally considered higher risk investments than G.O. Bonds and usually bear higher interest rates
- Examples of Revenue Bond Issues:
 - \$9,995,000 South Middleton Township Municipal Authority Water and Sewer Revenue Bonds (water and sewer system infrastructure) (Bond Counsel)
 - \$2,741,425,000 of New Jersey Transportation Trust Fund Authority Federal Highway Reimbursement Revenue Notes (state transportation system improvements) (Underwriter's Counsel)
 - \$63,720,000 Chester Water Authority Water Revenue Bonds (Bond Counsel)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Traditional Municipal Bonds vs. Conduit Bonds

- “Munis”
 - Most frequently issued type of municipal bond
 - issued to provide funds for “classic” governmental projects – roads, bridges, schools, water, sewer, or other general governmental capital improvements
 - No federal limit to the amount of tax-exempt debt governments can finance, however, local and state governments are subject to constitutional and state law debt limitations
 - Hundreds of billions of dollars in traditional Munis are sold annually

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Traditional Municipal Bonds vs. Conduit Bonds - Continued

□ Conduit Bonds

- Bond Proceeds lent by a governmental issuer to a third party (the conduit borrower) who is authorized by law to use municipal bond proceeds
- Conduit borrower is responsible for the repayment of the debt obligation
- Conduit borrowers can include 501(c)(3) organizations such as hospitals, senior living facilities, religious organizations, universities and charter schools
- Conduit bonds are used for projects that primarily benefit entities, rather than the general public, but yet also serve a public purpose
- Conduit bonds can also be issued for the benefit of for-profit entities if such bonds constitute exempt facility bonds
 - Can be issued on a tax-exempt basis, under certain conditions, to provide for certain facilities specified in the Internal Revenue Code including:
 1. Airports *
 2. Docks and wharves *
 3. Mass Commuting facilities *

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Traditional Municipal Bonds vs. Conduit Bonds - Continued

4. Facilities for the furnishing of water
5. Sewage facilities
6. Solid waste disposal facilities
7. Qualified residential rental projects
8. Facilities for the local furnishing of electric and gas *
9. Local district heating and cooling facilities
10. Qualified hazardous waste facilities
11. High speed intercity rail facilities
12. Environmental enhancement of hydroelectric generating facilities *
13. Qualified public educational facilities
14. Qualified green building and sustainable design projects
15. Qualified highway or surface freight transfer facilities

* Caveat -- facilities listed in 1, 2, 3, 8 and 12 must be governmentally owned

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Traditional Municipal Bonds vs. Conduit Bonds - Continued

- Recent Examples of Conduit Bond Issues:
 - \$21,590,000 Fulton County Industrial Development Authority (issued for the benefit of Fulton County Medical Center) (Bond Counsel)
 - \$57,707,470 Philadelphia Authority for Industrial Development Revenue Bonds (issued for the benefit of the Wistar Institute of Anatomy and Biology, a non-profit biomedical and research facility) (Bank Counsel)
 - \$800,000,000 Public Finance Authority Limited Obligation PILOT Revenue Bonds (American Dream @ Meadowlands Project) (Bond Counsel to New Jersey Sports & Exposition Authority)
 - \$287,000,000 Public Finance Authority Limited Obligation PILOT Revenue Bonds (American Dream @ Meadowlands Project) (Bond Counsel to New Jersey Sports & Exposition Authority)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Examples of the Federal Government's Impact on Municipal Bonds and Government Financing of Infrastructure

- Proposals to eliminate the tax-exemption for municipal bonds
- Federal laws provide money that “enhance” municipal and state financing of infrastructure programs:
 - Title 23 of the U.S. Code – Federal AID-Highway Programs
 - Established under the Federal AID-Highway Act of 1956; has been continued by successor statutes
 - Generally, federal grant funds are provided to state and local governments pursuant to federally-established formulas
 - Primarily used to finance highway operation and maintenance projects
 - State and local governments are able to securitize the receipt of future grant monies expected to be received pursuant to the Federal AID-Highway Program to finance projects in the present

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Federal Government Impacts -- Continued

- Clean Water State Revolving Funds (“CWSRF”) – established pursuant to the Clean Water Act in 1987 and amended in 2014.
 - Building on a federal investment of \$41 billion CWSRFs have provided more than \$118 billion to communities through 2016
 - Often combined with tax-exempt bonds to provide extremely low cost financing for publicly-owned wastewater treatment systems and storm water, water conservation, energy efficiency and estuary projects
 - Interest rates often around 1% versus typical interest rates of 4 or 5%

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



LEGAL PRIMER: 2017 Update

August 3, 2017



10 HOT TOPICS IN LEASING 2017

Presented by:

James A. Pellow, III

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.1986
jpellow@eckertseamans.com

Eric J. Zagrocki

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.1987
ezagrocki@eckertseamans.com

PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.1986

F: 412.566.6099

jpellow@eckertseamans.com

PRACTICE AREAS:

[Real Estate](#)

[Business Counseling](#)

[Energy](#)

[Shale Gas](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Western
District of Pennsylvania

U.S. Supreme Court

EDUCATION:

J.D., cum laude, University of
Pittsburgh School of Law, 1981

B.A., The Pennsylvania State
University, 1976



James A. Pellow, III

MEMBER

Jim Pellow focuses his practice in the areas of commercial real estate, corporate, and business law; finance; contracts; and business transactions. He represents clients engaged in commercial real estate development and office and retail leasing. Jim is experienced in the full range of commercial real estate transactions, including purchase and sale agreements, deeds, easements, leases, title and survey, and mortgage lending. He also has an active oil and gas practice, representing gas producers in various transactions.

REPRESENTATIVE MATTERS

Real Estate:

- Development, purchase, and sale of shopping centers, business parks, office buildings, and other commercial properties.
- Mortgage based financing as counsel to both borrowers and lenders.
- Real estate syndications as counsel to both developers and investors.
- Commercial leases, including retail, office, flex space, and other leasing matters, as counsel to both landlords and tenants.
- Billboard acquisitions and related transactions.
- Representation of real estate brokers and property managers.

Oil & Gas:

- Representation of producers and operators in the leasing, farmout, sale, and assignment of oil and gas interests.
- Representation of a large regional energy company in drafting and revising oil and gas lease forms.
- Representation of a regional gas company as local counsel in sale of 100,000 acres of oil and gas properties in Pennsylvania, including advice on gas leases and title curative matters, ongoing quiet title actions, and Pennsylvania law.

- Representation of oil and gas working interest owners in an action against the operator for an accounting under the Joint Operating Agreement.
- Representation of holders of well participation rights in an action to enjoin the Operator from drilling imprudent wells.
- Representation of a gas lessee who sought to terminate its farmout agreement and recover the acreage where the farmouttee failed to timely commence drilling of required gas wells.
- Representation of a group of oil and gas lessees in the negotiation of an option agreement for the proposed development of a gas storage reservoir covering 18,000 acres.

General Business Matters:

- Acquisitions of going business concerns including equity, mezzanine, and commercial financing.
- Advises clients regarding contracts and other day-to-day business matters.
- Assists corporations, partnerships and limited liability companies from initial formation and capitalization through merger, dissolution, and winding up activities.
- Represents both lenders and borrowers in asset-based and mortgage-based financing.
- Commercial real estate and oil & gas litigation.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association
- Pennsylvania Bar Association
- Energy and Mineral Law Foundation
- Marcellus Shale Coalition
- Licensed Pennsylvania Real Estate Broker

NEWS AND INSIGHTS

Speaking Engagements:

- "Analyzing Land Surveys," presented at the National Business Institute program *Real Estate Transactions From A to Z*, March 2016.
- "Legal Update: Mechanics' Lien Law, Warranty Provisions and Home Improvement Consumer Protection Act," co-presenter, Builders Association of Metropolitan Pittsburgh's Professional Education and Building Industry Trade Show, February, 2015.
- "Negotiating Key Contract Provisions," co-presenter, Fracking Law seminar, National Business Institute, August 13, 2012.

- Oil and gas leasing, co-presented with LuAnn Datesh, vice president of Land Resources for CONSOL Energy, CONSOL Land Super School, March 26, 2012.
- "What's New In Mineral Rights," What You Need to Know About Mineral Law NOW, National Business Institute Program, December, 2011.

Media Coverage:

- "Nearly \$200,000 in attorney fees sought in oil, gas lease fight," Westlaw Journal Environmental, January 18, 2017.

PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.1987

F: 412.566.6099

ezagrocki@eckertseamans.com

PRACTICE AREAS:

[Real Estate](#)

[Hospitality](#)

[Business Counseling](#)

[Shale Gas](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. District Court for the Western
District of Pennsylvania

EDUCATION:

J.D., Duquesne University School of
Law, 1992

B.A., University of Notre Dame,
1988



Eric J. Zagrocki

MEMBER

Eric Zagrocki is experienced in a broad range of real estate and corporate matters. He concentrates his practice in the area of commercial real estate and has represented sellers, purchasers, developers, lenders, landlords, and tenants in a wide variety of matters relating to the purchase, sale, leasing, and finance of commercial real estate. Additionally, Eric has represented both lenders and borrowers in multiple commercial financing matters. He also has extensive experience in the counseling of developers and contractors regarding condominium and homeowner association matters.

REPRESENTATIVE MATTERS

- Assisted a regional public transportation company with the expansion of its facilities.
- Responsible for the real estate segment of the liquidation sale of a large regional health system, including the sale of each of its multiple campuses and real estate holdings.
- Counseled multiple hospitality clients with acquisition and administration of hotel portfolios.
- Represented a national retail company with the refinancing and restructuring of its operations in over 40 states.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association
- Pennsylvania Bar Association
- Duquesne University School of Law Alumni Association, Board of Governors, Vice President; Former Treasurer

COMMUNITY INVOLVEMENT

- Pittsburgh Vintage Grand Prix Association, Operating Committee Member

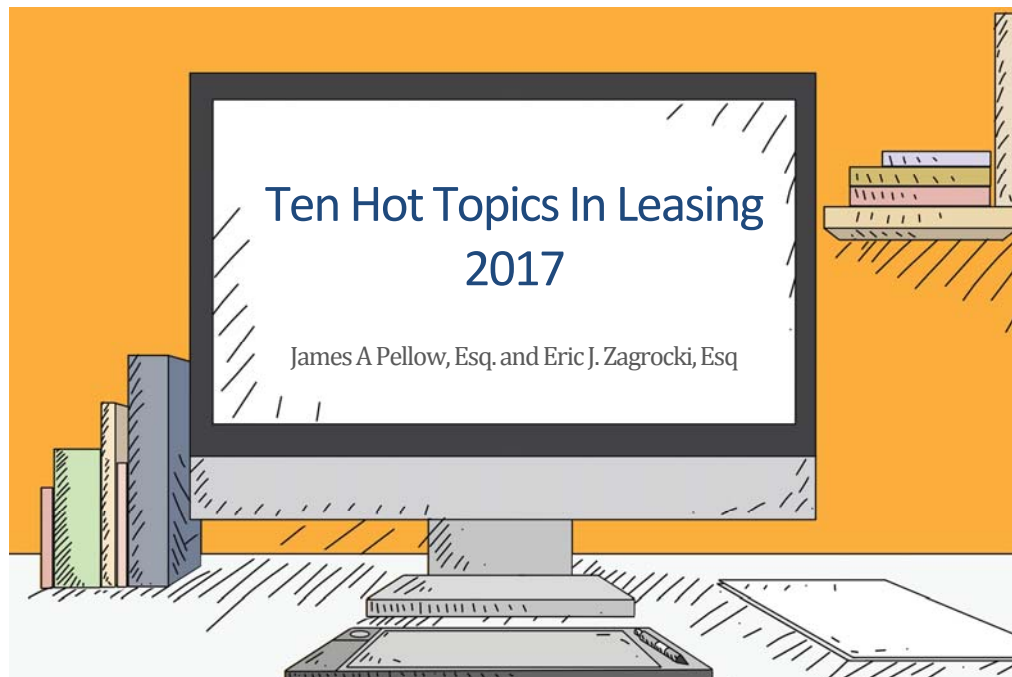
NEWS AND INSIGHTS

Publications:

- "Long Term Hotel Guests Might Not Be So Easy to Remove," co-author, *Hospitality Lawyer Converge blog*, September 2015.

Speaking Engagements:

- "Legal Update: Mechanics' Lien Law, Warranty Provisions and Home Improvement Consumer Protection Act," co-presenter, Builders Association of Metropolitan Pittsburgh's Professional Education and Building Industry Trade Show, February 2015.
- Duquesne University Term Lecture Series on Civility and Professionalism, coordinator, sponsored by Eckert Seamans.



LEGAL PRIMER: 2017 Update

August 3, 2017

OPENING COMMENTS

- ❑ Pennsylvania statutes generally do not require or prohibit specific commercial lease terms
- ❑ The prime directive in commercial leasing is “everything is negotiable”
- ❑ Issues are usually resolved by the relative bargaining strength of the parties
- ❑ “Hot Issues” – Focus is on areas where we have seen recent changes

1. “GREEN LEASES” AND LEED CERTIFICATION

“LEED” = LEADERSHIP IN ENERGY AND ENVIRONMENTAL DESIGN

LEED was developed by United States Green Building Council

LEED is a voluntary green building certification program

WHY IS LEED HOT?

LEED is becoming more well known and accepted

Landlords and Tenants want to demonstrate they are responsible and caring

- ❖ To customers
- ❖ To employees
- ❖ To the community

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

1. “GREEN LEASES” AND LEED CERTIFICATION

LEED programs coordinate all BUILDING PHASES:

- ❖ Site selection
- ❖ Design
- ❖ Construction

LEED offers RATING SYSTEMS for environmentally responsible:

- ❖ Building Design
- ❖ Building Construction
- ❖ Building Operation
- ❖ Building Maintenance

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

1. “GREEN LEASES” AND LEED CERTIFICATION

LEED rating systems give POINTS for

- ❖ Energy saving building structures
- ❖ Ecologically friendly building materials
- ❖ Energy saving building systems and fixtures
- ❖ Water saving fixtures
- ❖ Renewable energy use (solar panels)
- ❖ Lifestyle enhancement (open space, green areas, social areas)

LEED Costs and Disadvantages

- Requires detailed planning **early** in the development process
- Encourages use of new and **untested** technologies
- Compliance is **expensive**
- Compliance is becoming **mandatory**

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

2. ASSIGNMENT AND SUBLETTING

ASSIGNMENTS/SUBLEASES

- ❑ Absent a specific provision in a Lease prohibiting assignment or subletting, a lease can be freely assigned or sublet.
- ❑ Landlord’s draft usually contains a provision that simply states that no assignment or sublease of the Premises is permitted
- ❑ Assignments, and to a lesser extent, sublease provisions, are now being drafted to include corporate equity transfer, restructurings, estate planning issues, trust/trustee issues, death of shareholders and other non-traditional provisions

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

2. ASSIGNMENT AND SUBLETTING

Sample provision: “Any transfer of more than 50% of the direct or indirect voting rights or economic interests in Tenant, in Tenant’s manager or managing member (if Tenant is a limited liability company) or in any general partner of Tenant (if Tenant is a limited partnership or general partnership) shall constitute an assignment of this Lease which shall be prohibited and which shall, at Landlord’s sole option and upon written notice to Tenant, constitute an Event of Default.”

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

2. ASSIGNMENT AND SUBLETTING

- ❑ From a Tenant’s standpoint, any consent required by Landlord should not be “unreasonably withheld, conditioned or delayed”.
- ❑ A Landlord should not be permitted to control business operations of the Tenant.
- ❑ Carve-outs or a specific list of permitted transfers.
- ❑ Landlord will often ask for review fees for any attempted assignment or subletting.
- ❑ It is not unreasonable for Landlord’s standard leasing requirements to apply to assignee/subtenant: Financial condition, use, reputation, experience, etc.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

3. USE RESTRICTIONS

Landlord - wants to restrict the permitted use to a single, well defined use

Tenants - wants to be able to use the leased premises for “any legal purpose”

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

3. USE RESTRICTIONS

Tenant – Check that primary business use is included within the definition of permitted

- ☐ Recent lease contained the following:
 - Landlord’s obligation – Install 25-ton overhead crane
 - Permitted Use - Office Space Only
- ☐ Long Term Leases Require Flexibility
 - Anticipate changes to business
 - Grocery store of 1950 vs. Today

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

3. USE RESTRICTIONS

Landlord

- Vested interest in protecting its property
- No dangerous articles, illegal uses, negative uses
 - Hazardous Materials
 - Illegal Drugs
 - Strip Clubs
- Interest in balancing a office/retail center
 - Do not want two grocery stores
 - Non-retail uses – Spa next to shoe store
 - Poor mix – Church next to Tattoo Parlor
 - Landlord must be cautious of Tenant exclusives

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

4. INSURANCE, INDEMNITY AND WAIVERS OF SUBROGATION

Insurance And Indemnity Provisions In Commercial Leases

Insurance: management of risk and recovery:

- * Allocate Risks
- * Allocate Obligations to Insure

Indemnity: covers uninsured matters

Waiver of Subrogation: supports insurance allocations

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

4. INSURANCE, INDEMNITY AND WAIVERS OF SUBROGATION

Typical Lease Provisions: Key is for the insurance to follow the ownership of insured property

Fire and Casualty Insurance

Landlord insures Building and Property

Tenant insures Contents

General Liability Insurance: each party carries their own coverage

Possible Conflict in Lease Provisions: Requiring party to indemnify for damages it causes to other party's property may conflict with insurance provisions

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

4. INSURANCE, INDEMNITY AND WAIVERS OF SUBROGATION

Solution:

Waiver of Subrogation (claims for reimbursement by insurer)

Supported with **Waiver of Claims**

Harmonize Lease Provisions:

Insurance Policies must reflect Lease provisions

Get your insurance agent involved early!

Obligation to repair casualty damage must reflect Insurance provisions

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

5. GROUND UP LEASES IN THE INDUSTRIAL CONTEXT

Concern of tenants leasing industrial sites:

Superfund liability under **CERCLA** for **hazardous materials**

Owners **and tenants** potentially liable

Costs to **clean up** hazardous materials

Even if tenant **did not** generate or dispose of the hazmat

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

5. GROUND UP LEASES

Protection against tenant liability for existing contamination:

“**Innocent Purchaser**” Defense under CERCLA:

“**All due inquiry**” prior to leasing

Phase I report

Phase II report (soil samples)

What if you still suspect the property is contaminated?

Hot new topic: **GROUND UP LEASE**

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

5. GROUND UP LEASES

Ground Up Lease – special provisions:

Premises include only the surface, buildings and support

Tenant has no access to the subsurface

Landlord solely responsible for legal compliance of the subsurface

Landlord solely responsible for all existing subsurface conditions

Operating lease, not a capital lease

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

6. REIMBURSABLE OPERATING COSTS

Three Categories of Leases

- Gross leases are all inclusive
- Triple net leases require the tenant to reimburse landlord for all operating costs
- Everything in between

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

6. REIMBURSABLE OPERATING COSTS

- The latest trend in the leasing market is for landlords to include more capital expenditures within reimbursable operating costs
- To the Landlord - this makes sense since in a long term lease, tenant is essentially “using up” the building
- Even in short term leases, Landlords are now including the costs to replace the roof and repave the parking lot and other “capital” costs as part of the reimbursable operating costs
- Landlord asks for pro-rata costs

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

6. REIMBURSABLE OPERATING COSTS

Negotiating Operating Cost Provisions:

First Method - negotiate the reimbursable operating costs item by item.

- There are literally a hundred different operating costs to consider
- Some things more accepted than others
 - Yes - Landscaping, snow removal, common area utility costs
 - No – Costs to lease the building, financing charges, utilities metered to other tenants

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

6. REIMBURSABLE OPERATING COSTS

Second Method – Year over year cap

- Landlord may not charge more than a percentage of prior year
- Cap often does not apply to Taxes, Insurance and Utilities
- Eg. – no more than 5% increase per year
 - Year 1 – 100%
 - Year 2 – 105%
- What happens if Year 2 increase is only 3%?
 - Only increase 5% from prior year - Year 3 – 108.15; or
 - True 5% every year - Year 4 – 110%

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

6. REIMBURSABLE OPERATING COSTS

Tenant Audit Rights:

- Keeps Landlord diligent
- Rarely used if costs are reasonable
- Landlord usually accepts but accountant cannot be engaged on a contingency basis

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

7. LANDLORD SELF-HELP AND SECURITY INTERESTS

Common law: Landlord self-help was the norm:

- Eviction by force
- Distrain and sale of tenant's property

Modern law:

Landlord Self-help denies **due process rights**:

- To prior notice
- To prior opportunity to be heard in court

Landlord self-help may constitute:

- A denial of civil rights (*Wofford v. Vavreck*, 22 Pa. D.&C.3d. 444, 1981)
- A tort (*Williams v. Guzzardi*, 875 F.2d 46, 3rd Cir. Ct. 1989)

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

7. LANDLORD SELF-HELP

Prohibited landlord self-help includes:

Eviction without civil process

Summary Eviction by district justice

Court of Common Pleas

Seizing tenant's property without civil process

Distrain is facially unconstitutional: *Smith v. Coyne*, 555 Pa. 21 (1999)

Indirect eviction

- ❖ Changing the locks
- ❖ Turning off utilities

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

7. LANDLORD SECURITY INTEREST

Selling tenant's property to pay back rent

Can still be accomplished via UCC Article 9 Security Interest

Grant of security interest must be in the Lease

Consider filing UCC-1 Financing Statement to perfect

Still may require civil process (sheriff) to seize and sell tenant property

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

7. LANDLORD SECURITY INTEREST

What if tenant vacates and leaves property behind?

If lease language permits, landlord can take possession by self-help

Landlord Tenant Act now permits landlord to dispose of abandoned property

Be wary of seizing third party property in leased premises

Leased copiers, printers, office equipment

Consigned goods

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

8. MITIGATION OF DAMAGES

LEASES: CONTRACTS OR ESTATES IN PROPERTY?

COMMON LAW: a Lease is an **Estate for Years**

A tenancy or right to occupy land

MODERN LAW: a Lease is a **Contract**

All contracts imply a duty of the non-breaching party

To **mitigate** (lessen) its damages

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

8. MITIGATION OF DAMAGES

STONEHEDGE SQUARE LTD. V. MOVIE MERCHANTS, INC.

715 A.2d 1082 (Pa. 1998)

Pennsylvania Supreme Court Held:

A **commercial lease** is an **estate in property**, and

No duty of landlord **to mitigate damages** will be implied.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

8. MITIGATION OF DAMAGES

Tenants must be alert to include mitigation language in the Lease.

Landlords will want to mitigate the mitigation:

- ❖ Only required to use “commercially reasonable efforts” to re-let the premises
- ❖ Re-letting of premises only on terms and conditions agreeable to landlord
- ❖ Not required to mitigate by leasing other space in the building
- ❖ Not required to mitigate by leasing other properties of landlord

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

9. SUBORDINATION, NON-DISTURBANCE AND ATTORNMENT AGREEMENTS (SNDA)

- ☐ The Lease provides privity of contract between landlord and tenant
- ☐ Lender and Tenant simply share a connection through the landlord
- ☐ SNDA protects the Tenant in case of foreclosure

- ☐ **Caution** – Avoid overlooking the SNDA as mere boilerplate

- ☐ Many form provisions do not protect Tenant to any meaningful degree
- ☐ Reality - it is unlikely that a new owner will want to remove the tenant unless the building is being repositioned or the Lease is substantially below market

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

10. POTPOURRI OF LEASE ISSUES

- We have seen more and more leases contain the following provisions.
 - Request for Financial Statements – Ask Why Needed – Not a Deemed Insecure Provision
 - Tenant Relocation Clauses – Reasonable – Landlord Should Pay Costs – Letterhead?
 - Early Termination Clauses – Longer Term with and out rather than short term with options
- Tenant Remedies
 - Consider the interests of Landlord and Tenant
- Transfer Tax on a Lease
 - Tax applies if term is 30 years or more – Calculated Value
 - Must watch option periods
 - Saturday Family LP v. Commonwealth of Pennsylvania

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



LEGAL PRIMER: 2017 Update

August 3, 2017



REPEAL AND REPLACE? AN UPDATE ON THE AFFORDABLE CARE ACT

Presented by:

Sandra R. Mihok

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.1903
smihok@eckertseamans.com

Heather Stone Fletcher

Member

Eckert Seamans Cherin & Mellott, LLC
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

412.566.6112
hfletcher@eckertseamans.com



PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.1903

F: 412.566.6099

smihok@eckertseamans.com

PRACTICE AREAS:

[Employee Benefits & Executive Compensation](#)

[Health Care](#)

[Health Insurance Portability & Accountability Act – HIPAA](#)

[Tax](#)

[Data Security & Privacy](#)

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

U.S. Court of Appeals for the Third Circuit

EDUCATION:

J.D., magna cum laude, Duquesne University School of Law

B.A., summa cum laude, University of Pittsburgh

Sandra R. Mihok

MEMBER
CHAIR, EMPLOYEE BENEFITS & EXECUTIVE
COMPENSATION
VICE-CHAIR, WOMEN'S INITIATIVE AT
ECKERT (WIE)

Sandra Mihok acts as outside benefits counsel for plan sponsors and fiduciaries, advising on special projects and day-to-day matters involving employee benefit plan administration and tax, Employee Retirement Income Security Act (ERISA), and Health Insurance Portability and Accountability Act (HIPAA). She plays a key role in her clients' fiduciary compliance management by regularly attending plan committee meetings and providing training, education, and advice.

She specializes in matters ranging from qualified retirement plans and executive compensation to health and welfare and retiree medical benefits. Sandra regularly represents clients in matters involving the Internal Revenue Service (IRS), Department of Labor (DOL), Pension Benefit Guaranty Corporation, and Department of Health and Human Services (HHS) on issues such as government audits, voluntary corrections under the IRS and DOL correction programs, and HIPAA investigations.

REPRESENTATIVE MATTERS

- Provides plan sponsors and fiduciaries with consulting, advice, and practical solutions for the design, drafting, operation, and communication of tax-qualified retirement plans, including defined pension plans; cash balance plans; 401(k) plans; profit sharing plans; employee stock ownership plans; health, disability, life, severance and other welfare benefit programs; nonqualified deferred compensation arrangements; and governmental plans of state and local governments.
- Provides fiduciary training, education, and advice to plan administration and investment committees.
- Provides plan sponsors, fiduciaries, and health care providers with counseling and advice on privacy and data security issues under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) for employers and health care providers including negotiating business associate agreements.

- Has successfully resolved IRS, DOL, and HHS audits and investigation resulting in abated or significantly reduced penalties.
- Assists the firm's litigation department in ERISA litigation matters, including matters involving federal bankruptcy court, the federal district courts, and federal courts of appeals.

PROFESSIONAL AFFILIATIONS

- Duquesne University School of Law, Adjunct Professor of Law
- Pittsburgh Business Group on Health (PBGH), Member and Speaker
- PBGH Global Benefits Task Force
- Women's Bar Association of Western Pennsylvania
- Worldwide Employee Benefits Network
- National Center for Employee Ownership

AWARDS AND RECOGNITION

- Selected for inclusion in *The Best Lawyers in America*

NEWS AND INSIGHTS

Publications:

- "ERISA's impact on data breach lawsuits," *HR.BLR.com*, April 2016.
- "Affordable Care Act Update: Healthcare reporting for employers," *Eckert Seamans' Construction Law Update*, Fall 2015.
- "Honeywell Lawsuit Takes Aim at Biometric Screenings," *Workforce Magazine*, December 2014.
- "Defense of Marriage Act affects benefits," co-author, *Allegheny County Bar Association's Lawyers Journal*, November 2012.
- "Forum selection challenged by recent litigation and Department of Labor efforts," co-author, *Eckert Seamans' Legal Update*, Fall 2012.
- "Beyond I Do: The Defense of Marriage Act, same-sex marriage and employee benefits," co-author, *Eckert Seamans' Legal Update*, Fall 2012.
- "IRS proposal considers the meaning of 'governmental plan,'" *Eckert Seamans' Legal Update*, Spring 2012.
- "New requirements for pension plans," co-author, *Eckert Seamans' Construction Law Update*, Spring 2011; *Eckert Seamans' Legal Update*, Summer 2011.
- "Does your health and wellness plan violate GINA?" *Eckert Seamans' Legal Update*, Spring 2010.

- "The Most Common HIPAA Privacy Mistakes Employers Make," *Workforce Management Magazine*, July 2008.

Speaking Engagements:

- "Legislative Updates Forum: A View from Washington," co-presenter at the Pittsburgh Business Group on Health seminar, April 2017.
- "[The Latest Word on Employee Benefits: Update on Affordable Care Act and Wellness Programs](#)," co-presenter, Eckert Seamans Human Resource Forum, May 2016.
- "The Affordable Care Act: Understanding Employer Shared Responsibility and Information Reporting Requirements," co-presenter, 2015 Employment Law Institute, Pennsylvania Bar Institute (PBI), November 2015.
- "Beyond the Biometrics II," Eckert Seamans Human Resources Forum, May 2015.
- "Protect My Data: Protection of Confidential Employee Information Under the Health Insurance Portability and Accountability Act," co-presenter, Eckert Seamans Human Resources Forum, May 2014.
- "Affordable Care Act: Where Are We Now?" co-presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2014.
- "The Affordable Care Act Revisited: What's Hot Now," co-presenter, Eckert Seamans' Human Resources Forum, November 2013.
- "Health Care Reform: What Employers Need to Know Now," Eckert Seamans' Continuing Legal Education Seminar, August 2013.
- "Update on Affordable Care Act and Wellness Programs," Pittsburgh Business Group on Health, July 2013.
- "HIPAA Revisited: New Regulations Impact Privacy Rules and Wellness Programs," Eckert Seamans Human Resources Forum, June 2013.
- "Affordable Care Act/Health Care Update: What's Next?" Eckert Seamans Human Resources Forum, April 2013.
- "Assessing the Health/Welfare Plan Environment," co-presenter, PBI ERISA Update, March 2013.
- "Health Care Reform: Recent Developments & Guidance," co-presenter, Pittsburgh Business Group on Health, March 2013.
- "Health Care Reform: Cost and Benefit Considerations and Implications," co-presenter, Pittsburgh Business Group on Health, February 2013.
- "Health Care Reform: What's Next," co-presenter, Pittsburgh Business Group on Health, July 2012.
- "Hot Topics in Health Insurance," co-presenter, PBI 16th Annual Insurance Institute, May 2012.

- "Beyond the Biometrics," co-presenter, Eckert Seamans Human Resources Forum, November 2011.
- "Multiemployer Plans: a Legal Perspective," co-presenter, Pennsylvania Institute of Certified Public Accountants (PICPA) Construction Industry Conference, October 2011.

PITTSBURGH, PENNSYLVANIA

600 Grant St.
44th Floor
Pittsburgh, PA 15219

P: 412.566.6112

F: 412.566.6099

hletcher@eckertseamans.com

PRACTICE AREAS:

[Employee Benefits & Executive Compensation](#)

[Tax](#)

[Health Insurance Portability & Accountability Act – HIPAA](#)

[Health Care](#)

[Data Security & Privacy](#)

STATE ADMISSIONS:

Pennsylvania

District of Columbia

EDUCATION:

J.D., George Washington University
School of Law

B.A., The Pennsylvania State
University



Heather Stone Fletcher

MEMBER

Heather Stone Fletcher focuses her practice on compliance, regulatory, and legislative matters affecting employee benefit plans. She represents clients in matters before the Internal Revenue Service, Department of Labor, and the Pension Benefit Guaranty Corporation. Heather is experienced in a wide-range of tax and benefit issues including day-to-day welfare and retirement plan compliance matters, health care reform, plan drafting and documentation, ERISA fiduciary duties, health care continuation coverage, prohibited transactions, executive compensation, and HIPAA issues.

REPRESENTATIVE MATTERS

- Assists a variety of public, private, and governmental employers with the design, implementation, and maintenance of their employee benefit programs.
- Specializes in compliance with the Affordable Care Act, otherwise known as health care reform.
- Advises on the correction of employee benefit plans, including assistance with the filing of correction submissions with the Internal Revenue Service and Department of Labor.
- Submits comments on behalf of clients to government agencies regarding proposed regulations.
- Negotiates agreements with third-party service providers.
- Obtains determination and advisory opinion letters as well as tax-exempt status for entities.
- Assists clients with employee benefits issues related to corporate transactions, including risk assessment, plan mergers, and the establishment of new benefit platforms.

PROFESSIONAL AFFILIATIONS

- American Bar Association, Section of Taxation and Section of Health Care

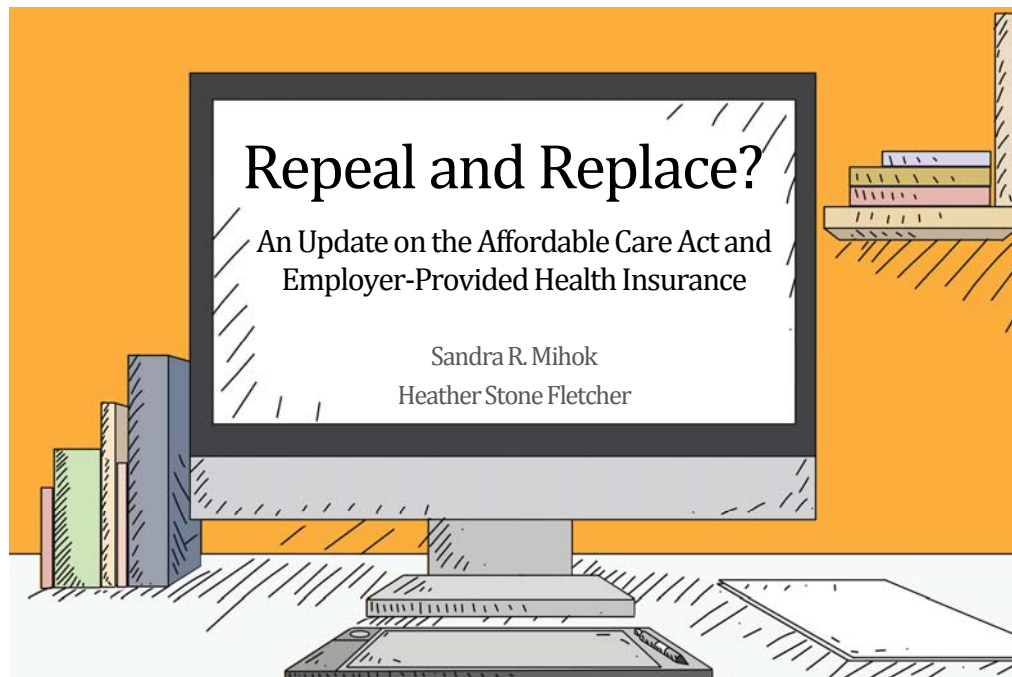
NEWS AND INSIGHTS

Publications:

- "Top 10 Summary Plan Description Issues Not Addressed in the ERISA Regulations," *Bloomberg BNA*, July 2013.

Speaking Engagements:

- "[No Good Deed Goes Unpunished: Recent Litigation Involving Retirement Plan Sponsors](#)," co-presenter, Eckert Seamans' Continuing Legal Education Seminar, August 2016.
- "The Affordable Care Act: Understanding Employer Shared Responsibility and Information Reporting Requirements," co-presenter, PBI 2015 Employment Law Institute, November 2015.
- "[ACA Reporting and Cadillac Tax](#)," co-presenter to the certified public accountants of Grossman Yanak & Ford LLP, August 26, 2015.
- "Analyzing the New Health and Welfare Environment," co-presenter, PBI ERISA Update, June 2015.
- "Healthcare Reform: 2015 and Beyond," Eckert Seamans' Human Resources Forum, January 2015.
- "A Primer on 409A," Eckert Seamans, November 2014.



LEGAL PRIMER: 2017 Update

August 3, 2017

Repeal and Replace

- ❑ 5/25/17 the Senate narrowly voted to begin debate on a bill to repeal the ACA
- ❑ 5/25/17 the Senate voted down replacement bill, 43-57
- ❑ 5/26/17 the Senate voted down repeal bill, 45-55
- ❑ 5/28/17 the Senate voted down skinny repeal bill, 49-51
- ❑ Is this the end of the effort to repeal?

House American Health Care Act

- The AHCA would repeal ACA mandates, both individual and employer (retroactive to 2016)
 - Impose a late enrollment penalty on people who are not continuously covered (30% of otherwise applicable premium)
- Premium tax credits
 - Repeal in 2020, replace with flat tax credit adjusted for age, phase out at higher incomes
- Retain some insurance market rules
 - Guarantee coverage, prohibition on pre-existing conditions, dependent coverage extended to age 26
 - Age rating may vary from 5:1, unless states adopt different ratios (2018)
- Retain exchanges
- Create state stability funds
- Encourage use of Health Savings Accounts (see later slides for details)
- Repeal tax revenue provisions - Cadillac tax suspended through 2025
- Wellness plan incentives allowed under the ACA would remain unchanged

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Senate Better Care Reconciliation Act

- The Senate BCRA would also repeal ACA mandates, individual and employer (retroactive to 2016)
- Notable differences from House AHCA:
 - Premium tax credits modified in 2020
 - Six-month waiting period for people who do not maintain continuous coverage (2019)
 - State stability fund differences
 - Repeal most ACA tax revenue provisions
 - Establishes authority for new association plans, “small business health plans”

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Skinny Repeal

- ❑ After repeal bill failed, Republicans considered a narrow bill that would repeal the individual and employer mandates
- ❑ Much of the rest of the ACA would remain
- ❑ Problems with maintaining protections, but repealing mandates
- ❑ Subsidies could blunt the effect of not having a mandate
- ❑ The skinny repeal bill failed on 7/28/2017

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Failure to Repeal

- ❑ Speculation that Congress will need to take action to shore up the individual insurance market
 - Uncertainty likely to lead to insurance premium increases
- ❑ Trump administration may continue legal challenges – see discussion regarding cost sharing subsidies below
- ❑ Current enforcement actions

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Cost Sharing Reduction Subsidies: how they work

- ❑ Cost sharing reduction (“CSR”) subsidies provide financial assistance with deductibles and out-of-pocket-expenses for lower-income consumers who purchase health insurance coverage on health insurance marketplaces.
- ❑ The ACA requires that insurers who offer marketplace coverage provide CSR subsidies to consumers who are below 250% of the federal poverty line and enroll in Silver-level health plans.
- ❑ To account for increased costs to health insurers, the ACA required the U.S. Department of Treasury to make CSR subsidy payments to health insurers to offset those costs.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Cost Sharing Reduction Subsidies: why they are in doubt

- ❑ Although the ACA provides the Treasury Department with the authority to make CSR subsidy payments, whether Congress appropriated funding for CSR subsidy payments has been the topic of an ongoing legal challenge.
- ❑ In *U.S. House of Representatives v. Burwell*, the federal District Court in the District of Columbia held in May of 2016 that the U.S. Departments of Treasury and Health and Human Services could not make CSR subsidy payments to health insurers because the ACA had not provided explicit funding for CSR subsidies. However, the District Court stayed the injunction against CSR subsidy payments, effectively allowing the Obama Administration to continue to rely on its interpretation of the ACA and continue to make CSR subsidy payments during the appeal.
- ❑ The Trump Administration has since repeatedly sought delays in the proceedings of the appeal while Congress considered repeal of the ACA.
- ❑ Further the Trump administration now has the authority to develop its own interpretation of whether or not the ACA provides funding for CSR subsidies and whether the government should continue to make CSR subsidy payments.
- ❑ President Trump has made assertions that the administration may decide to cease CSR subsidy payments and/or drop the appeal of the District Court ruling.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Cost Sharing Reduction Subsidies: what happens if they are not paid

- ❑ Health insurers are still obligated to apply CSR subsidies in the form of reduced deductibles and out-of-pocket expenses of CSR eligible enrollees even if the insurers are not reimbursed by the government.
- ❑ This has caused many health insurers to reconsider their individual market offerings for 2018.
- ❑ The Pennsylvania Insurance Department recently released information on individual and small group premiums suggesting that premiums will increase by an average of 11%.
- ❑ A failure to pay CSR subsidies would result in an expected 19% increase in premiums for Silver-level plans in 2018.
- ❑ Eliminating CSR subsidy payments would require a 2.3-billion-dollar increase in federal spending because the ACA's tax credit for the purchase of health insurance coverage rises correspondingly with increasing premiums. Spending on premium tax credits would offset any savings from failing to pay CSR subsidies.
- ❑ Another possible consequence is that health insurers may cease to offer individual coverage.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

ACA Enforcement

- ❑ President Trump issued an Executive Order on January 20, 2017 directing agencies with authorities or responsibilities under the ACA to “waive, defer, grant exemptions from, or delay the implementation of” any ACA provision that would impose a fiscal or regulatory burden on states or a host of private entities (including individuals, health care providers, health insurers, and medical device manufacturers)
- ❑ The EO is subject to applicable law, and Agencies are still required to utilize notice and comment period, if applicable
- ❑ The IRS announced that it will not reject 2016 individual income tax returns because of a failure by individuals to provide information about whether they have obtained coverage under the ACA's individual mandate

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Enforcement of Employer Mandate

- ❑ Under the ACA Employer Shared Responsibility Provision (i.e., the employer mandate), employers with an average of 50 or more full-time employees must offer a certain level of health insurance to full-time employees (and their dependents) or a shared responsibility payment may apply.
- ❑ The IRS is developing a new system, the ACA Compliance Validation (“ACV”) system, that will use employer-reported information returns as well as other tax data to identify employers that are not compliant with the Employer Shared Responsibility Provision and may be subject to the Employer Shared Responsibility Payment.
- ❑ However, the implementation of the ACV system has been delayed due to programming and processing errors.
- ❑ The IRS has yet to enforce the Employer Shared Responsibility Provision.
- ❑ The IRS began issuing IRS letter 5699, Request for Employer Reporting of Offers of Health Insurance Coverage, in December, 2016.
- ❑ The IRS has indicated that letters notification of employer shared responsibility payments for 2015 will be issued in 2017 - Treasury Inspector General for Tax Administration, April 2017
- ❑ According to the Joint Committee on Taxation’s estimate, revenue from the employer mandate could reach \$167 billion for years between 2016 - 2025

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Employer Mandate: Affordability Update

- ❑ Coverage offered to full-time employees must be “affordable”
- ❑ Generally, this means that the employee’s coverage cannot exceed 9.5% of household income
- ❑ 9.5% has been indexed
 - 2016: 9.66%
 - 2017: 9.69%
 - 2018: 9.56%
- ❑ Opt-out payments may also affect affordability – final regulations have not been issued

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Enforcement of ACA Market Reforms

- ❑ Failure to comply with market reforms (e.g., annual and lifetime limits on benefits, updates to appeals process, first-dollar preventive health benefits, etc.) can result in a penalty of \$100 per day per affected individual (\$36,500 per affected individual per year)
- ❑ Department of Labor (DOL) launched the Health Benefits Security Project, a national enforcement project that includes examinations for compliance with the ACA
- ❑ Example Enforcement: DOL reached settlement with Sierra Pacific Industries Health Insurance Plan (September 2016)
 - Errors were found with the plan's claims processing, the clarity of the plan documents and with the application of procedures for deciding claims – based on failure to recognize loss of grandfathered status
 - The plan fiduciaries agreed to comply with the ACA requirements for plans that are not grandfathered, re-adjudicate past claims, and forego plan premium or cost-sharing increases for one year

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Health Savings Accounts: Basics

- ❑ HSAs reimburse employees on for certain out-of-pocket medical, dental, and vision expenses
- ❑ Similar to an individual retirement account (IRA) for healthcare
- ❑ Employee-owned: Portable and non-forfeitable accounts
- ❑ Can be funded with pre-tax employer and employee contributions
- ❑ 2017 maximum contribution (employer + employee): \$3,400 for individual, \$6,750 for family
- ❑ Can only make employer or employee contributions if the employee is covered by a high deductible health plan ("HDHP"), and does not have other disqualifying coverage

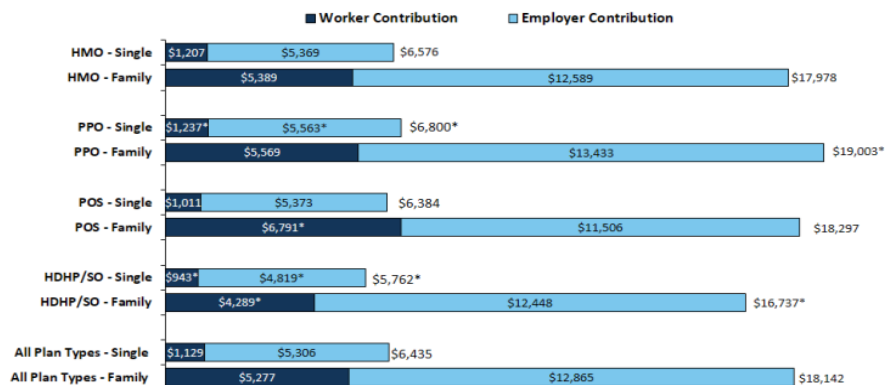
**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Congressional Push to Health Savings Accounts

- Proponents argue that giving people more control over their medical expenses will drive down costs
- Critics argue that low-income individuals do not pay enough in taxes to experience the tax savings
- Both House and Senate replacement bills encouraged HSA use through the following changes:
 - Increase annual tax-free contribution limit to equal the limit on out-of-pocket cost-sharing under qualified high deductible health plans (\$6,550 for self only coverage, \$13,100 for family coverage in 2017, indexed for inflation)
 - Catch-up contributions for those older than 55
 - Definition of qualified medical expenses expanded
 - Tax penalty for HSA withdrawals for non-qualified expenses reduced from 20% to 10%
- Senate replacement bill would have gone farther:
 - Allow HDHP premium payments from HSAs

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

**Exhibit A:
Average Annual Firm and Worker Premium Contributions and Total
Premiums for Covered Workers for Single and Family Coverage, by Plan
Type, 2016**



* Estimate is statistically different from All Plans estimate by coverage type ($p < .05$).
SOURCE: Kaiser/HRET Survey of Employer-Sponsored Health Benefits, 2016.

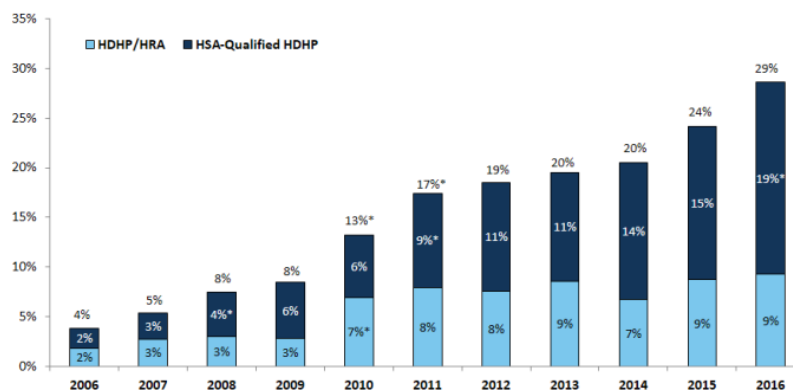
**ECKERT
SEAMANS**
ATTORNEYS AT LAW

High Deductible Health Plan Enrollment Trends

- PPOs continue to be the most common plan type, with 48% of employees
- 29% of employees are enrolled in an HDHP, with HSA
- Over the last two years, enrollment in PPOs has fallen 10% while enrollment in HDHP with HSA has increased 8%

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Exhibit E:
Percentage of Covered Workers Enrolled in an HDHP/HRA or HSA-Qualified HDHP, 2006-2016



*Estimate is statistically different from estimate for the previous year shown ($p < .05$).

NOTE: Covered Workers enrolled in an HDHP/SO are enrolled in either an HDHP/HRA or a HSA-Qualified HDHP. For more information, see the Survey Methods Section. The percentages of covered workers enrolled in an HDHP/SO may not equal the sum of HDHP/HRA and HSA-Qualified HDHP enrollment estimates due to rounding.

SOURCE: Kaiser/HRET Survey of Employer-Sponsored Health Benefits, 2006-2016.

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Flexible Spending Account

- ❑ FSAs allow employees to pay pre-tax for certain out-of-pocket medical, dental, and vision expenses (e.g., copays, co-insurance, Rx, but not insurance premiums)
- ❑ Employees save the amount equal to the taxes they would have paid on the money they contribute
- ❑ Can contribute up to \$2,600 per year (indexed annually); employer may make limited contributions, but is not required to
- ❑ Employer must also offer a major medical plan
- ❑ Must be provided under a cafeteria plan
- ❑ If employee does not use amounts contributed, generally they are forfeited at the end of the year
 - Partial rollover optional

**ECKERT
SEAMANS**
ATTORNEYS AT LAW

Health Reimbursement Arrangement

- ❑ HRAs reimburse employees on a pre-tax basis for certain out-of-pocket medical, dental, and vision expenses
- ❑ Paid for solely by the employer, can be paid through general assets
- ❑ After ACA, can generally only provide HRAs integrated with a group health plan (exception for retirees)
 - Cannot integrate with individual coverage
- ❑ If employee does not use amounts contributed, they can be carried over to the next year, but account is not portable
- ❑ Can be offered with general FSA coverage
- ❑ Subject to nondiscrimination testing

**ECKERT
SEAMANS**
ATTORNEYS AT LAW



SEX AND CLIENTS

Presented by:

Mark D. Yochum

Professor of Law

Duquesne University School of Law

412.396.5012

yochum@duq.edu

Mark D. Yochum is a Professor of Law at Duquesne University School of Law, specializing in bankruptcy and professional responsibility. He is a graduate of Carnegie Mellon University and Georgetown University Law Center. Professor Yochum has written and lectured extensively on lawyer's ethics. He served as the Law School's coordinator for participation in Continuing Legal Education from 1993 to 2011, and also provides legal counsel to the Small Business Development Center. Professor Yochum formerly served as President of the Pittsburgh Tax Club, and has been a regular lecturer for the Allegheny County Bar Association Taxation and Bankruptcy sections, as well as other professional organizations in the region. He has spoken on ethics for many national programs, ranging from the National Conference of Bankruptcy Judges, the National Associations of Bankruptcy Trustees and Chapter 13 Trustees, the Association of Legal Administrators and the Internal Revenue Service. Additionally, he has been active in regional theater for 20 years, performing leading roles at the Little Lake Theater, McKeesport Little Theater, Washington & Jefferson College's Olin Fine Arts Center and other local venues.

SEX WITH CLIENTS

Mark D. Yochum
Professor of Law
Duquesne University School of Law
Pittsburgh, Pennsylvania

2017©

These materials are no substitute for listening to my talk, *Sex with Clients*. For those too ready humorists, the talk has no pictures. Talk is talk, just talk. The lawyers burdened by continuing education of the ethics sort always listen. The topic, after all, is sex with clients.

In this short writing, I will parse the rule in its American Bar Association Model Form, Rule 1.8(j). (I have attached to this piece the pertinent provisions.) The rule itself is within the model paragraphs on conflicts and is a product of the chapters and verses on lawyers' conflicts with clients. While Rule 1.8(j) draws an unseemly clear line — a lawyer may have sex only with potential clients —, Rule 1.7, the general conflicts provision, draws a loose border. Lawyers wonder where the border is, in all matters. And, to put the problem as one of romance, when does the lawyer's interest, perhaps love interest, create a "significant risk" of a material limitation on the relationship?

Ordinary conflicts, meaning unromantic, are tested this way. If the conflict exists, the lawyer must notify the client. If the lawyer thinks that the conflict can be overcome by the lawyer's virtue and the client is so persuaded, the relationship may continue.

Treated as text for ordinary legal worrying, the rules offer an opportunity for doubt. Is there a conflict in the first place, is it now, is it over, is it yet to come and might not ever? Is it big enough, is it rough enough? Do I tell them? What do I tell them?

I interrupt this lawyers' anguish to suggest that lawyers' confusion about this rule is exacerbated by our culture's attitude toward the rule. Lawyers actually answer the first two questions, no. And, ala a tawdry affair, decide to tell the client nothing. If telling them comes to pass, the further question, can I be competent in spite of it, becomes an easy one to answer yes.

The experience with sex with clients, as a rule, is a fable of sorts that may deal with a special corner of evil, yet provide instruction about the larger story of conflicts. The experience of sex with clients as a talk is part of this story, if only to tell the story of lawyers' belief in the fable of love.

The early development of the talk was occasioned by the prospect of continuing education box office. My state, the Commonwealth of Pennsylvania, came to mandate continuing education in the early 1990's. The Quaker State trailed many jurisdictions in C.L.E. by a decade. Ethics education in C.L.E. is and was regularly mandated in a proportion far more than its weight in a law school curriculum, let alone legal practice. Several states, like ours, mandated only education in ethics in their start-up years. Now, Pennsylvania requires two of twelve hours annually, with many jurisdictions with similar requirements.

At the start, now twenty plus years ago, the creation of a useful, not boring ethics hour for practitioners, was difficult. Ethics law and lecturers were hard to come by, knowledge, if any, was produced from the litigators' experience. Most lawyers, however, do not ply that trade and even if they do, recounting the cautions and sins in their efforts grew rapidly stale. I created *Sex with Clients* to attract clients to Duquesne University School of Law and its nascent effort to sell continuing legal education. Consequently, *Sex with Clients* was first delivered circa 1995. Then, on average more than once a year since then, to groups large and smaller around the country, to lawyers general and specific. *Sex with Clients* has been requested. When I am asked in the ethics C.L.E. game about topics, I have, in response, suggested more than a few. When I offer *Sex with Clients*, lawyers almost always take it.

Without citation, I will say sex sells. When I talk I always allow the group to bowdlerize the title. I have offered to style the talk as “*Honor in the Profession.*” The description, however, always promises sex with clients.

In this writing and while I talk, I caution that the reality of the tales of sex with clients is not just sordid, but degrading horrors of predatory behavior. Before the CLE boom in ethics for all, family law associations offered programs on the subject. In those days, in towns large and even small, lawyers all knew of a divorce lawyer who had impregnated a client while also handling her divorce. The pronouns here are purposeful. Not without exception, but sex with clients brought to mind the male lawyer, the female client, the divorce or soon to be one. These stories are not titillating, prurient, or erotic. These are not love stories. They are not funny.

Sex with Clients is in some measure an ethical confidence trick, a play with words that might capture the conscience. Before I talk, as best I can, I mingle with the crowd. Before the event, of course, there has been interchange with organizations, administrators, and other poohbahs, about topic, title, time, tenor. My materials (until this piece) were a bare bones, skeletal outline of the rules of the age, a few case sketches and some bar association opinions. Purposely light and generic, they traveled well enough, as did I, to a gross of jurisdictions, broad based groups and narrow practice niches, audiences with national license, to Inns and outlying counties.

In these pre-talks about the talk, I was always frank that my thesis was, as I have set it out above, and this matter is serious on its own. I immediately confess that there will be much laughter, belied by the old scant materials. But I also offer that I hope to make you feel guilty for laughing. At this point, someone asks “Will there be PowerPoint?” The someone chuckles and maybe another someone with him. And, yes, again, a him. No, I reply and note that I have heard that bon mot every year since PowerPoint was invented.

What is so funny about sex with clients? Here is the trick; we tell ourselves stories. If you do not know sex with clients, it might become the image of imaginary fun, French farce, erotic pictures, en flagrante delicto. Not a real problem at all, perhaps like ordinary conflicts of interest.

Formal state law restrictions on sex with clients began with more vigor in the early 1990's. State supreme courts, the ne plus ultra of discipline, offered opinions (not rules) that restricted sex with clients in the family law setting. See In re DiSandro, 680 A.2d 73 (RI 1996). Here the sanction was censure. A.B.A. FO 82-364 analyzed the problem as one of conflict, a relationship fraught with dangers perhaps, but not so unworthy as to be banned. More than a few criminals had sex with defense attorneys that did not raise, apparently, issues of ethics but rather claims of ineffectiveness of counsel. See Neelley v. State, 642 So.2d 494 (Ala. Crim. App. 1993).

Some state supreme courts did engage in positive rule making, bucking the model, prohibiting sex with clients. Local conditions that do not appear in public pronouncements may have led to these decrees rather than part of a national movement of revulsion. Chatting with the locals in Wisconsin, Oregon, and West Virginia, three of the handful that pre-date the A.B.A. rule, I found each court motivated by spectacularly bad behavior, serial and exposed. At least, this intelligence was offered by the bar and often confirmed in the public press.

In the A.B.A. Ethics 2000 Project, the rule, again, 1.8(j) arose. Prior to the addition of the prohibition, such as it is, I talked about the wisdom of blanket restraint. Licensed professionals (other than ours) have long banned sex with the objects of their duty: medicine, education, social work, military. To what end do we quibble about whether the intimate relationship is a material impediment to legal judgment? The quibble becomes more offensive when the simple solution is to withdraw. But, of course, there was consent, true love, no harm, and broken hearts are the natural consequence of blooms falling off roses.

Lawyers have told me, in those days, that they agreed with me on a ban but they never would have met their second wife if they had not represented her in her divorce. Now, of course, absent that unlikely “pre-existing sexual relationship,” the lawyer would have to choose between the lady and the fee.

The rule had some subtleties. The conflict produced by sex with clients is personal to the lawyer. Unlike virtually all other types of conflicts, this one does not result in firm wide disqualification. The term “client” here, as elsewhere, has an indistinct border for those representing entities, wondering whether romance with the humans in the control group is off limits. Increasingly, lawyers must be reminded that non-lawyer assistants are subject to the rule as well. Lawyers must seek to educate and prevent all those they supervise from doing what they cannot. The paralegal’s fresh sex romp with the CEO must be stopped by the corporate law department. Perhaps in a sexualized culture, it is quaint to say that relationships, short of sex, can still create intensity that can shake a lawyer’s cold independent judgment into a conflict between love and law.

The law of conflicts is naturally blurred as the nature of conflict itself is infinite. All stories told require conflict. As the literature professor would say: man against nature; man against man; man against himself. Conflicts in law are produced by man (the lawyer) against nature, if one takes nature, as the elements, as the environment of practice. Even a hero may be doomed to fail for want of a nail, a horse, a match. Oedipus comes to a bad end because of the failure to disclose a conflict. Nature includes deities like God or gods or judges or fortune or fate (also like judges).

Man against man is where two interests are antithetical. In narrative, we root for one man and against another. Reading decisions on conflicts, one might find the quest for a rooting interest hard. You may of course have a view as to how these stories ought to come out, a view tinged by personal interest and experience.

Modern storytelling, since *Hamlet*, is much about man against himself. I am ill equipped to offer a survey of such literature or a Freudian explication. I will note that many ethical rules have been produced in response to judgments about human nature. Ethical prohibitions have been justified by the belief that certain situations are too tempting of sin or are too likely to be perceived as too tempting of sin.

For sins, ethics and conflicts, you cannot beat sex. The new model rule created more discussion and controversy than many other changes, as states examined the new model rules in consideration of changes to their real rules. More upset was evidenced for this minor inhibition on romance than on such serious issues as multijurisdictional practice, permissive revelation to prevent financial harm and screening. In part, one may say that the protests of the bar were in defense of true love. In part, the protests may just be evidence of lawyers' dislike of conflict analysis because, in their clouded hearts and minds, they believe they can overcome any temptation to ineffective representation.

Conflicts can arise from infinite permutations and, unexpectedly, just as love and sex. Often, lawyers see no conflicts, no trouble ahead, the same cloudy vision that comes with love and sex. And the lessons of conflicts, repeated over the years, still have only slightly dimmed the temptation to sin and error, just like love and sex.