

# Including Cybersecurity in the Transaction

By James C. Vandermark

CHAPTER 7 OF THE BANKRUPTCY CODE can offer individuals who are most in need a financial fresh start. If those individuals need help wading through the complexities of the process, resources like the Consumer Bankruptcy Assistance Project are available. CBAP and the National Bar Association/Women Lawyers Division Philadelphia Chapter presented a Philadelphia Bar Association CLE titled “Chapter 7 Bankruptcy Practice” on June 19. The program was presented by Prince Altee Thomas, counsel at Fox Rothschild LLP, and John

A. Gagliardi, partner at Wetzel Gagliardi Fetter & Lavin LLC. Thomas and Gagliardi are both members of the CBAP board of directors.

The CLE offered a practical nuts-and-bolts look at Chapter 7 practice. Gagliardi and Thomas walked attendees through the process of preparing and filing a bankruptcy petition and schedules as well as obtaining a bankruptcy discharge for clients. They talked about the significant benefits that an individual receives in a Chapter 7 case. They include protection under the automatic stay in Section 362 of the Bankruptcy Code that allows individuals the time and opportunity to

address their creditors, and the bankruptcy discharge that gives individuals a financial fresh start. Gagliardi talked about the risk of sanctions that creditors could face for violating the protections afforded individuals in bankruptcy.

The presenters said that attorneys should approach bankruptcy cases as a team effort with their clients. Gagliardi suggested sitting down with a client and filling out the required bankruptcy schedules together. Addressing all the items that need to be disclosed to the court can be challenging. Complicated issues often arise involving insurance proceeds, existing claims against third parties and inheritances.

The goal for the client be open and honest about their financial situation. “Bankruptcy is all about disclosure” and “the failure to disclose can have serious ramifications,” said Gagliardi. He said also that filling out the schedules together “makes it a lot easier because questions are going to come up and you can ask [the client] right there.” Thomas said that even in cases where CBAP is involved, “things pop up” and that it is prudent to “stress disclosure.” He suggested having conversations with clients about disclosures to “avoid surprises at the creditors’ meeting...with the [United States] trustee.”

Both Thomas and Gagliardi discussed opportunities with CBAP and the importance of volunteering to represent those

most in need of the bankruptcy process. CBAP was founded in 1992 to provide bankruptcy assistance to low-income individuals seeking relief under Chapter 7 of the Bankruptcy Code. It offers bankruptcy services at no cost for individuals under the federal poverty guidelines. For context, that is \$12,060 for a family of one and \$24,600 for a family of four.

“There is a lot of reward to working with CBAP clients” said Thomas. “When you work with CBAP clients you get a whole new perspective about bankruptcy.” He said that CBAP provides ample support through the process, including knowledge of bankruptcy practice from its staff attorneys, Henry Sommer and Siana Newman.

*James C. Vandermark (Vandermarkj@white-andwilliams.com) is an associate at White and Williams LLP.*

**Volunteer With the Consumer Bankruptcy Assistance Project**

If you are interested in volunteering with CBAP you can fill out the form at [cbap-phl.org/volunteer.html](http://cbap-phl.org/volunteer.html) or by calling CBAP at 215-523-9511.



Photo by Thomas E. Rogers

Alisha Lubin, incoming president (left) and Cateria McCabe, board member (center, left), National Bar Association, Women Lawyers Division, Philadelphia Chapter, and Mary Ann Lucey, executive director, Consumer Bankruptcy Assistance Project (second from right); with John A. Gagliardi (center) and Prince Altee Thomas at the Philadelphia Bar Association CLE on June 19.

# Complexities of Worker Classification Addressed

By Annie K. Kernicky

CLASSIFYING WORKERS AS EMPLOYEES OR INDEPENDENT contractors is a complex issue that vexes business owners, and getting it wrong can lead to severe consequences for misclassifying employees as independent contractors. The Labor and Employment Law Committee presented Philadelphia Bar Association CLE titled “Classifying Workers - Employee or Independent Contractor? A Complicated Decision” on June 23. The panel included Natalie F. Hrubos, associate at Duane Morris LLP, and Kenneth A. Sprang, partner at Washington International Business counsel, LLC, who provided a comprehensive overview of various regulations, case law, and tests controlling when a worker can be classified as an independent contractor, as well as the penalties associated with

misclassification. The two presenters also provided practical guidance on how to minimize risks associated with decisions on how to classify workers from the employer’s perspective.

This area of law is getting increasingly complicated as a worker’s status is a question of law that may be evaluated using different standards under the Fair Labor Standards Act, the accompanying regulations of the Department of Labor, state law and by the Internal Revenue Service, the panelists said.

Hrubos and Sprang evaluated and unpacked five common misconceptions about independent contractor misclassification. First, Hrubos addressed the common misconception that there is one uniform test for independent contractor misclassification. As many lawyers

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Photo by Thomas E. Rogers

Sarah R. Lavelle, cochair, Labor and Employment Law Committee (standing), with Kenneth A. Sprang and Natalie F. Hrubos at the Philadelphia Bar Association CLE on June 23.

# CALENDAR OF EVENTS

*Note: While the following listings have been verified prior to press time, any scheduled event may be subject to change by the committee or section chairs. Lunches are \$9 for members and \$15 for non-members, unless otherwise indicated. Register online for most events at PhiladelphiaBar.org. Unless otherwise specified, all checks for luncheons and programs should be made payable to the Philadelphia Bar Association and mailed to Bar Headquarters, 1101 Market St., 11th Floor., Philadelphia, PA 19107-2955.*

## Aug. 2

**CLE - Bridge the Gap:** 9 a.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

## Aug. 8

**CLE - Disability Discrimination in Housing:** 9 a.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

## Aug. 9

**Section and Division Chairs:** meeting, 8:30 a.m., 10th Floor Board Room.  
**APABA-PA Board Meeting:** meeting, 12 p.m., 11th Floor Committee Room South.

**CLE - Medical Marijuana: Business and Tax Issues for Growers, Processors, and Dispensaries:** 12:30 p.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

**CLE - Examining "Ugly Prey:" Constructed and Communicated Stereotypes and the Impact of Bias on Juries:** 4:30 p.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

## Aug. 10

**FREE CLE - American Health Care Act Update: Staying Current:** 9 a.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

**Legislative Liaison Committee:** meeting, 12 p.m., 10th Floor Board Room. Lunch: \$9.

**CLE - Opioids and Overuse in the Workers' Compensation System:** 4 p.m., 11th

Floor Conference Center. Register: PhiladelphiaBar.org.

**Happy Hour - Workers' Compensation Section and YLD:** 5:30 p.m., Smokin' Betty's, 116 S. 11th St., Philadelphia. Register: PhiladelphiaBar.org.

## Aug. 11

**Workers' Compensation Section Executive Committee:** meeting, 10:30 a.m., 10th Floor Board Room.

**CLE - VIDEO ENCORE - Major Trials Judge Pro Tempore Training:** 12 p.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

## Aug. 14

**Civil Rights Committee:** 12 p.m., 10th Floor Board Room. Lunch: \$9.

## Aug. 16

**Cabinet:** 12 p.m., 10th Floor Board Room.

**CLE - Addressing the Unique Challenges Facing Girls in the Adult Criminal:** 9 a.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

**CLE - Hot Topics in Intellectual Property Law:** 12 p.m., Eckert Seamans Cherin & Mellott, LLC, 50 S. 16th St., 22nd Floor, Philadelphia. Register: PhiladelphiaBar.org.

**Legal Line:** 5 p.m., LRIS Offices.

## Aug. 17

**Foundation Board:** meeting, 12 p.m., TBD.

**YLD Cabinet:** meeting, 12 p.m., 11th Floor Committee Room.

## Aug. 18

**FREE CLE - VIDEO ENCORE - American Health Care Act Update: Staying Current:** 9 a.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

**Social Security Disability Benefits Committee:** meeting, 12 p.m., 11th Floor Conference Center. Lunch: \$9.

**Criminal Justice Section Executive Committee:** meeting, 12:30 p.m., 10th Floor Board Room.

**Philadelphia Lawyer Editorial Board:** meeting, 12:30 p.m., 11th Floor Committee Room South.

## Aug. 19

**CLE - Bridge the Gap:** 9 a.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

## Aug. 21

**Equitable Distribution Committee:** 1 meeting, 12 p.m., Klehr Harrison Harvey Branzburg LLP, 1835 Market St., Suite 1400, Philadelphia.

## Aug. 22

**CLE - Cybersecurity: The Top 10 Things Attorneys Need to Consider:** 12 p.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

**Real Property Executive Committee:** meeting, 12 p.m., Ballard Spahr LLP, 1735 Market St., 48th Floor, Mattoon Room, Philadelphia.

## Aug. 23

**CLE - Damages Issues in Medical Malpractice Cases:** 12:30 p.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

**Employee Benefits Committee:** meeting, 12 p.m., 11th Floor Committee Room. Lunch: \$9.

## Aug. 24

**Criminal Justice Section:** meeting, 12 p.m., 11th Floor Conference Center. Lunch: \$9.

**Board of Governors:** meeting, 4 p.m., 10th Floor Board Room.

**CLE - Lien on Me:** 4:30 p.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

**Solo, Small & Mid-Size Firm Management Committee 5K Run/Walk:** Details to follow.

## Aug. 25

**CLE - The Million-Dollar Sentence and Other Recent Trends in Employment Background Check Litigation:** 12 p.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

**Senior Lawyers Committee:** meeting, 12 p.m., 10th Floor Board Room.

## Aug. 28

**YLD Executive Committee:** meeting, 12 p.m., 10th Floor Board Room.  
**FREE CLE - VIDEO ENCORE: American Health Care Act Update: Staying Current:** 4 p.m., 11th Floor Conference Center. Register: PhiladelphiaBar.org.

## Aug. 29

**DLSC Intake Subcommittee:** meeting, 3 p.m., 10th Floor Board Room.

## Aug. 30

**LGBT Rights Committee:** meeting, 12 p.m., 11th Floor Committee Room South.

## Classification

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know, which may be frustrating to clients, the answer to this issue is "it depends," Hrubos said. Specifically, the answer depends on what jurisdiction you are in and the facts of your case, because there are different tests with many factors considered with varying degrees of emphasis relied upon by particular courts, she said.

For example, Hrubos said, the "economic realities" test is utilized under the FLSA for wage and hour claims, and is a balancing test. On the other hand, the "ABC test," generally used in state unemployment compensation law to determine a worker's status for unemployment purposes, is not a balancing test, and, instead,

all three prongs must be met. Sprang said that yet another test, the "IRS test" is utilized by the IRS to determine whether a worker is properly classified by considering 11 factors, with the focus on economic independence of the worker.

Sprang said out that many companies think they can classify workers as independent contractors to save money (i.e. on wage taxes, benefits, unemployment, etc.), but ultimately run into more significant financial problems if a worker is misclassified. This is because both federal and state statutes – such as the FLSA and the Pennsylvania Wage Payment and Collection Law – permit severe penalties, including treble or liquidated damages, back pay, and/or attorneys' fees, depending on the applicable law, as well the company being presented with a collective or class action,

he said.

Another misconception Sprang talked about is that there is still risk if another company (such as a staffing agency) engages the worker, which can raise both joint employer issues as well misclassification problems. Sprang said that clients often overlook this as a risk area, where one business contracts with a second company and has minimal interaction with the second company's workers, including its independent contractors, and then is surprised when a misclassification claim is made against both companies.

The panelists discussed that because different states and laws vary widely, it is most important to consider where you are located and to look carefully at that jurisdiction and the governing law. In evaluating a classification, Hrubos recommended

always starting by looking at the workers' contract and to be sure specific expectations and specialized skills are included, but he recognized that a label within a contract is not determinative. Sprang also recommended an audit of all workers on payroll, or at least to target potentially higher risk groups, such as a high number of workers all doing the same type of job, to mitigate potential misclassification issues, because the potential economic loss risks can be significant, while the time to prevent such economic loss is comparatively low.

*Annie K. Kernicky (Annie.Kernicky@flastergreenberg.com), associate at Flaster/Greenberg, is an associate editor of the Philadelphia Bar Reporter.*