

**Business Law Section
PRMCLE Meeting
Attorney Resource Center (ARC)
February 15, 2018**

11:45 AM – Noon

Welcome/Introductions

Brad Costello, Business Law Section Chair

Noon – 1:00 PM

Program

Ethical Issues in Advising Small Businesses & Their Members

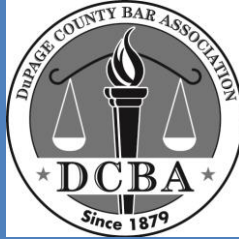
Michael Haeberle and Peter Evans, The Patterson Law Firm, LLC

Michael Haeberle is a member of The Patterson Law Firm, LLC where he represents clients in a variety of legal matters, including commercial disputes and legal malpractice. He graduated from the University of Chicago law school with honors.

Peter Evans is an associate of The Patterson Law Firm, LLC, where he represents clients in a variety of legal matters, including commercial disputes and legal malpractice. He currently serves on the DCBA Editorial Board for The Brief and the DCBA Business Section Council. He graduated from Vanderbilt Law School.

Topics covered include:

- (1) Avoiding confusion when forming the attorney-client relationship;
- (2) Obligations to the company and the individuals;
- (3) Avoiding confusion regarding who your client is during representation; and
- (4) What to do when a dispute arises between the company and an individual



Next Section Luncheon: 3/8/18 – Meeting jointly with Labor and Employment Law Section. Azam Nizamuddin on workplace conduct (advising business clients on proper handling of harassment). **Note that this meeting will take place at the Bar Center.**

DCBA Events: 3/2/18 Judges' Nite at the College of DuPage
3/21-24/18 DCBA Trip to Cubs Spring Training

View & Print All CLE Certificates through the DCBA Website:

Manage Profile -> Professional Development (under content & features) and choose the icon to the left of each meeting to print your certificate directly or choose to have them emailed to you to save to your computer (you MUST be logged in to view this feature)

DCBA OnDemand CLE is Now Powered by IICLE The Illinois Institute for Continuing Legal Education (IICLE®) and the DuPage County Bar Association (DCBA) are excited to offer a new IICLE®Share collaboration to provide DCBA members a high quality and reliable online learning experience.

Online Demand CLE on DCBA

Go to <http://www.dcba.org/> then log in.

After logging in, scroll to the bottom of the page and click on "Quick Links" in the beige bar. Then click on "On Demand CLE" which brings you to this page:

<https://dcba.site-ym.com/?page=Online>

Then go to "Click Here to Launch the DCBA Catalog":
Which brings you to the IICLE Page at:

<https://www.iicle.com/dcba?affiliateid=4&pagesize=12>

WHO'S YOUR CLIENT?

ISSUES IN ADVISING SMALL BUSINESSES AND THEIR MEMBERS/DIRECTORS

Michael D. Haeberle
Peter J. Evans

Patterson Law Firm, LLC
One North LaSalle, Ste. 2100
Chicago, IL 60602

Who's Your Client?

- ▣ Check your engagement letter
 - Specify who IS and who IS NOT your client
- ▣ Be careful of creating an implied attorney-client relationship
 - *Herbes v. Graham*, 180 Ill. App. 3d 692 (2d Dist. 1989)
 - *Restatement (3d) of the Law Governing Lawyers*, § 14
- ▣ Consider the advice. Is it something the individually would rely on?

Avoiding and Addressing Conflicts

- ▣ A lawyer owes a duty of loyalty to their client.
 - It is important to communicate who the client is.
- ▣ Refrain from advising constituents personally about their interests in the company.
 - Protects the company AND it protects you

Conflicts, Cont'd

- ▣ Illinois Rule of Professional Conduct 1.13
 - Know who you are supposed to be dealing with.
 - Reiterate that you represent only the entity whenever you identify adversity between constituents and the entity or among the constituents
 - Consider whether you have a conflict before you represent or advise any constituent individually
 - Get a conflict waiver IN WRITING

Conflicts, Cont'd

- ▣ Comment 10 to Rule 1.13
 - There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and discussions between the lawyer for the organization and the individual may not be privileged.

Conflicts, Cont'd

- ▣ Illinois Rule of Professional Conduct 1.7 governs when there is a conflict and if it can be waived
 - Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - ▣ the representation of one client will be directly adverse to another client; or
 - ▣ there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

Conflicts, Cont'd

- ▣ You may represent a client despite a conflict if:
 - ▣ the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - ▣ the representation is not prohibited by law;
 - ▣ the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - ▣ each affected client gives informed consent.
- ▣ See comments

Obligations to Individuals

- ▣ There is no duty owed to constituents based solely on their status as directors, officers, or shareholders
- ▣ Even when you are representing an organization, though, situations may arise in which you owe a duty to individual constituents
 - *Pelham v. Griesheimer*, 92 Ill. 2d 13, 21 (1982)
 - ▣ Primary purpose for the advice is to benefit or influence the individual
 - *Restatement (3d) of the Law Governing Lawyers*, § 51(2)
 - ▣ Invite the non-client to rely on the lawyer's opinion or advice

Obligations to Individuals, Cont'd

- ▣ Negligent Misrepresentation
 - General rule: If an individual is in the business of supplying information, that individual owes the recipient of any advice or representation a “duty to use care in obtaining and communicating information upon which others reasonably may be expected to rely in the conduct of their affairs.”
 - BUT the Second District says to follow *Pelham* when dealing with negligent misrepresentations by lawyers

Privilege

- ▣ The entity holds the privilege
- ▣ Some courts do not allow the privilege to be asserted against a current or former shareholder/officer as they had access to the materials
- ▣ Common interest doctrine
 - When the attorney acts for two different parties who have a common interest, communications between either party and the attorney may not be privileged in a subsequent dispute between the parties

Thank you!

▣ Questions?



***Business Law Section Council* – LEGAL UPDATE**
February 2018

Case Law Update

In re Timothy H. Thorpe, No. 17-1766 (7th Cir. Jan. 31, 2018)

HOLDING: The Court affirmed summary judgment in favor of the ex-wife of a bankrupt debtor, denying the bankruptcy trustee's adversary claim.

The debtor acquired his home in joint tenancy with his wife after they were married. His wife filed for divorce and, shortly after the divorce court found his wife had established grounds for divorce, the husband filed for bankruptcy. The bankruptcy stay was lifted for the purpose of obtaining a final divorce judgment awarding the home to his wife. The trustee of the bankruptcy estate subsequently filed an adversary proceeding against the debtor's wife, seeking to compel the sale of the husband's ½ interest in the home for the benefit of the husband's creditors. The 7th Circuit Court found that the estate had no claim to the marital home because, upon the filing of the divorce petition, the husband only had a contingent interest in the home, subject to his wife's claim. Once his wife was awarded the house by the judgment in the divorce court, the husband's estate no longer possessed an interest in the home.

Watts v. Addo Management, L.L.C., 2018 IL App (1st) 170201

HOLDING: The Illinois Appellate Court reversed and remanded a trial court order dismissing the plaintiffs' complaint against their respective Michigan and Illinois corporate employers and their principals for failure to state a cause of action under the Illinois Wage Payment Collection Act, 820 ILCS 115/1 et seq ("Wage Act").

The Defendants had argued that they were not liable under the Wage Act as the work at issue, interstate trucking, was performed almost entirely outside of Illinois. The Court noted that: a) there is no requirement under the Wage Act that any particular amount of covered work be conducted in Illinois, b) in some situations, the Wage Act can even apply when all of the work was outside of Illinois, and c) the Wage Act applies to out-of-state employers where at least some of the work is performed in Illinois and there are sufficient contacts with the state.

Alwan v. Kickapoo-Edwards Land Trust, 2018 IL App (3d) 170165

HOLDING: Court held that “[a]pplication of the 1997 [Uniform Partnership Act] ‘becomes mandatory for all partnerships, including existing partnerships . . . , that failed to take any action to be governed by the Uniform Partnership Act of 1997.’”

Plaintiff filed suit arguing that he was improperly terminated as a partner from several partnerships. At issue was which version of the Uniform Partnership Act applied. The court held that the 1997 Act mandates its application to all partnerships after January 1, 2008, regardless of when the partnership was formed or whether the partnership opts into the statutory scheme.

[Verfuerth v. Orion Energy Systems, Inc., No. 16-3502, \(7th Cir. Jan. 11, 2018\)](#)

HOLDING: To qualify as a “whistleblower” under Sarbanes-Oxley or Dodd-Frank, information must be provided to a federal agency (only the SEC under Dodd-Frank) regarding fraud.

Former CEO filed claims against the company alleging, among other things, claims under the whistleblower protections of Sarbanes-Oxley and Dodd-Frank. The claims arose from the CEO’s termination following a lengthy dispute between himself and the board, which included the use of funds provided to the CEO for attorney fees in his divorce, patent infringement issues, sales tactics, and more. Following his removal as CEO and reassignment to “chairman emeritus,” the former CEO resigned and attempted to negotiate a severance package. When a severance package could not be negotiated, the board terminated the former CEO for cause, citing misappropriation of funds intended to reimburse attorney fees and undermining the new CEO. The suit was filed alleging the termination was for attempting to report securities fraud based on the theory that material information was not included in public disclosures or shared with shareholders. The Seventh Circuit affirmed dismissal, holding that the acts alleged are not “fraud” as defined by the statutes. The former CEO never reported any of the omissions to the SEC, and never informed the board that he intended to report them to the SEC, which meant a report to the SEC was not the cause of his termination. It was not enough for him to simply tell the board about the purported material omissions and then take no action when they failed to follow his advice.

Schroeder v. Buhannic, No. 2017-0746 (Del. Ch. Jan. 10, 2018)

HOLDING: Removal and replacement of directors or officers must be done in the manner described by the corporation's governing documents and cannot be overridden by a majority of shareholders.

The majority shareholders of a corporation executed a written consent removing the company's current CEO and appointing his replacement. The current CEO and another shareholder filed a declaratory judgment action seeking a declaration that the consent was ineffective under the bylaws. Under the DGCL, officers must be chosen based on the terms described by the bylaws or determined by the board of directors. The bylaws provided that officers shall be elected by the board. The bylaws also provided that removal of an officer must be done by the board. A director could only be removed by a majority of the holders of all outstanding stock at a shareholders meeting. Because the written consent of the shareholders did not comply with the corporation's governing documents, the removal and replacement were ineffective.

Submitted by: Peter Evans, an associate with Patterson Law Firm in Chicago and Desmond Curran, a partner with Sullivan Hincks & Conway in Oak Brook

Business Law Committee - Links for Committee Members

LinkedIn Group for Business Law Committee – DuPage County (IL) Bar Association

<https://www.linkedin.com/groups/12013153>

LinkedIn Group for DuPage County Bar Association

<https://www.linkedin.com/groups/849357>

Online Demand CLE on DCBA

<http://www.dcba.org/> then log in.

From logged in on home page, go to bottom center of page beige bar to “Quick Links”. Then click on “On Demand CLE”, which brings you to this page:

<https://dcba.site-ym.com/?page=Online>

Then go to “Click Here to Launch the DCBA Catalog”:

Which brings you to the IICLE Page at:

<https://www.iicle.com/dcba?affiliateid=4&pagesize=12>

Illinois Institute for Continuing Legal Education (IICLE) and the DCBA

https://c.ymcdn.com/sites/dcba.site-ym.com/resource/resmgr/mcle_seminars/How_to_Access_OnDemand_CLE.pdf