

DELAWARE STATE BAR ASSOCIATION

PRESENTS

OFFICE AND TRIAL PRACTICE 2021

LIVE SEMINAR AT DSBA WITH ZOOM OPTION

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION

TUESDAY, NOVEMBER 16, 2021 | 9:00 A.M. TO 11:30 A.M.

2.0 Hours CLE credit for Delaware and Pennsylvania Attorneys



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OFFICE AND TRIAL PRACTICE 2021

MODERATORS

Kyle Evans Gay, Esquire
Connolly Gallagher LLP

The Honorable Monica A. Horton
*Court of Common Pleas
of the State of Delaware*

PROGRAM

8:45 a.m. – 8:55 a.m.

Message from the Delaware Bar Foundation

Kyle Evans Gay, Esquire
Connolly Gallagher LLP

9:00 a.m. – 10:00 a.m.

Part 1

Attorneys from the Office of the Governor and the Delaware Department of Justice, Civil Division will discuss their advisory roles in the State's response to the COVID-19 pandemic. The panelists will describe the process of drafting the State's Public Health Emergency Orders, including the edits needed to address the continually evolving situation, and will also discuss the collaboration between the Governor's Office and various State agencies, stakeholders, and constituents to help Delaware "flatten the curve."

Danielle Gibbs, Esquire
*Chief Legal Counsel
Office of the Governor*

Aaron R. Goldstein, Esquire
*State Solicitor
Department of Justice*

Allison McCowan, Esquire
*Assistant State Solicitor
Department of Justice*

10:00 a.m. – 10:15 a.m.

Break

10:15 a.m. – 11:15 a.m.

Part 2

During the COVID-19 pandemic, financial and economic factors had a significant impact on Landlord-Tenant issues. The attorneys in the panel will discuss their roles in handling the legal response to those issues, including the availability of rental assistance and federal funding as well as the eviction moratorium. The panelists will describe different perspectives of the challenges various groups have faced, and may continue to face, as a result of these issues.

John S. Whitelaw, Esquire
Community Legal Aid Society, Inc.

Donald L. Gouge Jr., Esquire
Donald L. Gouge, Jr. LLC

The Honorable Alan Grant Davis
Justice of the Peace Court of the State of Delaware

COVID-19 POLICY: The DSBA requires that everyone, including speakers and attendees, must be fully vaccinated against COVID-19 to attend live CLE events. In addition, all participants and attendees, regardless of COVID-19 vaccination status, must wear masks except when presenting, eating, or drinking.

CLE is a HYBRID CLE. You may register for this event as a live participant or by Zoom. Even if you register as a live participant, you will receive a Zoom link by email immediately which you may disregard if not attending by Zoom. (Check spam folders if you do not.) If you are going to attend the live session, you will report to the venue and check in. Only live attendees will receive live CLE credits after 12/31/2022.

REGISTRATION INFORMATION AND RATES

This CLE will be conducted live and via Zoom. To register, visit www.dsba.org/cle and select this seminar, choosing whether you wish to attend live or by Zoom. If registering for EITHER method, you will receive an email back from Zoom immediately providing you with the correct login information. If attending by zoom and you do not receive this email, contact DSBA via email: reception@dsba.org. The Supreme Court of the State of Delaware Commission on Continuing Legal Education cannot accept phone conferencing only. You must attend through a device that allows DSBA to obtain your Bar ID in order to receive CLE Credit. Your attendance will be automatically monitored beginning at the scheduled start time and will be completed when the CLE has ended. If you enter or leave the seminar after or before the scheduled start /end time, you will receive credit only for the time you attended. Your

CLE credits will be submitted to the Delaware and Pennsylvania Commissions on CLE, as usual. Naturally, if you attend the seminar live, you must sign in and we will use your attendance as the means for reporting the live credit.

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Part 1

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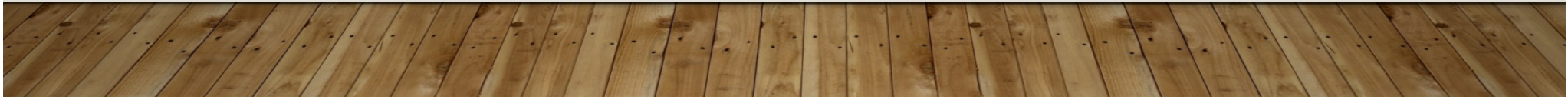
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PANDEMIC LAW:

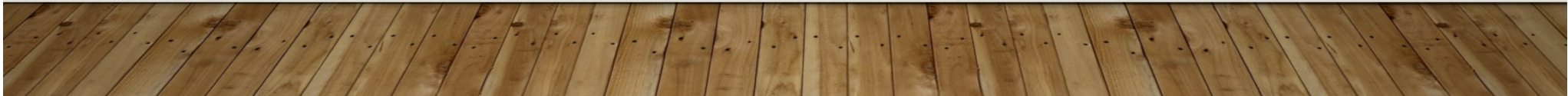
A LEGAL OVERVIEW OF DELAWARE'S RESPONSE TO THE COVID-19 PANDEMIC

NOVEMBER 16, 2021



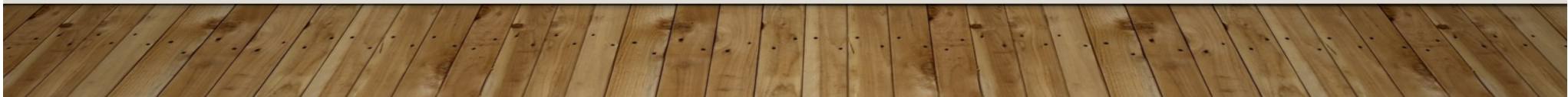
UNPRECEDENTED & LENGTHY STATE OF EMERGENCY

- The COVID-19 Pandemic is an unprecedented event in terms of **scope** and **duration**.
- The present state of emergency has persisted in one form or another since March of 2020...**more than 19 continuous months** of emergency conditions and orders.
- Required government responses impact almost every **core societal norm** regarding how we interact in public, how we consume goods and services, how we interact at work, school, home, with our family, friends, our healthcare providers, and our government.
- Initial stages of the pandemic response based on initial understanding of how COVID-19 is transmitted; restrictions have eased as science caught up to the virus, but **many open questions remain**.
- Most state law surrounding emergency operations and crisis management **presumes a short duration/high intensity** event. For ex. a weather event or a riot.
- Highly **politicized** ...no matter what your political persuasion, this presentation is about safety, not politics.



CORE PRINCIPLES FOR THE STATE'S PANDEMIC RESPONSE: 20 *DEL. C. § 3131*

- “New and emerging dangers, including emergent and resurgent infectious diseases and incidents of civilian mass casualties, pose serious and immediate threats.”
- “Emergency health threats, including those caused by bioterrorism and epidemics, require the exercise of extraordinary government functions.”
- “The exercise of emergency health powers must promote the common good.”
- “Emergency health powers must be grounded in a thorough scientific understanding of public health threats and disease transmission.”
- “The rights of people to liberty, bodily integrity and privacy must be respected to the fullest extent possible consistent with the overriding importance of the public’s health and security.”
- “Guided by principles of justice, it is the duty of this State to act with fairness and tolerance towards individuals and groups.”



DDOJ'S DUTIES REGARDING THE PANDEMIC

- 29 Del. C. § 2501: “rendering of **legal services** to the Governor, General Assembly, officers, departments, boards, agencies, commissions and instrumentalities of the state government and to provide for the enforcement of the criminal law of this State.”
- Provide legal services to **every branch** of State government.
- Yet the Civil Division is “a part of **no branch** of government.” AG Buckson (1967 floor debate on the creation of the Civil Division).

THE CIVIL ROLE OF DDOJ

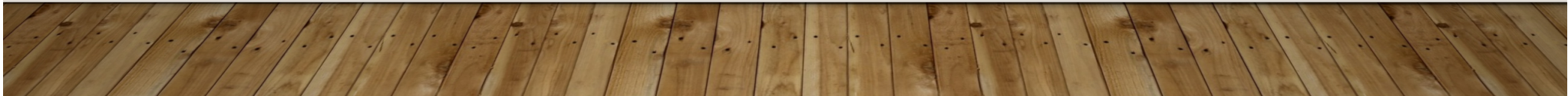
- **Advice and Counsel per 29 Del. C. § 2504(2):**
- Notwithstanding any other laws, to provide legal advice, counsel and services for administrative offices, agencies, departments, boards, commissions and officers of the state government concerning any matter arising in connection with the exercising of their official powers or duties ...
- **Litigation Representation per 29 Del. C. § 2504(3):**
- Notwithstanding any other laws, to represent as counsel in all proceedings or actions which may be brought on behalf of or against them in their official capacity in any court, except in actions in which the State has a conflicting interest, all officers, agencies, departments, boards, commissions and instrumentalities of state government...

LEGAL AUTHORITY TO GOVERN DURING A STATE OF EMERGENCY

- Title 20 of the Delaware Code entitled “Military and Civil Defense” – General Executive Branch Emergency Powers
- Title 16 of the Delaware Code entitled “Health and Safety” – DHSS/Division of Public Health (DPH) Authority
- Title 29 of the Delaware Code; Chapter 101 entitled “General Regulations for State Agencies” – State Agency Emergency Regulatory Authority

TITLE 20, CHAPTER 31 (ENTITLED “EMERGENCY MANAGEMENT”)

- In an emergency, the Governor may “issue, amend and rescind all necessary executive orders, emergency orders, proclamations and regulations, which shall have the force and effect of law.”
- “Governor may assume direct operational control over all or any part of the emergency management functions within the State.”
- “Suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business, or the orders, rules or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule or regulation would in any way prevent, hinder or delay necessary action in coping with the emergency or disaster.”
- “Take such other actions as the Governor reasonably believes necessary to help maintain life, health, property or public peace.”



TITLE 16, CHAPTER 5 (“CONTAGIOUS DISEASES GENERALLY”)

- “[DPH] shall ascertain the existence of cases of an illness or health condition which may be potential causes of a public health emergency ...and shall ensure that they are subject to proper control measures...”
- “[DPH] may close, evacuate or decontaminate any facility or decontaminate or destroy any material when the Division reasonably believes that it is more likely than not that such facility or material may seriously endanger the public health.”
- “An order of the Division given to effectuate the purposes of this section shall be enforceable immediately.”

CATEGORIES OF DPH'S EMERGENCY MANAGEMENT AUTHORITY

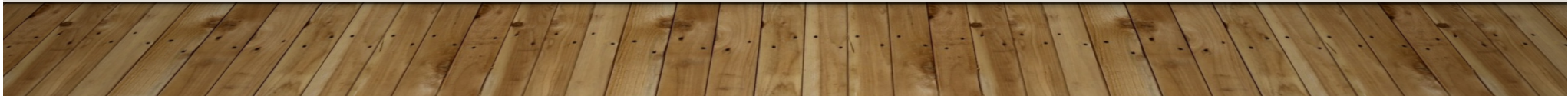
- Control and Direct Healthcare Supplies
- Medical Examination and Testing
- Isolation and Quarantine
- Vaccination and Treatment
- Manage Healthcare Professional Licensure and Credentialing
- Investigate and Enforce through Civil Penalties and Fines

EMERGENCY REGULATORY AUTHORITY

- 29 Del. C. § 10119 entitled “Emergency Regulations”:
- “[I]mmminent peril to the public health, safety or welfare”
- “The agency may proceed to act without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable.”
- Effective for 120 days; renewed for one period of 60 days thereafter.

ESTABLISHMENT OF THE GOVERNMENT'S PANDEMIC LEGAL TEAM

- DDOJ assembled a team of DAGs who were skilled in the areas of public health, public safety, emergency management, regulatory, and affirmative and defensive litigation.
- OGOV's lawyers, policy professionals and leadership first focused on the developing facts and the scope of the Governor's authority to protect public health. In short order, OGOV tapped the expertise and person power of DDOJ lawyers to help advise the Governor and Executive Branch agencies.
- DDOJ and OGOV worked together, often around the clock; nights and weekends; to keep the emergency orders updated, workable, and consistent with the rapidly changing understandings of the virus, how to control its spread, and the impacts of the orders on Delawareans.
- I've assisted with many emergent legal matters for the state; none of them compare with the intensity or duration of the State's pandemic response.
- Delaware's form of government allows it to be nimble and responsive; only one public health authority for the entire state.



POST-EXECUTION GOVERNMENT FUNCTIONS

- 3 core post-execution responsibilities:
- 1) agency interpretation and public guidance,
- 2) investigation and enforcement, and
- 3) defense of the orders from legal challenge.

AGENCY INTERPRETATION & GUIDANCE

- Members of the public need assistance understanding the orders and how they applied to their lives.
- The relevant state agencies (DSHS, DEMA, DHSS/DPH/DOE/DDOJ) took the lead on providing feedback and guidance.
- Agencies set up hotlines and dedicated email addresses where members of the public submitted questions and request for relief from the rules when safe to do so.

INVESTIGATION & ENFORCEMENT

- Law Enforcement often first “eyes and ears” on alleged violations of the SOE orders.
- DPH and DEMA provided joint legal authority to enforce in their organic statutes and the SOE Orders.
- Criminal vs. Civil Enforcement tools; adequacy and availability of remedies at law.
- DDOJ’s Defensive Litigation Unit primarily responsible to enforce and defend the SOE Orders.
- Developed a protocol for establishing a sufficient factual record for seeking emergency injunctive relief in the few instances it was deemed necessary.
- No legal precedent.
- Throughout the pandemic, the emphasis was on explaining the science behind the restrictions and seeking voluntary compliance, not enforcement.

DEFENSE OF THE SOE ORDERS

- SOE application is most challenging in settings associated with fundamental civil rights, for example: residences, houses of worship, and firearms sales.
- Inevitable disagreement over government's reach resulted in challenges based on freedom of religion, to contract, to purchase and possess firearms, and to carry out otherwise lawful business.
- Rational Basis v. Strict Scrutiny - depends on focus of the restriction.
- Deferential *Jacobson* precedent was being judicially redefined while the pandemic was playing out; resulted in unpredictable and inconsistent judicial outcomes across the country.

Part 2

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