BRIDGE THE GAP

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CLE Materials
New York Track | Saturday

January 11, 2020

Fordham Law School
Skadden Conference Center
Costantino Room (Second Floor)
150 W 62nd Street
New York, NY 10023
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Bridge the Gap 2020 Speaker Bios

**Janelle Baptiste**  
Immigration Attorney, Spar & Bernstein, P.C.

**Lindsay Baretz**  
Attorney, Law Office of Jeffrey R. Kuschner

**Honorable Clarence Barry-Austin**  
Chief Judge, Municipal Court, South Orange, New Jersey

**Tanya Blocker**  
Senior Counsel; Immediate Past President, Association of Black Women Attorneys

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**Janelle Baptiste**  
Immigration Attorney, Spar & Bernstein, P.C.

Immigration Attorney at Spar & Bernstein, P.C.

**Lindsay Baretz**  
Attorney, Law Office of Jeffrey R. Kuschner

Lindsay R. Baretz, Esq. is an experienced landlord-tenant attorney who specializes in subsidized housing programs. She has been working in housing related issues for eight years. She graduated with honors from both New York University’s Gallatin School of Individualized Study and from Seton Hall University School of Law. After graduation, she clerked for the Honorable Camille M. Kenny, J.S.C. in the Union County Superior Court of New Jersey. She has been with the Law Office of Jeffrey R. Kuschner since 2011.

**Honorable Clarence Barry-Austin**  
Chief Judge, Municipal Court, South Orange, New Jersey

Clarence Barry-Austin is a Martindale Hubbell AV-Preeminent Rated Certified Civil Trial Attorney with a practice concentration in personal injury litigation. Clarence is an undergraduate of Fordham University and Law graduate of Rutgers-Newark Law School. He practiced civil defense law for Allstate Company Insurance from 1977 to 1984. Then started his own practice where he concentrated in Plaintiff personal injury cases. In 1994, Clarence was appointed to the South Orange Municipal Court.

**Tanya Blocker**  
Senior Counsel; Immediate Past President, Association of Black Women Attorneys

A Senior Counsel in Labor & Employment, Ms. Blocker has extensive experience litigating management-side employment matters. This includes federal and state anti-discrimination laws, state and local wage and hour, and class and collective actions. Ms. Blocker has successfully tried cases in both state and federal court and has significant experience litigating race, gender, age, disability, and retaliation actions.

Prior to joining Gordon & Rees, Ms. Blocker served as Senior Counsel in the Labor & Employment Law Division of the New York City Law Department, Office of Corporation Counsel. There she successfully co-chaired a trial on significant First Amendment retaliation claims, defended numerous depositions in various employment and retaliation matters on behalf of municipal agencies, led the defense of a class/collective action involving a 50,000 employee municipal agency against gender discrimination and pay equity claims, and litigated an equal pay action involving executive compensation resulting in a favorable settlement for her client.

Ms. Blocker is also a complex commercial litigator. Preceding her tenure at the NYC Law Department, Ms. Blocker was an associate at the law firm Kaye Scholer LLP, where she concentrated on white collar criminal defense, securities litigation, and government and corporate investigations. Ms. Blocker played a key role in successfully defending a fraudulent inducement/conveyance action on behalf of the firm’s Fortune 500 client.

Recognizing the importance of community engagement and leadership, on November 1, 2017, Ms. Blocker was installed as the twenty-second President of the Association of Black Women Attorneys (ABWA), a non-profit bar association, established in 1976, committed to promoting and supporting both the personal and professional development and growth of Black women attorneys. Notably, the New York Law Journal recognized Ms. Blocker as a Distinguished Leader in the 2018 edition of the journal’s Professional Excellence Awards for her exemplary leadership of the organization.

Ms. Blocker also spent a significant portion of her time in West Africa engaging in diversity and governance work as well as presenting on international employment law. Ms. Blocker was recently selected to participate in the Center for Strategic & International Studies (CSIS) Abshire-Inamori Leadership Academy (AILA) 2019.
Fellowship program—a flagship leadership program designed to equip aspiring global leaders to be effective and ethical changemakers. In addition, Ms. Blocker has volunteered a significant portion of her time serving as a mock trial coach for a public school in Harlem, New York, and she is a former board member of the After-School All-Stars (ASAS) NY/NJ Chapters—a not-for-profit organization committed to sustaining after school programming for middle schoolers.
Ms. Blocker currently serves as the Co-Chair of the Metropolitan Black Bar Association (MBBA) Labor and Employment Law Section, is an Executive Council for the Network of Bar Leaders, and is a member of the New York City Bar Association Labor and Employment Committee.

Association of Black Women Attorney’s (ABWA) – President (2017 – 2019)
New York City Bar Association – Labor and Employment Committee Member (2018 – present)
Metropolitan Black Bar Association (MBBA) – Labor and Employment Section Co-Chair (2013 – present)
National Bar Association – 2018-2019 Legislative Committee Chair
Council of Urban Professionals (CUP) Executive Leadership Participant (ELP)
Abshire-Inamori Leadership Academy (AILA) 2019 Fellow

Ms. Blocker’s awards include, the National Bar Association Women Lawyers Division’s Outstanding Young Lawyers award, the NAACP Mid-Manhattan Branch Women of Excellence Award, the NAACP Jamaica Branch Community Service Award, the Assembly Member Nick Perry Outstanding Legal Advocate Award and the St. John’s University Law School Women’s Law Society Influencer Award. She has also been named a Network Journal 40 Under Forty Achievement honoree, a Diversity Journal 2019 Women Worth Watching honoree, a National Bar Association 40 Under 40 Nation’s Best Advocates honoree and a New York Law Journal 2018 Professional Excellence Awardee.

Cristin M. Boyle
Associate, Riker Danzig Scherer Hyland Perretti LLP
Cristin M. Boyle is an associate in the Firm’s Governmental Affairs Group and Cannabis Law Group. Her practice includes general litigation, litigation for and against government agencies, condemnation and eminent domain litigation, representation of state agencies and local authorities and governments, white collar defense, and representation of utilities in rate proceedings. She received her law degree from Fordham University School of Law in 2013, where she served as a Board Member and Competitor for the Brendan Moore Trial Advocates, a Teaching Assistant for the Legal Writing Program, and an associate editor of the Intellectual Property, Media & Entertainment Law Journal. Cristin is a member of the New Jersey State Bar Association Cannabis Law Special Committee. She has served as an adjunct professor at Fordham Law School, teaching trial advocacy skills to students as part of the Brendan Moore Trial Advocacy program. Cristin graduated from New York University, cum laude, with a B.F.A. in Drama and B.A. in English and American Literature. Prior to law school, Cristin was a professional actor and worked at several New York casting and talent agencies. Thomson Reuters included Cristin on the New Jersey Super Lawyers “Rising Stars” list for State, Local and Municipal Law in 2019.

Mary Kate Brennan
Associate, Dentons
Mary Kate Brennan is an associate in the New York office. A professional chaser of “bad guys,” her practice focuses on protecting brands from counterfeiters around the world through multi-jurisdictional litigation, supply chain analysis, asset-tracing and client counselling on critical intellectual property enforcement issues. A seasoned litigator, Mary Kate accrued significant courtroom experience through both government service and private practice. During the course of her career, she has first and second chaired trials, prepared and argued dozens of motions and taken and defended well over 50 depositions. As a member of the litigation department of The Port Authority of New York and New Jersey, Mary Kate handled matters in both state and
federal courts, from inception through trial and appeal, including working on a three-attorney team responding to state and federal subpoenas related to the lane-closing scandal at the George Washington Bridge, better known as “Bridgegate.” Prior to joining Dentons, Mary Kate was an associate at an intellectual property boutique where she managed more than 60 anti-counterfeiting cases against e-commerce infringers in Manhattan federal court.

Mary Kate holds a JD from Fordham University School of Law and an LL.M. in Fashion Law, also from Fordham. She received the LL.M. Fashion Law Award, presented to the graduate with the highest cumulative GPA in the program. An article she wrote on Amazon’s attempt to control the international maritime transportation of goods, based upon her LL.M. thesis, was published in the first fashion-focused edition of the Fordham Intellectual Property, Media & Entertainment Law Journal.

Ryan Patrick Campi
Attorney, Graziano & Campi, LLC
Ryan Patrick Campi, of the law firm Graziano & Campi, LLC, represents individuals and corporations in civil litigation at both the trial and appellate levels, estate matters including probate litigation, as well as commercial contract transactions and disputes. He began his career as a litigation attorney in New York City advocating in trial and appellate cases ranging from construction defect, World Trade Center litigation, mass toxic tort and transportation litigation.

Ryan was named to the 2020 New Jersey SuperLawyer’s Rising Stars List. He is a member of the Bar Association of the City of New York, the New York County Lawyers Association, the New Jersey State Bar Association and the New York State Bar Association. Admitted to practice in both New York and New Jersey, he holds a Juris Doctor degree from Fordham University School of Law. Ryan also practices in federal courts, holding admissions to the Supreme Court of the United States, the U.S. Circuit Court for the Third Circuit, and the District Courts of New Jersey, and the Southern & Eastern Districts of New York.

Natacha Carbajal-Evangelista
Deputy Director, Regulatory Affairs, New York State Workers’ Compensation Board
Natacha Carbajal-Evangelista is Deputy Director, Regulatory Affairs, for the New York State Workers’ Compensation Board. In this role, she is responsible for all aspects of regulatory affairs for the agency, including developing and interpreting policy for the Board’s risk management program; overseeing New York State’s Paid Family Leave and Disability Benefits programs; and serving as an advisor to the Chair and Executive Director on policy matters.

Prior to joining the Workers’ Compensation Board, Ms. Carbajal-Evangelista served as the Governor’s Assistant Secretary for Labor and Workforce at the Office of the Governor of the State of New York. As a key member of the State’s leadership team, she assisted, oversaw and directed program and fiscal activities of New York State's dynamic labor and workforce-related agencies and boards, including providing daily strategic operational, legal, policy and budgetary management. Drawing upon her legal training and experience, Ms. Carbajal-Evangelista negotiated budget initiatives on behalf of the Governor through four successful on-time budget cycles. She also led the Statewide implementation of groundbreaking initiatives, including New York's Paid Family Leave, the strongest paid family leave policy in the nation.

Before that, Ms. Carbajal-Evangelista served as the Special Counsel for Ethics, Risk and Compliance to the Commissioner for the New York State Department of Labor, where she focused on government efficiency, responsiveness and accountability.

Prior to joining State government, Ms. Carbajal-Evangelista was a senior associate at Baker & Hostetler LLP, where she was Counsel to the Trustee in the Liquidation of Bernard L. Madoff Investment Securities LLC and advised on issues of international insolvency and bankruptcy. She also previously served as a Judicial Law
Clerk for the Hon. Elizabeth S. Stong of the United States Bankruptcy Court of the Eastern District of New York and for the Hon. Arthur J. Gonzalez (retired), former Chief Judge of the United States Bankruptcy Court of the Southern District of New York. She is a proud graduate of Fordham Law School and Cornell University’s School of Industrial and Labor Relations.

**Jana Checa Chong, Esq.**  
**Senior Intellectual Property Counsel, Louis Vuitton Americas**  
Jana Checa Chong currently serves as Senior Intellectual Property counsel for Louis Vuitton and has been with the company since February 2014. In her role, Ms. Checa Chong is involved in the civil enforcement of the intellectual property rights of Louis Vuitton as well as various LVMH fashion group brands including Christian Dior, Céline, Givenchy, Marc Jacobs, Emilio Pucci, Berluti, and Loewe. Prior to joining Louis Vuitton, Ms. Checa Chong was an associate attorney in the New York office of Gibson, Dunn & Crutcher LLP. Her practice focused on intellectual property litigation and white collar defense and investigations. As part of Jana’s intellectual property practice, she had extensive experience representing brand owners in trademark infringement actions relating to internet-based counterfeiters. Jana received a Bachelor of Arts degree in International Affairs from the George Washington University. She received a Juris Doctor degree from Fordham University School of Law, where she served as Managing Editor of the *Fordham Law Review*.

**Pei Pei Cheng-de Castro**  
**Executive Deputy Inspector General for Legal, MTA Office of the Inspector General; Adjunct Professor, Fordham Law School**  
Pei Pei Cheng-de Castro serves at the MTA Office of the Inspector General as Executive Deputy Inspector General for Legal. She recently served at the New York State Joint Commission on Public Ethics for over six years as Deputy Counsel and the Director of Investigations and Enforcement. Prior to that, she was a partner at the law firm Peluso & Touger, LLP where she practiced criminal defense and commercial litigation. She co-founded a charter school, Central Queens Academy Charter School, serving immigrant and underprivileged youth. She currently teaches Legal Writing at Fordham Law School and formerly taught legal writing and drafting litigation at New York Law School. Ms. Cheng-de Castro is a graduate of the University of California at Berkeley (Double major in Economics and Environmental Science; minor in Education) and New York Law School.

**Honorable Chandra Cole**  
**Chief Judge, Municipal Court, Township of Irvington, New Jersey**  
The Honorable Chandra Rainey Cole, C.J.M.C. is the Chief Judge in the Township of Irvington, New Jersey where she grew up. Judge Cole completed her undergraduate education at Rutgers University in New Brunswick, New Jersey attending Livingston College where she double majored in Criminal Justice and African American Studies, graduating Cum Laude. She completed a joint degree program at Rutgers University Law School in Camden, where she earned her Juris Doctorate and her Master’s Degree in Public Administration and Politics from the Edward J. Bloustein School of Public Policy in New Brunswick. During the summers, she interned at the New Jersey Office of the Attorney General, Division of Law and Public Safety in both the Trenton and Newark offices.

After completing her law school education, Judge Cole immediately began her life of public service. She served as a judicial clerk with the Office of Administrative Law in Newark, New Jersey. She then began practicing at the Law Offices of Love and Randall in East Orange, New Jersey where she represented several public Boards of Education.

Judge Cole was appointed to the Municipal Court bench in February of 2015 where she continues to faithfully serve as the Chief Municipal Court Judge. Prior to her appointment as a Judge, she was the Chief Prosecutor of the Township of Irvington for over ten (10) years. She is also currently an Assistant County Counsel in the County of Union where she has been for three (3) years and prior to that an Assistant County Counsel for the
Judge Cole has a husband, Carl Cole, Sr. and two sons aged 14 and 10, Carl (CJ) and Chase. Her boys are the apples of her eye and chasing after them keeps her young.

We are what we repeatedly do. Excellence, then, is not an act, but a habit.
– Aristotle

Jordana Alter Confino
Director of Professionalism; Adjunct Professor of Law, Fordham Law School

Jordana Alter Confino joined Fordham Law School in summer 2019 as the Director of Professionalism and Special Projects in the Office of Academic Affairs. In that role, Jordana is responsible for overseeing the 1L house system and developing additional programs to promote student wellness and professionalism. Jordana also serves as an Adjunct Professor of Law, co-teaching Peer Mentoring and Leadership and overseeing the upper-year peer mentorship program.

Prior to joining Fordham, Jordana served as the Assistant Director of Academic Counseling and Acting Clerkship Advisor at Columbia Law School, where she continues to co-teach the Federal Appellate Court Externship. Jordana previously clerked for the Honorable Robert D. Sack on the United States Court of Appeals for the Second Circuit, and for the Honorable Paul A. Engelmayer on the United States District Court for the Southern District of New York.

Jordana is Vice Chair of the Law Firm/Law School Collaboration Work Group of the National Association for Law Placement's Well-Being Interest Group. She is also an active member of the Law School Assistance Committee of the ABA Commission on Lawyer Assistance Programs and the New York City Bar Association’s Mindfulness & Well-Being in Law Committee. Jordana earned a Certification in Applied Positive Psychology from the New York Open Center in 2018.

Mark Conrad
Associate Professor of Law and Ethics; Director of Sports Business Concentration, Fordham University Gabelli School of Business

Mark Conrad directs the sports business concentration and is an associate professor of law and ethics at Fordham University’s Gabelli School of Business. In addition to teaching sports law and the business and ethics of sports, he also has taught courses covering contracts, business organizations, and media law.

Professor Conrad’s books and articles have appeared in academic, legal, and general-circulation publications. The third edition of his book The Business of Sports — Off the Field, In the Office, On the News was published by Routledge in 2017. Prior editions have been cited in leading journals as among the most comprehensive texts on the subject.

In addition to his full-time responsibilities at Fordham, Professor Conrad has lectured at leading sports business and law programs, including Columbia University’s sports management program and at St. John’s University’s LLM program in international sports practice. He has appeared on panels at Duke, Fordham, Cardozo, and the University of Virginia Law Schools. He was president of the Sport and
Recreation Law Association from 2014 to 2015 and is serving as president of the Alliance for Sport Business from 2016 through 2018. He has been asked to advise international programs in sports and communications.

Professor Conrad has been quoted in The New York Times, Boston Globe, and Chicago Tribune and has appeared on CNN and Bloomberg TV. He holds a BA from City College of New York and a JD from New York Law School. He also received an MS from Columbia University’s Graduate School of Journalism. He resides in New York City.

Elizabeth Crotty
Founding Member, Crotty Saland PC

Founding member, Elizabeth “Liz” Crotty, has a varied legal career garnering extensive experience in both criminal law and complex civil litigation. Since joining with her partner, Jeremy Saland, to establish Crotty Saland PC, Liz has handled countless cases and represented both those accused of crimes as well as those who are victims of the same. An aggressive advocate, Liz also knows when zealous representation mandates a subtler approach. Irrespective of the case, Liz has secured dismissals, declination of prosecutions, and host of successful dispositions in a wide variety of cases including Grand Larceny, Frauds, Assault, Rape, DWI, Weapon Possession and other crimes. If a case requires mitigation or a trial, Liz is prepared to do whatever is ethically necessary to best achieve success for a client. It is this experience and character that resulted in her selection as a Super Lawyer, an honor given to those attorneys who have attained a high-degree of peer recognition and professional achievement as a result of independent research, peer nominations and peer evaluations.

Liz began her career at the New York County District Attorney's Office under Robert M. Morgenthau where she served as an Assistant District Attorney in the Trial Division. In that capacity, Liz handled the entire spectrum of crimes. Whether the offenses were “street crimes” such as assault, drug sales and weapons possession or more sophisticated crimes including falsifying business records, identity theft and money laundering, Liz had tremendous success investigating these matters and securing convictions before both juries and judges. While far from an exhaustive list of the offenses Liz prosecuted, the cases she handled included the white collar crimes of scheme to defraud, forgery and grand larceny to violent offenses including burglary, kidnapping and attempted murder.

After serving over four years in the Trial Division, Liz continued her training and expanded her legal skills by moving to the Investigation Division of the Manhattan District Attorney's Office. For two years, Liz prosecuted cases as a member of the Special Prosecutions Bureau. While there, Liz handled and supervised complex white-collar cases that were not merely perpetrated locally, but on a national and international level. Notably, Liz worked on a complex international investigation involving an international organization, banks and foreign governments.

Upon leaving the Manhattan District Attorney's Office Liz worked at a well-known boutique civil practice for over two years. While there, Liz honed her investigatory and litigation skills further while working on complex international litigation. At the firm she handled both State and Federal matters regarding aviation litigation, wrongful death, negligence and product liability. Specifically, Liz worked on cases involving foreign banks, governments, charities, airlines, municipalities, and large corporations. In some instances, these resulted in settlements in excess of a million dollars.

Liz is admitted to New York State Courts, the Southern and Eastern Districts. Liz currently serves as board member for the Manhattan District Attorney’s Association, the not-for-profit official alumni organization for the Manhattan District Attorney’s Office. Additionally, Liz serves on New York City Bar Association’s Judiciary Committee where she and her colleagues evaluate candidates for election, reelection, appointment,
reappointment, designation and certification to judicial office and other offices connected with the administration of justice in state and federal courts in City of New York. Liz also belongs to the Federal Bar Council and previously served on the International Human Rights Committee at the Association of the City Bar.

Benjamin I. Dach
Associate, Quinn Emmanuel Urquhart & Sullivan, LLP

Ben Dach is an associate in Quinn Emanuel’s New York office. He is a life sciences patent attorney with a focus on patent litigation in the chemical, biological, and pharmaceutical sciences. He is also part of Quinn Emanuel’s Cannabis Litigation Practice Group. Before joining the firm in 2018, Ben worked six years at an intellectual property boutique where he focused on patent litigation, prosecution, counseling, opinion work, and patent strategy in a broad range of technologies. He has experience in all stages of patent litigation, including pre-suit investigation, fact and expert discovery, trial, post-trial, and appeals. Ben has represented innovative brand name pharmaceutical companies in complex Hatch-Waxman litigations against multiple defendants.

His practice also includes performing diligence on IP portfolios regarding the patentability of inventions, the validity of patents, and the freedom-to-operate new technologies. Ben received his J.D. from Fordham Law School. As a graduate researcher, Ben earned a Ph.D in Chemistry from Columbia University in 2012. And he received a B.A. in Chemistry from Yeshiva University in 2007.

Edgar De Leon
Attorney, The De Leon Firm PLLC

Edgar De Leon is a graduate of the Fordham University School of Law (J.D.) and Hunter College (M.S. & B.A.). He has worked as a Detective-Sergeant and an attorney for the New York City Police Department (“NYPD”). His investigative assignments included investigating hate motivated crimes for the Chief of Department and allegations of corruption and serious misconduct by members of the service for the Deputy Commissioner of Internal Affairs and the Chief of Detectives. While assigned to the NYPD Legal Bureau, Mr. De Leon litigated both criminal and civil matters on behalf of the Police Department. He conducted legal research on matters concerning police litigation and initiatives and advised members of the department on matters relating to the performance of their official duties. Mr. De Leon has counseled NYPD executives and law enforcement and community-based organizations domestically and internationally, concerning policy and procedure development in police related subjects including cultural diversity. In 2005, Mr. De Leon was part of an international team that traveled to Spain and Hungary. Working under the auspices of the Office for Democratic Institutions and Human Rights (“ODIHR”), a subdivision of the Organization for Cooperation and Strategy in Europe (“OCSE”), the team drafted a curriculum and implemented the first ever training program for police officers in the European Union concerning the handling and investigation of Hate Crimes.

In January of 1999, Mr. De Leon retired from the NYPD with the rank of “Sergeant S.A.” (Special Assignment) and began his private law practice. In 2003, he was one of the founding partners of De Leon & Martin, PLLC, now known as The De Leon Firm, PLLC. The firm practices in the areas of criminal defense, matrimonial/family law, employment litigation and general litigation matters. Mr. De Leon has also worked on a per-diem basis representing members of the NYPD Patrolman's Benevolent Association. Mr. De Leon serves as Impartial Hearing Officer for the New York State Department of Education, whereby he adjudicates claims arising under the Individuals with Disabilities in Education Act (“IDEA”). He has on many occasions trained newly appointed Impartial Hearing Officers and has been a speaker for the New York State Bar Association’s continuing legal education class on special education law. Mr. De Leon has also served as a Trial Officer for the New York City Housing Authority where he adjudicated cases concerning employee discipline pursuant to the New York Civil Service Law § 75, and currently serves as a Hearing Officer for the City of New York - Office of Administrative Trials & Hearings (“OATH”). OATH is the City's central
independent administrative law court, that is responsible for holding hearings on summonses issued by a variety of City agencies.

Mr. De Leon has served as a member of the advisory board of the Advanced Systems Technology Corporation (“AST”) located in Lawton, Oklahoma and Instructional Systems Incorporated (ISI) located in Hackensack, New Jersey. He counseled both companies in legal and related issues regarding computer-based training in the area of cultural diversity for the law enforcement community and private security industry nationwide. Mr. De Leon also served on the Board of Directors of Loisaida, Inc.; a not-for-profit corporation founded in 1979, to address the problem of social and economic disenfranchisement of poor and low-income residents in the Lower East Side of Manhattan. In September of 2003, Mr. De Leon was appointed by the Mayor of the City of New York, Michael R. Bloomberg, to serve on the Mayor's Committee on City Marshals. He served on the committee until the end of the Mayor’s term in office in 2013. Mr. De Leon also served as the President of the Puerto Rican Bar Association (“PRBA”) from June 1, 2004 to June 1, 2005. All PRBA Presidents serve a one-year term. In June of 2012, Mr. De Leon was appointed to the Board of Directors of Equal Justice USA (“EJUSA”) where he served a one-year term. EJUSA is a national, grassroots organization working to build a criminal justice system that is fair, effective, and humane, starting with repeal of the death penalty and increased services to families of homicide victims. Mr. De Leon has served as a legal analyst and frequent guest on Court TV and the WWRL Radio show, Legally Speaking.

Mr. De Leon currently sits as an executive board member of the New York State Association of Criminal Defense Lawyers. He has at various times been a member of the American Bar Association, the New York State Bar Association (Criminal and Family Law Section Member), the Association of the Bar of the City of New York, the New York County Lawyers Association (Civil Rights and Small Firm Committee Member), the Hispanic Bar Association of New Jersey, the Puerto Rican Bar Association and the Dominican Bar Association. He is a recipient of the Network for Woman's Services Commitment to Justice Award in 2000, the Borough of Manhattan Community College's Latino Honor Society Award for 2001, the Fordham University School of Law LALSA Alumni Award for 2004 and the El Diario - Most Notable and Outstanding Latinos Award in 2012. Mr. De Leon is admitted to practice law in the state and federal courts of New York and New Jersey.

Kevin DeMaio
Associate, Drinker Biddle & Reath LLP

Kevin DeMaio is an associate at the Florham Park office at Drinker Biddle & Reath LLP, who represents a wide range of clients in civil litigations. Kevin’s experience includes a variety of complex commercial and business disputes, including disputes involving contracts, commercial leases, and consumer class actions. Kevin is a regular contributor to the firm’s TCPA blog, which provides important news and insights about the Telephone Consumer Protection Act.

Upon graduation from law school and prior to joining the firm as an associate, Kevin served as a law clerk to the Hon. Anne E. Thompson of the United States District Court for the District of New Jersey from 2016-2017. While in law school, Kevin served as a judicial intern for the Hon. Cathy L. Waldor, also of the United States District Court for the District of New Jersey.

Raymond Dowd
Partner, Dunnington, Bartholow & Miller LLP; Adjunct Professor of Law, Fordham Law School

Raymond Dowd is a partner in the law firm of Dunnington Bartholow & Miller LLP in New York City. He authored Copyright Litigation Handbook (now in its 10th edition). His practice consists of federal and state trial and appellate litigation, arbitration and mediation, having served as lead trial counsel in broadcasting,
fashion, publishing, art law, copyright, trademark, cybersquatting, privacy, trusts and decedents estates, licensing, corporate and real estate cases.

He has litigated questions of Austrian, Canadian, French, German, Italian, Russian and Swiss law. He litigated landmark decisions from Surrogate’s Court to the New York Court of Appeals, including the Estate of Doris Duke and recovering an ancient Assyrian tablet for Berlin’s Pergamon Museum. Mr. Dowd lectures internationally on copyright litigation and on Nazi art looting. He serves on the Board of Governors of the National Arts Club, co-founded the annual Art Litigation and Dispute Resolution Institute at New York County Lawyers’ Association, served as President of the Network of Bar Leaders and served as the Federal Bar Association’s General Counsel. He co-chairs Fordham Law School’s International Affinity Group.

After graduating from Westhampton Beach High School, he graduated cum laude from Manhattan College and earned his law degree at Fordham Law School. He maintains a residence in Westhampton Beach and his interests include restoration of the wild oyster population. He speaks French and Italian.

On January 10, 2018 at the United States District Court for the Southern District of New York, the Network of Bar Leaders awarded Mr. Dowd the Harold Baer, Jr. Award for service to the legal profession.

Veronica Escobar
Attorney, The Law Office of Veronica Escobar
Native New Yorker Veronica Escobar has been practicing law in her home state for fourteen years. For the past eight years, she has been the Principal and Founder of The Law Offices of Veronica Escobar, a practice focusing exclusively in the areas of Elder Law, Special Needs Planning, and Trusts and Estates. She has two offices, one in her home borough of Queens and the other on the island of Manhattan.

What she likes most about her practice is being able to connect to individuals and families during what can be difficult life moments and creating solutions through careful and considered planning. As she often says, “I like leaving my clients in a better place than when I encountered them.” Naturally, she extends this into her experience as a lecturer to lawyers and the public on issues in elder law and special needs.

Veronica is admitted to practice in the state of New York. She is also admitted to practice before the U.S. District Courts for the Eastern and Southern Districts of New York. She graduated summa cum laude from Fordham College at Rose Hill, Fordham University, where was also elected to Phi Beta Kappa, with a degree in American Studies and a minor in Latin American/Latino Studies. Veronica also received her law degree from Fordham, where she was a Notes and Articles Editor of the Fordham International Law Journal. She is a member of NYSBA and the New York City Bar. She is also chair of the Solo and Small Firm Affinity Group and the AAC Solo and Small Firm Subcommittee at her alma mater, Fordham Law.

Nicole Fisher
Municipal Prosecutor, Municipal Court, Township of Irvington, New Jersey
Nicole R. Fisher is a native of New Jersey; born and raised in the Township of Orange. Ms. Fisher attended Pennsylvania State University in University Park, Pennsylvania as a Bunton-Waller Fellow. She completed her undergraduate course work at Penn State with a major in Criminal Justice and a minor in Sociology. While working full-time as a commercial litigation paralegal, she later attended Seton Hall University School of Law, earning her Juris Doctor degree. During her time at Seton Hall Law, Ms. Fisher participated in the School’s prestigious Interscholastic Moot Court Program.

Upon graduating from Seton Hall Law, Ms. Fisher served as a Judicial Law Clerk to the Honorable Michael J. Nelson, in the Essex County Civil Division. After completing her clerkship, Ms. Fisher worked as an Associate Attorney at Hardin, Kundla, McKeon & Poletto, LLP in Springfield, New Jersey, working in the Firm’s medical malpractice defense unit. Ms. Fisher now proudly serves the
public as the Chief of the Welfare & Support Section with the Office of Essex County Counsel in Newark, New Jersey. She also serves as an Assistant Municipal Prosecutor for the Township of Irvington.

Ms. Fisher believes strongly in giving back to her community. As such, she serves as the Church Clerk for the Canaan Missionary Baptist Church in Newark, New Jersey. She also serves as volunteer at the food pantry of Saint Peter’s of Chelsea, New York. Ms. Fisher is a proud member of Alpha Kappa Alpha Sorority, Incorporated.

Ms. Fisher is truly humbled by all the opportunities that she has been afforded and seeks to continue to be an agent of change for her community.

Norberto A. Garcia
Attorney, Blume Forte Fried Zerres & Molinari

As a Certified Civil Trial Attorney and member of the American Board of Trial Advocates (ABOTA), Norberto A. Garcia has represented clients in a broad spectrum of personal injury matters including automobile accidents, construction cases, premises liability and medical malpractice. He has been named as a New Jersey Super Lawyer from 2013 through the present year.

Mr. Garcia is currently the Vice President of the New Jersey State Bar Foundation, an organization dedicated to promoting law-related education and giving all New Jersey residents a basic understanding of the legal system. He has also served the organization as a trustee since 2009. He is the co-chairperson of the New Jersey State Bar Association’s Diversity Committee.

Mr. Garcia is the past president of the Hudson County Bar Association, where he served as a trustee from 2000 through 2013. He is currently a trustee of the Hudson County Bar Foundation.

Mr. Garcia has been certified by the New Jersey Supreme Court as a civil trial attorney since 2001. He has been active in the Hudson County Inns of Court program since 1996 and is currently a master in the program. He served as a president of the North Hudson Lawyers Club in 2003. He has been co-chairperson of the Hudson County Civil Practice Committee since 2003. The committee serves as a liaison between the civil bench and bar on issues affecting civil practice, arranges seminars and holds an annual meeting between all the civil judges and the bar to address rule changes and other concerns.

Mr. Garcia is a member of the executive committee of the Civil Trial Bar Section of the New Jersey State Bar Association. The section provides a forum for the professional advancement of civil trial attorneys. He served on the Supreme Court Office of Attorney Ethics, District VI Fee Arbitration Committee from 2004 through 2009, becoming its chairperson in 2009. From 2005 through 2008 he served on the Supreme Court Committee on Minority Affairs, which advises the New Jersey Supreme Court on how the state judiciary can assure fairness, impartiality and equal access to the courts. It also monitors legislation that may affect minority citizens of the state.

He is an incoming 2019 trustee of the New Jersey State Bar Association.

Additionally, he lectures on civil practice issues for various bar organizations including the New Jersey Institute for Continuing Legal Education, the New Jersey State Bar Association, the New Jersey Association for Justice, The National Business Institute of Continuing Legal Education and the Hudson County Bar Association.
Mr. Garcia has had numerous jury trial verdicts in cases where the defendant’s insurance company was not making any offers. In recent years these verdicts on “no-pay” cases include Ryou v. Kim (Bergen County) $420,000.00, Savi v. Cohen (Hudson County) $300,000.00, Manzanal v. Manzanal (Hudson County) $237,000.00, Pak v. Lee (Bergen County) $200,000.00, Magner v. Geico (Essex County) $124,000.00 and Lowery v. Smith (Union County) $70,000.00. Other significant recent trial verdicts include Suarez v. Benoit (Hudson County, Fatal Bus Crash) $1,240,000.00, and Baldeo v. Molfetta (Hudson County, fall on ice) $829,000.00. In addition to these jury trial verdicts, Mr. Garcia has achieved millions of dollars in settlements for his clients throughout his career. Recent settlements include a $450,000.00 dram shop case, a $625,000.00 auto case and a $2.1 million trucking accident case.

Mr. Garcia’s first exposure to the law was in college at Seton Hall University where he worked for Pressler & Pressler in East Hanover as a collection team manager. While attending the University of Pennsylvania Law School, he worked for the Bronx Legal Aid Society assisting public defenders. Shortly upon graduation from Law School, he joined Sinins & Bros in Newark and began working for the rights of negligence victims. He later joined Blume, Goldfaden, Berkowitz, Donnelly, Fried & Forte where he became a partner in 2008. He became Of Counsel and later partner with Javerbaum, Wurgraft in 2013. He returned to the Blume firm as a partner effective April 1, 2019.

Born in Camaguey, Cuba, he came to the United States with his parents as a young child and grew up in Hudson County. He has a B.A. cum laude in history from Seton Hall University and graduated from the University of Pennsylvania Law School. He has been admitted to the bars of New Jersey, New York, and Pennsylvania. He is fluent in Spanish. Mr. Garcia resides in Kinnelon, New Jersey with his wife and two sons. He is a member of St. Mary’s Church in Pompton Lakes.

Samantha Gleit
Partner, Feuerstein Kulick LLP
Samantha Gleit is a partner at Feuerstein Kulick, focusing on debt and equity financing, alternative capital sources, leveraged buyouts, senior and mezzanine investments, asset-based lending, and other commercial transactions. Samantha has extensive experience advising companies (ranging from startups to large public companies), investors, sponsors, and financial institutions on risk management, debt structure, acquisitions, capitalization, compliance, workouts, restructuring, and distressed debt. Beyond traditional legal advice, Samantha also assists startups and growing companies identify liquidity sources, formulate strategy and negotiate efficient financing solutions.

Samantha is well known for her knowledge and experience in the debt market and is regularly interviewed and published in leading debt media outlets, including a recent interview with Debtwire discussing distressed debt in the pharmaceutical industry, and an article featured on the cover of the ABI Journal discussing suggested reforms to the federal bankruptcy process. Samantha was selected as a Rising Star in the 2015 – 2019 editions of New York Metro Super Lawyers® and featured in The New York Times Magazine Super Lawyers® Top Women Attorneys in the New York Metro Area. Samantha was also awarded the International Bar Association’s Insolvency Scholarship in 2013 for her award winning article on distressed law firms. Prior to joining Feuerstein Kulick, Samantha worked at King & Spalding LLP in New York, in the corporate finance and investments group.

Edward W. Greason
Counsel, Dunnington, Bartholow & Miller LLP
Edward W. Greason is Counsel at Dunnington, Bartholow & Miller, LLP where he is a member of the Trust, Estates and Private Clients Group. In his practice he advises clients on estate planning, Wills and Trusts of various types, closely held businesses, public and private charities, probate and administration, art law, estate litigation, estate taxation, trust administration and fiduciary accountings. He has advised a broad spectrum of
individual clients varying from retired teachers to billionaires to royalty, executors, trustees, bank and trust companies, corporations and public charities.

Mr. Greason is admitted to practice in New York and before the Supreme Court of the United States. He is a member of the American Bar Association (Real Property, Trusts and Estates Section), New York State Bar Association (Trusts and Estates Law Section) and the New York County Lawyers Association (Estates, Trusts and Surrogate Court Practice Committee). Mr. Greason graduated from Lafayette College with majors in History and Art History. He received his Juris Doctorate from Fordham University School of Law where he was a Notes Editor on the Entertainment, Intellectual Property and Media Law Forum. He is involved in a number of charitable activities and has served on the board of several charitable and not for profit entities.

Divya Jayachandran
Vice President & Deputy Head, Marketing Legal (TV & Film), NBCUniversal Media
Divya Jayachandran is Vice President & Deputy Head of Marketing in the legal department at NBCUniversal Media. Her primary role involves collaborating with marketing teams across NBCU’s portfolio of film and television properties, including Universal Pictures, Focus Features, Dreamworks Animation, NBC, Bravo, SYFY, Oxygen, and USA Network. Prior to joining NBCU, she was an intellectual property associate in the New York office of Kilpatrick Townsend & Stockton. She graduated with honors from Cornell University, and holds a JD from Fordham University and an MBA from NYU Stern.

Natalya G. Johnson
Attorney, Riker, Danzig, Scherer, Hyland & Perretti LLP
Natalya earned her J.D. from Cornell Law School and a bachelor’s degree with honors and distinction in Government, graduating magna cum laude from Cornell University. Natalya is a past member of the Executive Board of Directors of the Cornell Law School Alumni Association and sits on the inaugural board of the Mary Kennedy Brown Society. She is also a member of Cornell Mosaic and the President’s Council of Cornell Women.

Natalya has held various leadership roles. She serves on the Board of Directors as Northern Region Director and Co-Chair of the Continuing Legal Education committee of the Garden State Bar Association (GSBA), co-founded a women’s network called the Advancement Initiative (AI), which reaches approximately 200 attorneys in the tristate area, and is President of the Cornell Black Lawyers Alumni Network (CBLAN).

On behalf of CBLAN, Natalya successfully helped to fundraise money in support of its endowed scholarship fund for diverse law students. She spearheads alumni programs around North America in cities and states such as California, New Orleans, New York City, San Francisco, Toronto, New Jersey, and Washington, D.C.

Committed to pro bono service, Natalya started her legal career as an attorney fellow with Volunteer Lawyers for Justice (VLJ). At VLJ, she helped clients with criminal records address the civil legal barriers that serve as obstacles to successful community reintegration through its Criminal Record Expungement Clinic. Natalya also volunteers and takes cases with organizations such as Pro Bono Partnership and Kids in Need of Defense (KIND).

In 2018, Natalya received the Young Lawyer Award from the GSBA for her dedicated service to the legal profession. In 2019, she was named by the National Bar Association to its 40 under 40 Nation’s Best Advocates List. Natalya has been included in the Super Lawyers “Rising Star” list published by Thomson Reuters every year since 2016.

Sean Kane
Co-Chair, Interactive Entertainment Group, Frankfurt Kurnit Kein + Selz, P.C.
Sean F. Kane is co-Chair of the Interactive Entertainment Group at Frankfurt Kurnit, where he represents a variety of companies in the video game and social media industries. Mr. Kane’s clients often are on the cutting-edge of media, content and technology creation where rapid innovation is leading to the birth of new
Mr. Kane has worked at the forefront of the interactive entertainment industry for the past decade and has represented clients on transactional matters involving various business segments, such as console and PC video games, virtual worlds, eSports, online gaming, social gaming, mobile and tablet gaming, virtual currency, mobile apps, social media, computer software and the Internet. Mr. Kane’s clients range from start-ups to the largest developers and publishers in the video game industry. He counsels and works with clients to structure, negotiate and implement complex video game content acquisition, development and distribution deals. Mr. Kane regularly advises clients on video game licensing, co-branding, consulting, advertising, content monetizing, video game publishing and video game distribution transactions. He also has experience litigating complex business and intellectual property disputes in federal and state courts at trial and appellate levels and in ADR forums throughout the country.

Mr. Kane is a frequent speaker on video game panels and seminars on behalf of organizations such as: Law Seminars International, Practising Law Institute, Game Developers Conference, LOGIN, RSA, Digital Hollywood, NY Games and the American Bar Association. Mr. Kane is frequently quoted by the media and has written extensively on legal topics relating primarily to intellectual property and entertainment issues. For example, he is the co-author of Video Game Law: Everything You Need To Know About Legal and Business Issues in the Game Industry, published by Taylor & Francis/CRC Press, author of: "How Courts View Copyright Protection For Video Games" published by Law360, July 2017, "When It Comes to Games, the Practical Limit to U.S. Copyright Protection May Only Be Skin Deep" published in the first issue of the Games Law Industry Journal, May 2017, "Game On: Have an Idea for a Great Video Game?" published by Athletes Quarterly, March 2016, "Copyright Assignment Termination After 35 Years: The Video Game Industry Comes of Age" published by The Lawyer, September 2013, "Evolving Case Law on the Fair Use of Famous Trademarks in Video Games" published by Law360, August 2013, and more.

Mr. Kane is a founding member of the Video Game Bar Association. He is a member of the American Bar Association Section of Intellectual Property Law, where he recently served as Chair of the Computer Games and Virtual Worlds Committee. Additionally, he is a member of the Section of Science & Technology Law, where he served as the founding Chair of the Virtual Worlds and Multiuser Online Games Committee.

Prior to joining Frankfurt Kurnit, Mr. Kane was special counsel to Pillsbury Winthrop Shaw Pittman LLP and founder of Kane & Associates LLC, where he served as Chair of the firm’s Interactive Entertainment Practice Group. He is admitted to practice in the United States District Courts for the Southern and Eastern District of New York and in New Jersey.

Melissa E. Katsoris
Immigration Attorney, Spar & Bernstein, P.C.
Melissa E. Katsoris handles various types of immigration matters. She has extensive experience in managing and preparing employment-based immigrant and non-immigrant visa petitions for a wide variety of professionals including artists, athletic coaches, tech professionals, business executives, engineers and more. She also handles family-based petitions, waivers, asylum, naturalization and many other types of immigration petitions and applications. Melissa takes a creative approach in handling her client’s immigration cases to boast a successful outcome. She understands that a strategic approach and attention to detail can be the deciding factors for immigration cases.

Prior to practicing immigration law, Melissa was an Adviser to the Permanent Mission of Greece at the U.N. where she covered multiple topics, including Migration. While advising on migration issues, she represented Greece during high-level negotiations and meetings leading up to the adoption of the Global Compacts for Migration and Refugees, the first intergovernmental negotiations under the auspices of the U.N. to cover all
aspects of international migration. Her work on migration policy at the U.N. piqued her interest in U.S. immigration, which led her to practice immigration law.

**Honorable Grace E. Lee**

*Administrative Law Judge, New York State Office of Temporary and Disability Assistance*

Honorable Grace E. Lee has dedicated her career to public service. Judge Lee currently serves as an Administrative Law Judge for the New York State Office of Temporary and Disability Assistance, adjudicating over 2000 cases involving public benefits including Public Assistance, SNAP benefits, Medical Assistance and temporary housing. Prior to her judicial role, Judge Lee worked as an attorney for the Division of Legal Affairs at the New York State Office of Children and Family Services where she managed a robust caseload of child care enforcement matters and facilitated laws and policies impacting the welfare of children and communities in the state. Judge Lee was also a Special Assistant for Legislative Affairs at the New York State Governor's Office, identifying pertinent legal and legislative issues for senior government officials. She received her B.A. from Boston College and J.D. from Fordham University School of Law, graduating with honors. Judge Lee is a member of the New York City Bar Association, Brooklyn Women's Bar Association, Asian American Bar Association of New York, and Korean American Lawyers Association of Greater New York. Judge Lee has previously served on the New York State Bar Association's President's Committee on Access to Justice.

**Samuel P. Madden**

*Managing Member, The Madden Firm PLLC*

Samuel P. Madden is the founder and managing member of The Madden Firm PLLC, his own solo practice started after two years of practicing entertainment law at a boutique firm in downtown Manhattan. Prior to that, Mr. Madden worked for three years at one of the nation’s preeminent plaintiff’s litigation firms. Mr. Madden’s practice has focused on both litigation and transactional work for clients in the entertainment industries, particularly music, film, and television. Mr. Madden earned his Juris Doctor from Fordham Law in 2013. He is licensed to practice law in state and federal courts in New York and California.

**Joseph C. Mahon**

*Partner, Cooper Levenson PC*

Joseph C. Mahon is a partner in Cooper Levenson, P.A., Taxation Group, advising high net worth clients, executives and business owners on family wealth planning, administration and succession. Mr. Mahon regularly assists clients in structuring, documenting and implementing plans and transactions to transfer, maximize and protect wealth.

For more than 35 years, Mr. Mahon has advised clients on a range of issues, including: Estate Planning, Estate, Gift and Income Tax Planning, Generation Skipping Transfer Tax Planning, State Death Taxes, Family Office Services, Family Governance, Liquidity Events, Business Succession, Insurance, Lifetime Gifts, including Valuation Discounts, Grantor Trusts, Dynasty Trusts, Family Limited Partnerships, Intra-Family Loans, Grantor Retained Annuity Trusts, Private Annuities, Qualified Personal Residence Trusts, Crummey Trusts, Trust Terminations, Trustee Succession, Trust Protectors, Pre-Nuptial Agreements, Powers of Attorney, and Health Care Proxies. Mr. Mahon also regularly advises clients on trust and estate litigation and dispute resolution, including contested guardianships, and on tax and other issues unique to Non-U.S. persons and assets.

Mr. Mahon is a frequent writer on Trusts and Estates matters. His articles have appeared in Trusts & Estates magazine, Estate Planning magazine, New Jersey Lawyer, Unique Homes, and other publications. His leading 2011 article on the impact of income taxes on estate planning pursuant to recent tax changes -- "The 'TEA"
Factor: How Much Appreciation Must Occur for a Gift to Provide Estate Tax Savings Greater Than Income Tax Costs?— was published by Trusts & Estates magazine in August 2011. Mr. Mahon has lectured frequently on estate planning for leading organizations including New York City Bar Association, New York State Bar, New Jersey Institute for Continuing Legal Education, New Jersey Society of Certified Public Accountants, and Princeton Bar Association.

Mr. Mahon served as a member of the New York City Bar's Committee on Trusts & Estates (1987-1989), and the New York State Bar Association's Committee on Legislation -- Trusts & Estates Section (1990-1996). He has also served on several charitable boards, including the Board of Trustees of the Hudson Valley Shakespeare Festival, in Cold Spring, New York.

Alexander Serrano Mercado
Associate Immigration Attorney, Spar & Bernstein, P.C.
Alexander Serrano Mercado has been a licensed attorney for almost 6 years the majority of it practicing immigration law. He is currently an Associate Immigration Attorney at Spar and Bernstein in Downtown Manhattan. His areas of expertise include removal defense before the Executive Office of Immigration Review and Board of Immigration Appeals and family based petitions before the U.S. Citizenship and Immigration Services. These include asylum, specialized waivers to obtain lawful permanent resident status (a.k.a. green cards) overcoming fraud, criminal, and unlawful presence issues, self-petitions such as Violence Against Women Act (VAWA) and Special Immigrant Juvenile (SIJ), and naturalization. He is a native of Puerto Rico and is fluent in English and Spanish as well as proficient in French and Portuguese.

A graduate of the University of Puerto Rico-School of Law, Mr. Serrano Mercado’s passion for advocacy started during his law school studies when he was elected to the Academic Senate. There he advocated for numerous policy changes geared towards higher representation of low income students and a revision of the University’s Student Handbook. Furthermore he participated in his law school's Pro Bono program particularly working on issues regarding gender, sexual identity and reproductive rights for indigent and low income youths many of whom were immigrants. After graduating from law school, Mr. Serrano Mercado was named Attorney Mentor of the same Pro Bono Program and in this capacity worked with the Legislative Assembly of Puerto Rico to pass the first sexual identity and gender employment discrimination bill in Puerto Rico. Mr. Serrano Mercado has also collaborated with a number of pro bono organizations in New York City such as Legal Services of New York and Center for the Integration and Advancement of New Americans (CIANA) providing free legal advice to impoverished immigrants with regards to green card and naturalization applications.

Andrew Moskowitz
Partner, Javerbaum Wurgaft Hicks Wikstrom & Sinins, P.C.
Andrew Moskowitz is a partner with the law firm of Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins (www.lawjw.com). He has been an attorney for twenty-two (22) years. For most of that time, he has focused on employment law as well as commercial and personal injury litigation cases.

Andrew was named one of New Jersey’s Super Lawyers for the years 2012 through 2019 in the Employment & Labor category. Prior to that, from 2007 to 2010, he was a Rising Star in the Employment & Labor category. Andrew is a member of the NELA-NJ Board of Directors and has served as a Co-Chair for the NJAJ Employment Law Section.
Andrew is a graduate of Duke University and attended the Fordham University School of Law, where he graduated in the top 25% of his class.

Roger R. Quiles
Founding Partner, Quiles Law
Roger R. Quiles, Esq. is a leading attorney servicing the esports industry. Roger represents dozens of businesses and individuals who operate on all sides of the esports industry, including teams, players, shoutcasters, event hosts, Twitch streamers, Youtube content creators, tournament providers, marketing and apparel companies, and more. Roger is one of the few attorneys experienced in representing both an esports and traditional sports clientele, having also represented athletes and sports businesses. Roger counsels his clients on a variety of business, intellectual property, corporate, mergers and acquisitions, sports and gaming matters. As one of the preeminent esports attorneys, Roger's work has been featured in publications such as ESPN, Dot Esports, Law 360, and more.

An avid legal writer, Roger authored The Little Legal Handbook for Esports Teams, an ebook discussing the basic legal principles involved in creating an esports team. Roger also wrote several articles on recent and emerging Sports Law and Business Law developments.

In addition to representing individuals in the esports industry through his law practice, Roger also is the Co-Founder of FTW Talent, a full service esports talent management agency representing players, coaches, and influencers.

Prior to starting his own law practice, Roger worked for a New York City judge and a small firm in Manhattan. Roger firmly believes that most of life's problems can be solved with Up, Up, Down, Down, Left, Right, Left, Right, B, A, Start.

Leah A. Ramos
Regulatory Compliance Counsel, Structure Tone

Leah Ramos is Regulatory Compliance Counsel at Structure Tone, a global leader in construction management and general contracting services with offices in the US, Canada, UK, and Ireland. Leah’s role includes instituting and developing company policies and procedures, integrating new business units, leading ethics and compliance training, and investigating potential violations of policies, laws, and regulations. She is also an Adjunct Professor at Fordham Law School, teaching Legal Research and Writing to first-year students.

Leah graduated from the University of Pennsylvania, and worked in finance and accounting at PricewaterhouseCoopers and Merrill Lynch before she attended law school. She earned her JD in 2004 from Fordham Law School, where she was captain of the National Moot Court team. She worked for two years as a litigation associate at Kirkpatrick & Lockhart before clerking for the Honorable Denny Chin in the Southern District of New York from 2006 to 2007. She then spent over seven years as a litigator focusing on complex commercial and employment matters, first as an associate at Morrison & Foerster and then as senior counsel at Thompson Hine. Before joining Structure Tone, Leah was Associate Counsel and Director of Financial Disclosure Compliance at the New York State Joint Commission on Public Ethics, an independent state agency created to restore public trust in government by ensuring compliance with the state's ethics and lobbying laws, regulations, and guidance.

Anthony Ricco
Attorney-at-Law; Adjunct Professor, Fordham Law School

Anthony L. Ricco specializes in state and federal criminal defense litigation, particularly capital defense litigation. Over the past two decades, Mr. Ricco has represented over 50 defendants in federal death penalty prosecutions throughout our county.

Throughout his career, Mr. Ricco has received many professional recognitions and honors, including his induction as a Fellow in the American College of Trial Lawyers in 2010; and various awards from both local, regional and national Bar associations, including the New York State Association of Criminal Defense Lawyers' Hon. Thurgood S. Marshall Award for Outstanding Criminal Practitioner in 2016. However, Mr. Ricco is most proud of the fact that in 2008 he was the recipient of the United States Court of Appeals for the Second Circuit and the American Inns of Court Professionalism Award, as it reflects a recognition of his long time commitment to providing opportunities for younger attorneys.
During his career Mr. Ricco has handled numerous high profile and controversial cases, including, inter alia, the World Trade Center bombing conspiracy case (USA v. Omar Abdel Rahman, et. al.); the U.S. Embassy bombing case (USA v. Usama Bin Laden, et. al.); and counsel for one of the police officers in the so-called Sean Bell police murder case in New York; and many of New York City, State and Federal politicians.

Mr. Ricco has been married for 30 years and has two children; his daughter is a 2011 graduate of Loyola University School of Law and his son is a 2012 graduate of Penn State University.

Sam Roberts
Senior Staff Attorney, Homicide Defense Task Force, Legal Aid Society

Sam Roberts is a Senior Staff Attorney with the Legal Aid Society's citywide Homicide Defense Task Force. Sam graduated from Fordham Law School, summa cum laude in 2006, where he was an Editor of the Fordham Law Review and a Stein Scholar for Public Interest. After graduation, Sam served as a Law Clerk for the Honorable John Keenan, Senior District Judge for the Southern District of New York. After his clerkship, Sam joined the Legal Aid Society as a staff attorney with the Society's Criminal Defense Practice in Manhattan. As a public defender, Sam has acted as lead counsel in approximately 40 felony jury trials and numerous hearings, representing indigent clients in cases ranging from drug possession to first degree murder.

During his tenure at Legal Aid, Sam has assisted in Trial Advocacy Training for newly admitted attorneys. He has also been a faculty member at Harvard Law School's Trial Advocacy Program, administered by Harvard's Criminal Justice Institute. In 2017-2018, Sam volunteered as a Fellow for the International Legal Foundation, where he worked in Myanmar to help establish public defender offices in the cities of Yangon and Mandalay.

He is a proud New Yorker and the even prouder relatively new dad of a 19 month old daughter, Olivia.

Diana Santos
Associate Counsel, New York Genome Center, Inc.

Diana G. Santos, Esq. is Associate Counsel at the New York Genome Center, Inc., an independent, nonprofit academic research institution focused on genomic research. Diana specializes in handling NYGC's technology and intellectual property-related transactions, including licensing and transfer agreements; commercial agreements; SaaS agreements; software license agreements; and outsourcing and service agreements. She develops and maintains NYGC’s policies on IP, privacy, and cybersecurity. Prior to joining NYGC, Diana worked at Willkie Farr & Gallagher LLP and Ropes & Gray LLP. As outside counsel, she advised major technology, automotive, pharmaceutical, consumer product, and medical device companies in the development of offensive and defensive legal strategies. Diana has experience in a variety of patent litigation stages, and has represented clients in various forums, including district courts, the International Trade Commission, the Patent Trial and Appeal Board, and the American Arbitration Association. She also counseled clients on IP issues for investments, product development, and branding, including as related to trademarks, copyrights, and consumer law.

Diana is a member of the LatinoJustice PRLDEF Líderes Board and a Deputy of the Hispanic National Bar Association’s Region II. Diana is also a member of the New York Intellectual Property Law Association’s Women in IP Law Committee; Fordham Law's Recent Graduates Committee; Fordham Law’s Alumni Attorneys of Color Affinity Group; and NYIPLA’s Women in Law Committee.

Diana received her J.D. from Fordham’s University’s School of Law and LL.M. in European Law from Université Panthéon–Assas, Collège Européen de Paris. Diana received her Master of Biotechnology from the University of Pennsylvania and Bachelor of Engineering from The Cooper Union for the Advancement of Science and Art.

Matthew Siegal
Of Counsel, Dilworth & Barrese LLP
Matthew Siegal is currently Of Counsel to Dilworth and Barrese LLP on Long Island and was formerly a partner at Stroock & Stroock & Lavan in NYC. He received his J.D. from Fordham Law School in 1987 and a B.S. in Chemical Engineering from Cornell University in 1984.

Mr. Siegal has spent his 30 year legal career practicing all aspects of Intellectual Property law. This has included obtaining patents and trademarks for large companies such as Epson and Fujifilm as well as start-ups and solo inventors. He has also litigated patent, trademark and copyright disputes for those companies and others such as Merck and Bayer. He holds a rare distinction of obtaining a preliminary injunction for one of his clients on a patent that he wrote and obtained for them in the USPTO.

Mr. Siegal spends his spare time negotiating Intellectual Property licenses and preparing freedom to operate and patentability opinions. He has published over 70 articles in the field of Intellectual Property and has spoken both nationally and internationally on a variety of intellectual property topics and is frequently quoted in various Intellectual Property related publications such as IP360.

**Elina Teboul**  
*Founder, The LightUp Lab*

Elina Teboul is the founder of The LightUp Lab, through which Elina seeks to inspire and empower people and organizations through positive psychology, mindfulness and coaching training. Elina combined her previous experience working in big law with her passion and knowledge of positive psychology and mindfulness to help lawyer’s flourish, personally and professionally. Previously, Elina was a corporate lawyer at Davis Polk & Wardwell, LLP and Credit Suisse in New York and managed philanthropic projects and initiatives in Bermuda for the Allan & Gill Gray Foundation. Elina holds a Bachelor's degree in Economics from New York University and a J.D. from Columbia Law School. Elina is currently pursuing her executive coaching degree through the Columbia Coaching Certification Program and is a candidate for her M.A. in Psychology at Columbia University, Teacher’s College.

**Pratin Vallabhaneni**  
*Partner, White & Case LLP*

Pratin Vallabhaneni is a partner in White & Case's global Banking and Financial Institutions Advisory practices. He represents both US and non-US fintech, banking, broker-dealer, exchange, insurance, asset management and specialty finance companies, as well as their directors, senior officers and investors, on transactional, enforcement and regulatory matters. Clients often call upon Prat to strategically navigate cutting-edge fintech issues that are complex, rapidly evolving and multijurisdictional in nature.

Prat's transactional practice focuses on public and private M&A, capital raising, bank finance, commercial agreements and activism matters. Prior to joining the firm, Prat was an investment banker at Morgan Stanley, where he advised clients on valuation and execution of M&A, capital markets, bank finance, securitization, activism defence and restructuring mandates.

Prat's financial regulatory and enforcement practice focuses on advising financial services clients on matters before the Federal Reserve, OCC, FDIC, SEC, CFTC, CFPB, FTC, Treasury Department, FinCEN, OFAC and state banking and securities agencies. Earlier in his career, Prat served as an attorney at the FDIC during the global financial crisis where he worked on numerous crisis-related, private equity-backed bank M&A transactions, bank receiverships and enforcement actions against banks, consumer finance firms, and directors and officers. He was also actively involved in the interagency implementation of the Dodd-Frank Wall Street Reform and Consumer Protection Act.

**Alexander Wentworth-Ping**  
*Associate, Quinn Emanuel Urquhart & Sullivan, LLP*
Alexander Wentworth-Ping is an associate in Quinn Emanuel’s New York office. He practices criminal defense, complex commercial litigation, and international dispute resolution, with experience in white collar criminal defense and investigations and cross-border disputes, as well as securities, employment, antitrust, and appellate litigation. He advises clients on a broad range of white collar issues, including alleged corruption, healthcare fraud, securities fraud and insider trading, money laundering, and other disputes with federal and state prosecutors and enforcement agencies. He has also advised and successfully represented clients in multiple Section 1782 proceedings, a mechanism that allows a foreign litigant to obtain discovery in the United States for use in a foreign proceeding. He is a member of the firm’s Latin America Practice and has published articles on Section 1782 discovery, civil procedure and constitutional law issues.

Prior to joining the firm, Alex worked at a prominent London-based law firm, Allen & Overy LLP, and also served as a law clerk to Magistrate Judge James Orenstein of the United States District Court for the Eastern District of New York. Alex graduated cum laude from Fordham University School of Law in 2013, where he was actively involved in the Fordham Law Review, Moot Court, and Dispute Resolution Society. Prior to law school, he served as a Peace Corps volunteer from 2008 to 2010. Alex is fluent in Spanish.

**Gregory Xethalis**  
**Partner, Chapman and Cutler LLP**

Greg Xethalis is a partner in Chapman's Corporate and Securities Department and a member of the firm's Investment Management Group. He represents clients in financial services and emerging technology matters.

Greg counsels clients in the investment management, corporate, and digital asset/blockchain ecosystems. His representation of clients in the digital asset space has included registered and private fund sponsors, operators of digital asset trading, lending and custody platforms, bitcoin mining companies, clients developing tokenized platforms, and entrepreneurs and institutional clients experimenting with blockchain/DLT projects. He also counsels clients in developing ventures and building consortia to leverage blockchain technology in existing and new frameworks. Greg is a frequent speaker on developing regulatory issues relating to bitcoin, ethereum, and the adoption of distributed ledger technology.

Greg also advises investment advisers and boards of exchange-traded fund (ETF) and mutual fund platforms in matters including fund formation, registration of shares with the Securities and Exchange Commission (SEC), and ongoing compliance matters. He represents sponsors of exchange-traded commodities (ETC) and advisers to private funds.

**Michael D. Yim**  
**Partner, Putney, Twombly, Hall & Hirson LLP**

Michael D. Yim is a Partner at Putney, Twombly, Hall & Hirson LLP. His labor & employment law practice is multidisciplinary and international in scope. Michael offers extensive skill in resolving complex wage and hour claims, including class actions with millions of dollars in dispute. He regularly serves as lead counsel in high-stakes matters, and works diligently with each client to develop comprehensive strategies for all workplace issues. Notably, his practice includes executive employment strategies such as noncompetition, trade secrets and cross-border mobility and compensation, as well as discrimination, whistleblower and other labor-related matters.

Michael represents a broad range of international and domestic clients, and is known and consistently valued for his creative and aggressive solutions for all types of employment problems. In addition to his proven legal acuity, Michael's industry experience is both broad and deep, and includes hospitality, financial services, retail, manufacturing, technology and lifestyle businesses, to name only a few.

Michael is a graduate of Fordham University School of Law where he was a Crowley Scholar and recipient of the Dean’s Special Achievement Award.
Amanda M. Yu  
**Associate Attorney, Lesnevich, Marzano-Lesnevich, O’Cathain & O’Cathain, LLC**

Amanda M. Yu, Esq. is an associate with the law firm of Lesnevich, Marzano-Lesnevich, O’Cathain & O’Cathain, LLC, in Hackensack, New Jersey, where she practices exclusively family and matrimonial law. Ms. Yu is admitted to practice in New Jersey, the District of New Jersey, and New York, and is also a member of the Family Law Section and Young Lawyers Division of the New Jersey State Bar Association. She serves on the Social/Sponsorship Committee of the Young Lawyers Subcommittee of the Family Law Executive Committee for the 2019-2020 term.

Ms. Yu received her B.A. from Rutgers University and her J.D. from Fordham University School of Law. She served as a law clerk to the Honorable Linda E. Mallozzi, J.S.C., Union County Superior Court, Chancery Division, Family Part.

Michael C. Zogby  
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Michael C. Zogby is a trial lawyer whose clients trust him to handle a variety of complex, aggregate litigation, including products liability, medical device, life sciences, class action, consumer disputes, intellectual property, trade secrets, toxic tort, and multidistrict proceedings. Mike also has significant experience counseling clients and coordinating cross-border discovery, privacy, information governance, cybersecurity, and data collections involving Asian and European companies.

Mike co-chairs the firm’s 60-attorney nationally ranked Products Liability and Mass Tort Group, as well as the firm wide Pharma and Life Sciences Group.

He serves as a faculty member at the National Trial Advocacy College at the University of Virginia School of Law, an intensive hands-on trial advocacy training program for practicing attorneys and law students. Mike is an elected trustee of the Trial Attorneys of New Jersey, a nonprofit organization whose mission is to preserve and improve the civil and criminal justice system in New Jersey, providing its plaintiff and defense attorneys with a wide range of services, including legal education, leadership and advocacy on issues that affect the quality of life of lawyers, judges and litigants at the trial bar.

Mike is a member of the Product Liability Advisory Council (PLAC), an organization comprised of more than 100 leading product manufacturers and 350 of the most elite product liability defense counsel operating in the U.S. and abroad. PLAC focuses on achieving balance and fairness in the application of existing law within the civil litigation system and its many facets, leveraging litigation—and trials—to shape the common law.

Mike is also a member of the International Association of Defense Counsel (IADC). The IADC is an invitation-only, peer-reviewed organization founded in 1920 and comprised of leading corporate defense trial lawyers and in-house counsel from across the United States and more than 35 countries.

Mike was elected to membership in the Trial Attorneys of America. This national organization of trial counsel, founded in 1969, is limited to 200 attorneys who devote a substantial portion of their practice to the defense of product liability litigation and to corporate counsel who work primarily in that area.

Mike was appointed to the Law360 Life Sciences Editorial Advisory Board and the Law360 Product Liability Advisory Board. He co-chairs the Pharmaceutical and Medical Device Subcommittee of the ABA's Mass Torts Litigation Committee, and he has served as a Master in the William J. Brennan, Jr.-Arthur Vanderbilt Inn of Court, as ethics investigator for the District V Attorney Ethics Committee, and on the New Jersey State Bar Equity Jurisprudence, Class Actions, and Antitrust Special Steering Committees.

Steven Zweig, Esq.  
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Steven Zweig has been practicing law for 27 years, as a Securities Exchange Commission enforcement attorney, as corporate counsel, and—for the last 10 years—as a landlord-tenant attorney in New Jersey, handling public housing, private landlord, and commercial tenancy matters for both landlords and tenants. He also has hands-on business and negotiating experience, having been a vice president of operations, executive
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Tips for Effective Legal Writing

Prof. Pei Pei Cheng-de Castro
Prof. Leah Ramos

Fordham Law School | January 11, 2020
Rules to Write By

- Rewrite, rewrite, rewrite!
- Be precise with language
- Use plain English
- Know (and write to) your audience
- Tell me the answer upfront
Tell me the answer upfront: the formal memo

Question Presented: Does the unauthorized use of an individual's picture during a television news broadcast violate his or her right of privacy under sections 50 and 51 of the New York Civil Rights Law?

No. The statute is not violated as long as the picture is used in a "newsworthy" story and there's a real relationship between the picture and the story.

No. McKay cannot bring a claim because the story is newsworthy and he appears to be part of a romantic couple.
Question Presented: Does the unauthorized use of an individual's picture during a television news broadcast violate his or her right of privacy under sections 50 and 51 of the New York Civil Rights Law?

Generally no. In New York, the right of privacy is protected exclusively under the statute, which prohibits the unauthorized use of a person's name or likeness for "advertising or trade purposes." Courts have held, however, that the statute does not apply to the use of a person's picture in connection with the reporting of "newsworthy" events or matters of public interest. While courts have interpreted the scope of "newsworthy" broadly, there must be a legitimate connection between the use of the person's name or likeness and the subject of the news story.

Here, a court would probably consider the WFLN story on romance in New York to be newsworthy because it is a matter of general public interest. In addition, the picture of McKay holding hands with a female co-worker appears to have a real relationship to the subject matter of the story. Accordingly, McKay does not have a viable claim against WFLN.
Tell me the answer upfront: the informal memo

You have asked me to research whether the termination of employment of certain employees pursuant to the Asset Purchase Agreement between the Gaming and Entertainment Co. and National Gaming, Inc. (the "Agreement") dated August 29, 2017, will trigger the employment notification requirements under the Worker Adjustment and Restraining Notification Act ("WARN") and any similar state law. [INSERT CONCLUSION HERE]. Section 14 of the Agreement specifically provides ....
Answer the question

Q: Whether Johnson's conduct gives rise to a cause of action.
A: Yes. Johnson's conduct may give rise to a cause of action.

Answer the question presented

Q: Whether expert testimony is necessary to show that harassment caused a plaintiff emotional distress, such that the plaintiff could no longer work.
A: Most courts rely on expert testimony in determining whether harassment caused an employee emotional distress, sometimes such that the employee could no longer work. The central issue in these cases is causation, i.e., whether the expert can show that the employee's mental disabilities are causally related to the harassment . . .
The Facts

Be careful and specific. You need absolute accuracy.

In a brief/litigation document, the facts should be persuasive and engaging, but not slanted unfairly.

Tell the story completely. Don't omit bad facts.

Don't argue the facts. Save that for your Argument section.
This case raises two hearsay issues, one relating to the business records exception and one relating to out-of-court admissions. We will consider each in turn.

Under RICO, it is "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affected, interstate ... commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." [cite] A violation is established upon demonstrating that a person (1) employed or associated with an enterprise involved in or affecting interstate commerce (2) conducted or participated in the enterprise's affairs (3) through a pattern of racketeering activity. [cite]

1. **Enterprise**
2. **Participates in the Affairs of the Enterprise**
3. **Pattern of Racketeering Activity**
Using cases: case illustrations

Explain what you want me to get from your case illustration

First, tell me the key proposition you want me to take away from the case.

Then get into details

Second, tell me:
• the factual background of the case (determinative facts)
• the court’s reasoning (reasons for the holding)
• the holding (decision)
Using cases: case illustrations

In analyzing the defendant’s knowledge, the court will likely consider the circumstances surrounding the defendant’s conduct objectively [key proposition]. [cite.] In Capetta, for example, the defendant, a topless dancer, exposed her breasts to patrons and allowed them to touch her breasts for a dollar. The patrons were willing participants, solicited her conduct with their dollars, and did not leave in shock [factual background]. Because a reasonable person would interpret the patrons’ conduct to signal approval [reasoning], the court held that, under these circumstances, the defendant had no reason to know that her exposed breasts would cause affront or alarm [holding]. [cite.]
Using cases: comparing cases

Give me your best facts
Identify the facts the court will rely on in analyzing the rules and reaching its conclusion, and tell me why those facts are determinative.

Compare your facts to the precedent
Lay out the determinative facts in your case and in the precedent, and explain why your client's circumstances will yield a similar or different result.

Connect to the expected result
Predict how the court will rule. Make the connection for me; don't make me do the work.
Give me your best facts
Because Ms. Boyle exposed herself at a public pool, at 11 a.m. and in the presence of children, ages 8 and 9, the court probably will find that her conduct under the circumstances was likely to cause affront or alarm.

Compare your facts to the precedent
Like the defendant in *Randall*, who exposed himself to an 11-year-old-child during the afternoon, Ms. Boyle also exposed herself during the day and in the presence of children.

Connect to the expected result
Therefore, just as the court in *Randall* held that the defendant's exposure during the day and in the presence of children caused affront and alarm, the court here will probably hold that Ms. Boyle's exposure also caused affront and alarm.
Quotations

Use quotes selectively

Don't use unreadable quotes

Avoid block quotes

If you need to use a long quote, offer some guidance

At the very least, emphasize the key language

Put the key points in your own words and use quotes to reinforce those points
Choose words with maximum impact

- It was plaintiff’s understanding that
- These documents clearly indicate that
- Plaintiff hereby moves this Court to compel Defendant to produce documents withheld under the protection afforded under the attorney-client privilege.

- It was plaintiff’s mistaken belief that
- These documents clearly establish that
- Plaintiff hereby moves this Court to compel Defendant to produce documents that it has refused to provide, asserting that the documents are ostensibly protected under the attorney-client privilege.
Be consistent in your phrasing

- Aetna was the primary insurance company on the risk. The carrier declined coverage.

- There are a number of questions under the Americans with Disabilities Act ("ADA"), such as what constitutes a "disability" under the Act.

- The district courts in the Second Circuit consistently hold that each class member must meet the jurisdictional requirement. The District Courts in the Sixth Circuit generally hold that every class member must satisfy the amount in controversy requirement.
Use plain English

- hereinafter
- it is beyond peradventure
- enclosed please find herewith
- above mentioned/aforementioned
- heretofore
- the movant
- thereafter
- thereon
- such reasoning/such holding/anything with "such"

BUT:

- Generally, a reinsurer is bound to follow the fortunes or settlements of its cedent.
- The SEC filed a civil action alleging that defendant had wrongfully sold, transferred, or hypothecated the customers' stock that had been entrusted to it.
The parties are in agreement that
The court's conclusion is that
The court reached this conclusion based on the fact that
As supported by the facts set forth below and the argument that follows
In the motion, Jones set forth in both the Memorandum of Law and Affirmation in Support of the motion that
Defendant’s actions constituted a violation of the statute.

The parties agree that
The court concluded that
The court reasoned that
As established below

In his motion [papers], Jones established that
Defendant's actions violated the statute.
Avoid passive verbs

- It was held by the court …
- The statute is interpreted broadly by the courts.
- The requirements of the statute have been met by the plaintiff.
- Leave of the court must be obtained by the parties.

**BUT:**
- Our client stabbed Smith seventeen times.

- The court held …
- The courts broadly interpret the statute.
- The plaintiff has met the requirements of the statute.
- The parties must obtain leave of the court.

**BUT:**
- Smith was stabbed seventeen times.
Avoid compound constructions

at that point in time ⇒ then
by means of ⇒ by
by reason of ⇒ because
inasmuch as ⇒ because
for the purpose of ⇒ to
in order to ⇒ to
with a view to ⇒ to
in connection with ⇒ with, about, concerning
in relation to ⇒ about, concerning
with reference to ⇒ about, concerning
in favor of ⇒ for
in the event that ⇒ if
prior to ⇒ before
subsequent to ⇒ after
Avoid verbose word clusters

the fact that she had died ➞ her death
he was aware of the fact that ➞ he knew
despite the fact that ➞ although, even though
because of the fact that ➞ because
in some instances ➞ sometimes
in many cases ➞ often
during the time that ➞ during, while
for the period of ➞ for
the question as to whether ➞ whether, the question whether
until such time as ➞ until
in the majority of instances ➞ usually
at such time ➞ when
in accordance with ➞ by, under
Thank you!
PLAIN ENGLISH: ESCHEW LEGALESE

Don't escheat your reader.

Good legal documents are free of legalese. Legalese is pettifog: the foreign and formulaic way many lawyers write. Legalese drowns the reader and hides gaps in analysis. Legalese is lawyers' dull and turgid jargon. It makes lawyers the butt of jokes. It's a pseudo symbol of prestige lawyers use to indulge their egos, dominate others, and distance themselves from their lay readership. Legalese leads to interpretations that stray from the author's intended meaning: Legalese masks meaning. Legalese favors form over content: It forces readers to dig for content. Legalese alienates. Legalese is lazy. Although the best writing is planned, formal speech, legalese deviates from how people speak: Legalese is obscure and wordy.

Lawyers need to filter legalese to create readable documents. Good lawyering means writing in accessible, clear, and efficient language.

The opposite of legalese is plain English. The plain-English movement calls on lawyers to write comprehensibly and succinctly. The movement aims to keep legal documents precise and simple. The word “plain” is deceiving. Plain English isn't “plain” in the aesthetic sense. Nor does plain English dumb down writing. “Plain” denotes logically organized, concise documents that are to the point and visually inviting to the audience. Documents in plain English are understandable on their first read.

To write in plain English, writers must visualize their audience's interests and needs. This visualization moves writers to give readers only the information they require. Ignoring the audience leads to documents no one wants to read and which don't inform or persuade. To break bad habits, writers must become reader-oriented. Writers should write for their readers, not themselves. Writers must treat readers like busy professionals. Writers shouldn't waste their readers' time or insult them.

Most judges, law professors, lawyers, and clients prefer legalese-free documents. This preference is motivated by the need to read documents without verbiage. Verbiage leads to ambiguity not only slow reading. With the growing volume of legal work, plain English is critical in today's environment for both writer and reader.
The movement to use plain English is traced to the profession's earliest days. While practitioners have always used legalese, the public has always urged lawyers to write plainly. The movement's recent wave gathered pace in the 1940s, when Rudolf Flesch published *The Art of Plain Talk*. The plain-English movement grew in 1960s. In 1963, David Mellinkoff wrote *The Language of the Law*, a magisterial work in which he tracked language development and its weaknesses. By the 1970s, federal agencies began redrafting regulations into plain English. This resulted in documents that are easier to understand. New York also mandates plain English in commercial transactions.

Plain English became popular in the legal community in the 1980s. In May 1984, the *Michigan Bar Journal* began publishing a regular column on plain English. The movement has expanded, but the popularity of plain English has come slowly and painfully. As George Hathaway noted in 1994, “plain English in the law is like safe sex: you never used to hear about it; now you hear about it all the time, but not enough people actually practice it.” Quitting legalese is harder than quitting smoking.

Numerous articles, books, and organizations extol plain English's virtues. One group of scholars presents annual awards for excellent plain English as well as the Golden Bull Award, “given for the year's worst examples of gobbledygook.” The legal community tolerates gobbledygook less and less.

**Putting Plain English Into Practice**

Many lawyers don't know how to write in plain English. They never unlearned the bad habits they gleaned from the poor role models they read in law school. Although knowledgeable in the law, lawyers -- society's best-paid writers -- need to learn more about communication. Plain English requires the writer to take each sentence and ask: “Will this be misunderstood?” “Is this the clearest, most efficient way to write it?” “Is this word necessary?” These questions demand focus on message, respect for audience, and intent to be coherent. Good legal writers “write the document in a way that best serves the reader. They convey ideas with the greatest possible clarity.”

*59* Many techniques exist to write in plain English. They range from organization, to word choice, to sentence structure. What follows are some tools -- suggestions to help writing be effective, readable, and succinct.

**Keep organization tight.** Use headings to break documents into manageable bits. Put related issues together, in logical order. Say it once, all in one place. Put the most important information first. State the general before the specific. Introduce things before you discuss them. Introduce people before you write about them. Minimize cross-referencing. Use thesis paragraphs and topic sentences. State what relief you seek before you say why you want it. Give a full citation before you give a short-form citation. Organize by issues and arguments, not by cases and statutes.

**Admire the active voice.** The active is less vague than the passive. The active is also shorter and easier to read. In the passive, the sentence's subject is used as the verb's receiver. *Incorrect:* “The respondent was interrupted by the petitioner.” *Becomes:* “The petitioner interrupted the respondent.” Double passives don't identify the subject or the actor. *Example:* “The passive voice is avoided.” *19* Use single passives to connect sentences or end sentences with emphasis. *20* Use double passives if the actor is known or identification is unnecessary.

**Cut compound constructions.** A compound construction uses several words when only one or two are needed. *Incorrect:* “At that point in time the petitioner moved for summary judgment for the reason that no factual issues remained.” Eliminating compound phrases will shorten the sentence. *Becomes:* “The petitioner moved for summary judgment because no factual issues remained.”
Reject redundant phrases. Redundancies include “null and void.” Use “void” instead. If you can say it in one word, don't use two or three. Other redundancies: “made and entered into” (“made”), “rest, residue, and remainder” (“rest”), “force and effect” (“force”), “last will and testament” (“will”), and “give, devise, and bequeath” (“give”).

Don't nominalize verbs. Nominalized verbs turn into nouns because of an added suffix. Nominalizations make phrases and sentences long and complicated. They also make action abstract; they don't describe action forcefully. Nominalized verbs end in “al,” “ance,” “ancy,” “ant,” “ence,” “ency,” “ent,” “ion,” “ity,” and “ment.” Examples with auxiliary verbs: “is waiting,” “was reading,” and “were.” They result in phrases like “made the argument that” instead of “argued” and “engaged in a discussion about” instead of “discussed.”

Use “of” sparingly. Incorrect: “At issue is the duty of a lawyer to preserve the confidences of a client.” The sentence is more effective without the excess. Becomes: “At issue is a lawyer’s duty to preserve client confidences.”

Delete lead-ins, called metadiscourse, like “it is well settled that,” “it is hornbook law that,” “it is important to add that,” and “it is interesting to note that.” Noteworthy points speak for themselves.

Vitiate vague antecedents. Let the following refer to one person or thing only: “he,” “she,” “his,” her,” “their,” and “its.” To avoid confusion, repeat the word.

Eliminate elegant variation. Use the same word to refer to the same thing. Different words have different meanings. Variations will be understood as an intent to distinguish. Incorrect: “The first case was adjourned, and the second piece of litigation was put over to a new date.” Becomes: “The first case and the second case were adjourned.”

Match modifiers. Dangling, misplaced, and squinting modifiers confuse. Dangling modifiers modify no word or the wrong word. Example modifying no word: “As someone who teaches at St. John's Law School, it's easy to assume that all law students are uber smart.” Becomes: “As someone who teaches at St. John's Law School, I easily assume that all law students are uber smart.” Example modifying the wrong word: “Although nearly finished, we left the trial because of our client.” Becomes: “Although the trial was nearly finished, we left because of our client.” To place modifiers correctly, keep them next to the word they modify. Misplaced word example: “We almost ate the entire Inn of Court dinner.” Becomes: “We ate almost the entire Inn of Court dinner.” Misplaced clause or phrase example: “I threw the baby down the stairs some candy.” Becomes: “I threw some candy down the stairs to the baby.” Squints can modify the word before or after. Example: “To practice New York landlord-tenant law, I only had to re-learn the doctrines of subinfeudation and petty serjeanty.” Becomes: “To practice New York landlord-tenant law, I had to re-learn only the doctrines of subinfeudation and petty serjeanty.” Be careful with the word “with.” Incorrect: “I robbed a bank with money.” Becomes: “I used a gun to rob a bank.” Or: “I robbed a bank because it had money.”

Nix negatives. People speak and think in the positive. Incorrect: “We have not yet received permission ....” Becomes: “Our application is under review.” Also, avoid negative words like “except,” “disallowed” (“dis-” words), “fail to,” “notwithstanding,” “other than,” and “unless” and “unlawful” (“un-” words). And don't place these words after “not.”

Seek shorter paragraphs. Save one-sentence paragraphs for emphasis, but long paragraphs bore readers. A good average for paragraph length is three to five sentences. Paragraphs shouldn't exceed 250 words, two-thirds of a double-spaced page, or one large thought.
Limit long sentences. Shorter sentences increase understanding. The best sentences have one thought only and 25 words or fewer, ideally between 15 and 18. But vary sentences length to make writing interesting.

Simplify sentence structure. Prefer simple declarative sentences to complex constructions. Put the subject near the beginning in most sentences. But vary sentence structure, like long sentences, to make writing interesting. Avoid connecting sentences with weighty conjunctive adverbs like “however,” “moreover,” and “therefore.”

Don’t separate subject from predicate. Every complete sentence contains two parts: a subject and a predicate. The subject is what (or whom) the sentence is about. The predicate tells something about the subject. Inserting lengthy qualifiers between subject and predicate frustrates readers. Incorrect: “The judge made the decision after consulting with colleagues to recuse himself.” Becomes: “After consulting with colleagues, the judge recused himself.” Or: “The judge recused himself after consulting with colleagues.”

Omit unnecessary detail. People, places, and dates are clutter unless they’re relate to the theme of your document.

Avoid over-long or too many quotations. They substitute for analysis.

Avoid acronyms. Acronyms appear to simplify or shorten your documents. But “alphabet soup” forces readers to retrace their steps to find definitions.

Axe archaic legalisms. Archaic legalisms include “aforementioned,” “hereinafter,” and “wherefore.” The veil of legalese is made of words like “hereto,” “in witness whereof,” “now comes,” and “whereas.” They mystify readers, lack substance, and are wordy. Incorrect: “Enclosed herewith please find ....” This common formula serves no purpose. Becomes: “I enclose ....” Or: “Enclosed please find ....’

Forgo formalisms. Unwanted formalisms include “and/or,” “the instant” case,” and “such” and “said” as adjectives.

Advocate for Anglo-Saxon words. Latinisms and romance-language words are proper when they're terms of art. Otherwise, use foreign words only if an English equivalent is unavailable. Examples to avoid: “ad infinitum” (“forever”), “arguendo” (“for the sake of argument”), “inter alia” (“among others”), “pro rata” (“proportional”), and “to wit” (“namely”).

Toss technical terms. Use them only when writing about a field-specific topic. Example: “holdover” when referring to landlord-tenant proceedings. If you must use technical terms, include a short definition so that your reader knows what you're discussing. The amount of explanation will vary with your audience and the purpose of your document. If helpful, give examples to illustrate your point.


Mutilate multi-syllabic words. Prefer shorter words with fewer syllables. Shorter words are familiar to readers. They're read quickly and grasped easily. Examples: “consequently” (“as a result”), “notwithstanding” (“despite”).

Simplify. Incorrect: “Sixty days prior to the expiration of the license ....” “Prior to” is clunky. Use the shorter and simpler “before.” Becomes: “Sixty days before the license expires ....” Instead of “subsequent,” use “following” or “after.” Incorrect: “Subsequent to the defendant's appearance, the plaintiff moved for leave to amend.” Becomes: “After the defendant appeared, the plaintiff moved for leave to amend.”
Cherish concision. Examples: “In order to” becomes “to,” “at that point in time” becomes “then,” “for the reason that” becomes “because.”

Write as you say it -- and don't write it if you wouldn't say it. Example: “Pursuant to the terms of the covenant, a payment of $100 must be remitted by you.” “Pursuant to” is less precise than “under,” and “the terms of” adds nothing. Becomes: “Under the covenant, you must pay $100.” Use the same unaffected tone you'd use while speaking.

Verify vocabulary. Example: “His bad faith in the failure to investigate is exacerbated by the ease with which violations can be avoided.” “Exacerbate” means “to increase in severity of or to aggravate, to make worse.” One can't exacerbate bad faith or do so easily.

Stress content, not style. Legal writing succeeds when the reader doesn't notice word choice or sentence structure.

Present properly. Appearances count, in legal writing as in everything else. Add plenty of white space around text. No excessive capitals, italics, bold, underlining, or strange font styles.

Revise regularly. Editing produces plain English. There's no “good writing, only good rewriting.”

Get Involved With Plain English

Several organizations further plain English. Scribes, an organization of legal writers, was founded in 1953 to honor legal writers and encourage a “clear, succinct, and forceful style in legal writing.” Scribes has developed into a nonprofit, ABA-affiliated organization that publishes a newsletter, The Scrivener, and a law journal, Scribes Journal of Legal Writing. Clarity promotes clear language in the legal profession. It publishes Clarity, which explores the use of plain English internationally. The Plain English Campaign, the organization that awards the Golden Bull, is an editing service that publishes Plain English magazine and books. It has more than 10,000 supporters in 80 countries.

Here's some food for thought to chew on: To eschew legalese, write in plain English. If you write in plain English, you won't escheat your reader.

Footnotes

a1 GERALD LEOBITZ is a judge of the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. For their research, he thanks law students Boris N. Gorshkov (Brooklyn Law School), Katharine Keefe (Washington University), and Cynthia Ganiere (New York Law), Judge Lebovits's e-mail address is GLebovits@aol.com.


Ramos, Leah 1/7/2020
For Educational Use Only

PLAIN ENGLISH: ESCHEW LEGALESE, 80-DEC N.Y. St. B.J. 64


6 Joseph Kimble, Writing for Dollars, Writing to Please, 6 Scribes J. Legal Writing 1, 1 (1997).


13 See N.Y. General Obligations Law § 5-702.

14 Hathaway, supra note 9, at 19.


19 This example comes from Gerald Lebovits, The Legal Writer, He Said -- She Said: Gender-Neutral Writing, 74 N.Y. St. B.J. 64, 55 (Feb. 2002).
Gerald Lebovits, The Legal Writer, *Do's, Don'ts, and Maybes: Legal Writing Do's -- Part II*, 79 N.Y. St. B.J. 64, 64 (June 2007).


For additional pointers, see Mark P. Painter, *30 Tips to Improve Readability in Briefs and Legal Documents or, How to Write for Judges, Not Like Judges*, 31 Mont. Law. 6, 10 (Apr. 2006).


Wydick, *supra* note 21, at 70 (giving example).

For a good explanation of modifier problems, see University of Ottawa Writing Centre, *HyperGrammar*, http://www.uottawa.ca/academic/arts/writcent/hypergrammar/msplmod.html.


Id. (giving example).

Wydick, *supra* note 21, at 11 (giving examples).

This example comes from Goldstein & Lieberman, *supra* note 29, at 112.


This example comes from Goldstein & Lieberman, *supra* note 29, at 110.

Id. (giving example).


Resisting the Devil’s Voice: Write Short, Simple Sentences

BY STEPHEN V. ARMSTRONG AND TIMOTHY P. TERRELL

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Together, they are the authors of Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing (Clark Boardman Callaghan, 1992).

Many otherwise sensible legal writers are addicted to long, convoluted sentences. If writing were a diving competition, these sentences would get a “10” for difficulty but only a “2” for grace. In some lawyers, particularly younger ones, this addiction is so strong that it resists argument, ignores preaching and withstands the application of brute force. In law firms all over the country, partners who take their writing seriously snarl at young associates, “Write short, simple, declarative sentences.” The associates nod respectfully and, for a minute, may even think that the gray-hair is right, for once. But the devil’s voice inside them whispers another, more tempting message: “Simple sentences are for the simple-minded. Where’s the challenge? Write sentences that are hard to write, and take pride in them.”

As always, the devil’s argument is plausible, and those who teach legal writing need to understand its attractiveness. Why do so many smart, well-educated (or, at least, much-educated) writers refuse to let go of their penchant for overly complicated sentences? To a cynic, the diagnosis is obvious: They are trying to impress their audience. But that is not the whole story. These writers have skill (although seldom enough to write truly good long sentences), and they want to exercise it and take pride in it. This is to be encouraged. The problem is that—being lawyers—they instinctively associate skill with length and complexity. Writing long, complex sentences, they think, is like ballet (if only they could stop tripping over their feet). Writing short, simple sentences is no more difficult than walking in Kansas.

To convince them otherwise, it is not enough to berate them for inflicting pain on their readers, or to repeat “clarity” like a mantra. We have to steal part of the devil’s message: We must convince them that they can take pride in writing a passage of relatively short, relatively simple sentences. Writing “simple” sentences well takes just as much linguistic skill as writing baroquely complicated ones. It also demands just as much, if not more, intellectual skill, because writing “simply” does not mean simplifying your thinking for an audience of idiots. The opposite is true: If you write shorter, simpler sentences the way they should be written, the effort can clarify your thinking, making it more precise and nuanced.

Here is one way to present this argument to your students.

Writing is not just the communication of discrete bits of information. Nor is it just a matter of linking these bits into a logical sequence—although this is the level of skill at which many legal writers get stuck. A good writer constructs sentences and paragraphs that convey the nuances of the relationships among the bits: Which matter most? Which are just a part of the background? Which role does each play in the analysis or description being created? To write shorter, simpler sentences effectively, lawyers have to master a set of skills that allows them to orchestrate details into a whole that is not just roughly logical, but entirely coherent. What are these skills?

The most fundamental is intellectual, not linguistic: the ability to identify what truly deserves attention in a sequence of information. Focus on the second sentence in the following passage:

Before the hearing for summary judgment, appellant’s counsel stipulated that he had not served a notice of intent to file litigation against appellees. The trial court heard argument on May 9, 1989, and entered final summary judgment in favor of appellees which in essence was based on the applicability of § 768.57 and appellant’s failure to comply with the pre-filing notice requirements of the statute.

In the sentence, the most important information is probably the grounds for the court’s decision. The fact that the court reached a decision is itself important, of course, but only as a necessary step toward discussing its grounds. The fact that the court heard argument on May 9 is probably unimportant; at best a necessary piece of procedural background. But the structure of the sentence obscures these relationships, because the writer had not mastered the basic techniques for writing sentences so that their form clarifies their content.
1. Match the importance of the information to the importance of the grammatical “container.”

In the hierarchy of grammatical units, an independent clause is more “important” than a dependent clause, a clause more important than a phrase, and a phrase more important than a word. Most of the time, more important information should go in the more important grammatical container. A particularly important bit of information probably deserves a sentence to itself, without other phrases or clauses to distract the reader. A corollary to this technique is that equal or parallel grammatical structures should contain bits of information that deserve roughly the same degree of emphasis.

Now reexamine the sentence above. Its crucial information is relegated to a dependent clause (“which in essence was based . . . ”), while the secondary information occupies the sentence’s primary grammatical slots—the subject and its two parallel verb-object combinations (“heard argument” and “entered final summary judgment”). To make matters worse, the parallel structure implies that the court’s having heard argument was just as important as its having entered summary judgment.

2. Make use of a sentence’s natural points of emphasis.

In any sequence, readers (or listeners) are likely to pay most attention to the beginning and the end, and to remember them best. As a result, the beginning and end of a sentence, especially the end, should be occupied by important information. (This, incidentally, is the true reason for thinking twice before ending a sentence with a preposition.) In the sentence above, the writer at least put the key information (“ . . . failure to comply with . . . ”) at the end. But the effect is ruined by two syntactical mistakes: The earlier parts of the sentence send misleading signals about what is important, and the sentence contains such a long, uninterrupted string of words that, by the time readers reach its end, they no longer care what it says.

3. Make use of a sentence’s rhythm.

Prose should have rhythm: enough variety in the length and structure of its sentences to keep the reader alert. But the variety should not be random. The rhythm of a sentence, and of a sequence of sentences, can encourage a reader either to move quickly and casually onward, or to slow down and pay attention. Readers are forced to focus by anything that interrupts a sentence’s flow—punctuation, for example, or a phrase inserted between parts of the sentence that fit naturally together (such as the subject and verb). They are also brought to attention by sharp contrasts—for example, a very short sentence that follows some longer ones. Rhythm, therefore, can be used to emphasize what is important, not just to keep readers awake.

Let’s now try a revision of our original example, relying primarily on the first technique:

[First sentence remains the same.] After hearing argument on May 9, 1989, the trial court entered final summary judgment in favor of appellees. In essence, the court held that § 768.57 applied and that appellant had failed to comply with the statute’s pre-filing notice requirements.

To spell out the changes:

- In the new second sentence, the hearing has been demoted to a phrase, while the summary judgment—the more important information—occupies the sentence’s main clause.
- The most important information (the court’s analysis) has a sentence to itself, as it deserves.
- Because the string of words now has a structure, it also has some rhetorical vitality.

Two questions remain about what has not been changed. First, is the last sentence properly constructed? It depends upon whether the writer’s analysis will have two legs: (1) the statute applies and (2) the appellant failed to comply with it. If so, the sentence’s syntax structure should reflect that conceptual structure, as it does. If not—because the applicability of § 768.57 was not contested—the sentence could be shortened: In essence, the court held that appellant had failed to comply with § 768.57’s pre-filing notice requirements.

Second, is the phrase “pre-filing notice requirements” too cryptic? Should it be expanded into “requirements that notice be provided before filing”? (In other words, do we need a clause, not just a phrase, here?) The answer depends on the audience: Is it familiar enough with the subject matter so that it has no trouble understanding the verbal shorthand? If not, the clause works better than the phrase, for reasons of clarity if not emphasis.

Here is another before-and-after exercise:

The implementation of the proposal would force Widget Corp. to breach existing contracts because it would have to change its source of raw material.
From the perspective of an advocate for Widget Corp., the most important information—the breach of existing contracts—is buried in the middle of a badly structured sentence. A revision gives it the prominence it deserves:

To implement the proposal, Widget Corp. would have to change its source of raw material, and therefore to breach existing contracts.

Or even more emphatically,

The proposal would force Widget Corp. to change its source of raw material. This would breach its existing contracts.

The third technique is more difficult to master than the first two, because it requires more precise attention to the details of a sentence’s punctuation and structure:

**Before:**
Moreover, the conflict involves an important question of law on which a uniform nationwide rule is essential. For example, it would be intolerable for the minimum wage provisions to be applied differently in different regions of the country. In the same way, it would also be intolerable for courts in some states but not others to grant exceptions to the priority of a secured creditor’s perfected lien under the UCC. The continuing inconsistency on these matters could have serious economic consequences because creditors would be reluctant to finance businesses in regions where their liens may not enjoy true priority.

**After:**
Moreover, the conflict involves an important question of law on which a uniform nationwide rule is essential. It would be intolerable, for example, for the minimum wage provisions to be applied differently in different regions of the country. Similarly, it would be intolerable for courts in some states, but not in others, to grant exceptions to the priority of a secured creditor’s perfected lien under the UCC. This inconsistency would do more than inconvenience specific creditors. In a region where creditors are reluctant to finance businesses because their liens may not enjoy true priority, [the region’s economy could suffer serious economic consequences].

The changes are designed to make the reader pause at points that deserve special emphasis. At the paragraph’s end, this goal had to be accomplished by more drastic means than using a little punctuation. The short penultimate sentence interrupts the paragraph’s flow in order to slow the reader down for the information in the last sentence. In that sentence, the most crucial bit of information—the serious economic consequences—has been moved to the sentence’s end; the place of maximum emphasis. But this move reveals a flaw in the writer’s thinking, not just his or her writing. The words “serious economic consequences” are too abstract, too empty to have much impact. The next step in the revision would be to flesh out the phrase in another sentence (or paragraph).

As even these brief and easy examples show, writing shorter sentences requires some linguistic skill—or, at a minimum, some concentration on syntax. This alone is often a revelation to legal writers. In addition, though, crafting shorter sentences requires a good deal of intellectual concentration, with results that again and again refine the content, not just the style, of a document. Until legal writers grasp this truth, they will find the devil’s stylistic message—be proud of your complexity—hard to resist.
SOUNDING LIKE A LAWYER

BY MARTHA FAULK

Martha Faulk is a former practicing lawyer and English instructor who teaches legal writing seminars through The Professional Education Group, Inc. She is co-author with Irving Mehler of The Elements of Legal Writing (Macmillan Publishing Co., 1994). She is a regular contributor to the Writing Tips column in Perspectives.

“But Martha, if I use these words you suggest, will I sound like a lawyer?” This question, asked recently by a first-year student attending one of my Legal Writing seminars for practitioners, is not as naïve as it may appear. Every law school graduate takes pride in acquiring skill in legal analysis—thinking like a lawyer—as well as skill in legal writing—sounding like a lawyer. Lawyers themselves, wary of abandoning entrenched writing habits, sometimes question the advice to avoid legal jargon, and to use short words, plain English, and common terminology.

A Profession of Words

Students of the law come to respect the power of legal language and their obligation to write coherently. As David M ellino, an astute observer of legal language, notes, “The law is truly a profession of words.”1 In addition to acquiring legal concepts, every student of the law also acquires a legal vocabulary. Much of this vocabulary has functional justification. Terms of art, for example, identify in a shorthand way a more complex idea (proximate cause, hearsay, res ipsa loquitur). Words of identification (plaintiff, conformed copy, appellee) also have conventional meaning within the profession. Indeed, all lawyers must have at their disposal a comprehensive lexicon of functional and descriptive words such as these examples. Why, then, is this legal lexicon often the subject of criticism and even derision?

Legal Jargon

One answer may be that legal language is readily identifiable. Although terms of art may not be accessible to the lay person, legal jargon is certainly recognizable. When playwrights and parodists choose to amuse us, they use language that taints the character or the passage with words that only lawyers use. Consider this example:

T he party of the first part hereinafter known as Jack, and the party of the second part hereinafter known as Jill, ascended or caused to be ascended an elevation of undetermined height and degree of slope, hereinafter referred to as “hill.”2

It's the silly, overstuffed sound of the archaic and repetitious “hereinafter” that makes us smile. The cautiously defined “hill” is also recognizable as a typical (and sometimes essential) lawyerly technique for specificity.

Jefferson’s Lament

Thomas Jefferson, considered to be one of our best writers, recognized the problems of legal language early in our history. When English common law came to this country with the English colonists, the ponderous writing style of English lawyers came with it. In 1817, Jefferson complained about the “taste of my brother lawyers,” who, he said, had an affinity for “making every other word a ‘said’ or ‘aforesaid’ and saying everything over two or three times so as that nobody but we of the craft can untwist the diction.”3

Modern Complaints

Recognizing that problems with legal language persist, modern commentators, including law professors, judges, and English teachers, have condemned the way contemporary lawyers write and offered ways to correct bad writing. Richard Wydick, a professor of law, says

We lawyers cannot write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose.”4

2 From D. Sandburg’s The Legal Guide to Mother Goose (1978), quoted in Crystal, supra at 375.
Wydick's Plain English for Lawyers contains excellent advice for overcoming arcane language, redundancies, and verbosity. This book should be required reading for law students and a companion piece to any handbook for citation form.

Judges, those intended readers for much of our writing product, also plead for clear, concise, and appropriate diction. The American Bar Association's excellent publication Judicial Opinion Writing Manual offers this advice in its "Writing Style" section:

Use the simplest, shortest, most precise words possible. ... Unduly formal or abstract words and expressions make your writing difficult to follow. Eschew words such as 'eschew.' Avoid Latinisms and other foreign terms that are not necessary terms of art. 5

Because of the large volume of legal documents requiring scrutiny, understanding, and decision, judges desire readability most of all.

English teachers bring a unique approach to their criticism of legal writing. Dr. Terri LeClercq, who has taught writing skills at the University of Texas School of Law for many years, believes that "[i]t is a compliment to be told that you think like a lawyer, but an insult to be told that you write like one." 6

Professional Language

Despite this good advice from many sources, law students and practicing lawyers alike are concerned about using language that sounds lawyer-like, or, from their perspective, professional. Two prominent journalists explain that being a professional requires effort and skill. Tom Goldstein and Jethro Lieberman suggest that for lawyers, "professionalism means writing the best possible document within the deadline, just as it means doing sufficient research." 7

Court Documents

For those legal writers still not persuaded by the advice of law professors, judges, English teachers, and journalists, a good source for professional advice is Irwin Alterman's Plain and Accurate Style in Court Papers. This American Law Institute-American Bar Association publication provides examples of language suitable for the most formal of legal writing situations: complaints, answers, motions, discovery matters, and briefs. For example, Alterman suggests that "it is unnecessary to add the phrase 'defendant in the above entitled cause' to any court paper. Simply name the party or say 'defendant(s)' or 'defendants(s)________________________.'" 8

Archaic Language

As an example of inappropriate legal language, law students and even some practicing lawyers may be surprised to find the following suggested list of "Words to Avoid" in Plain and Accurate Style in Court Papers. The book lists several categories of unacceptable legalisms; the following words are archaic forms of modern and shorter prepositions. Many legal writers routinely use these words and others like them without giving much thought to their usefulness. 9

Hereafter
Herein
Hereinafter
Hereinbefore
Hereby
Hereof
Hereof
Hereunto
Hereewith

This "here" list is merely representative. Most legal writing books, including those cited here, contain copious lists of words to weed from legal documents.

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7 The Lawyer's Guide to Writing Well, 114.

8 Irwin Alterman, Plain and Accurate Style in Court Papers 77 (1987).
9 Id. at 168.
Wydick and others, including Jefferson, have selected words such as “aforesaid” and “said” as examples of legal jargon, words that have no larger frame of reference and serve merely to give a legal aroma to lawyers' writings. These words may unduly influence law students into thinking their documents have a professional sound. But good writing, legal or otherwise, will always deliver the meaning to the reader in a clear and concise manner. To do otherwise is to confirm the worst suspicions about the profession and to further burden the courts and shortchange our clients.

**Best Advice**

The best advice I can give students who ask “Will I sound like a lawyer?” is this: Sounding like a lawyer means using appropriate and precise language. You will then feel confident about your knowledge, and your readers will be appreciative.

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No matter that we tend to offer sophisticated defenses to criticism of the density of legal language. There is much we can do to make our sentences shorter and more readable. Although determining a document's essential content may be difficult, it's usually fairly easy to determine what makes a sentence too long.

Check Readability Statistics

Use your computer’s grammar checker to discover the average number of words per sentence. This average number will tell you approximately which century your writing fits into. According to Rudolf Flesch, the developer of the “Reading Ease” indicator used in Microsoft® Word, our sentences are shrinking. Linguistic research has shown that English sentences have grown shorter over the centuries. This observation will certainly ring true to any modern reader of novels of Jane Austen and Charles Dickens, for example. Flesch reports that “the average Elizabethan written sentence ran to about 45 words: the Victorian sentence to 29: ours to 20 and less.”

So what do these numbers mean for modern writers? Although much of what we read in the law is historical in its origin, we modern writers should always be aware that we’re writing for modern readers. If we deliver “Elizabethan” or “Victorian” sentence length, then we’ve made reading, and ultimately comprehension, difficult for our readers who are used to discerning meaning in about 20 words.

Flesch, as you might imagine, had special criticism for legal writers. “[T]here is one profession that thinks it can’t live without long sentences: the lawyers. They maintain that all possible qualifications of an idea have to be put into a single sentence or legal documents would be no good.”

Here’s an example from a recent appellate brief that would have made Flesch cringe:

T he district court, on the other hand, erroneously addressed but one word of the Bankers Blanket Bond— the term “realized”— and then the district court misapplied it by erroneously considering whether [the appellee] “realized” a benefit and the Bank suffered a loss, which is not a question.
under the Bankers Blanket Bond: and once the district court found that the Bank suffered a loss it held the Insurer liable without considering the language of the Bankers Blanket Bond as relevant to the issue of whether that loss was covered under the Bankers Blanket Bond.  

**Break Up Long Sentences**  
Close examination requiring more than one reading reveals that this 94-word sentence contains at least four important ideas. Let’s break up the sentence into its salient points, omit useless words, add some transitional words, and thus make the writer’s ideas immediately comprehensible:

> The district court addressed only the term “realized” as used in the Bankers Blanket Bond. Then the court considered whether the appellee “realized” a benefit and the Bank suffered a loss. At that point, the court incorrectly held the insurer liable. The issue is whether that loss was covered under the Bond.

Of course, the corollary benefit to readability is comprehension. If our reader immediately understands our writing, then we are more likely to be persuasive. In the case of the above example, the lawyer-writer would certainly want the judge-reader to be favorably persuaded.

**Omit Useless Words**
Getting rid of empty prose is harder than you might think because we writers become fond of our words. Sir Arthur Quiller-Couch, in his celebrated essay “On Jargon,” recommends a kind of ruthlessness. His advice: “If you require a practical rule of me, I will present you with this … Murder your darlings.”

Which “darlings” do we want to eliminate? Some expressions can be entirely omitted, as in the examples below:

- Because (of the fact that) construction was delayed by bad weather …
- The principal obligation of the Trustee is fiduciary (in nature) …
- In (the instance of) our first trial, we did not have

Here’s a list of some wordy phrases that could easily be reduced:

- A large number of many
- Be in receipt of have
- Come to a conclusion as to conclude
- Conduct an investigation of investigate
- During the course of during
- Have a bearing on affect
- In consideration of the fact that considering
- On many instances often
- In reference to about
- Make allowances for allow for
- Make provisions for provide for
- Take into account consider

Eliminating intensifying adverbs such as very, really, actually, obviously, and certainly is also good advice. Legal writers should make their sentences self-assured without the crutch of overworked modifiers.

**Acquire the “Shrinking” Habit**
These lists of useless and weak words are meant to serve only as examples of common offenders. More examples can be found in Line by Line: How to Improve Your Own Writing, an excellent compendium of editing techniques published by the Modern Language Association. The author counsels: “[T]rain yourself to recognize and remove empty prose additives. … Almost always expendable, any of these terms should set off a reflex action like a flashing light at a railroad crossing.”

Just as stopping at a flashing light becomes habitual, reviewing your written work for long sentences is a worthy habit to acquire. It’s as easy as accessing the spell checker program on your computer. If your number of words per sentence is significantly above 20, then it’s time to break up those long sentences into shorter units, and get rid of useless words. The results will be satisfying to you, the writer, and edifying to your reader. As Gustave Flaubert, a master of modern prose advised, “W herever you can shorten a sentence, do. And one always can. The best sentence? The shortest.”

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8 id. at 6.
9 See Flesch, supra note 4 at 187.

10 Claire Kehrwald Cook, Line by Line: How to Improve Your Own Writing 13 (1985).
11 Quoted in Flesch, supra note 4 at 106.
The skillful quoter seamlessly meshes the author’s words with those of supporting voices.

To Quote or Not to Quote

Writers’ Toolbox … is a regular feature of Perspectives. In each issue, Professor Anne Enquist offers suggestions on how to teach specific writing skills, either in writing conferences or in class. Her articles share tools and techniques used by writing specialists working with diverse audiences, such as J.D. students, ESL students, and practitioners. Readers are invited to contact Professor Enquist at ame@seattleu.edu.

By Anne Enquist

Anne Enquist is the Associate Director of the Legal Writing Program at Seattle University School of Law in Seattle, Wash. She also serves as the Co-Director of Faculty Development and the Writing Advisor at the law school. She is a member of the national Board of Directors for the Legal Writing Institute and has served on the editorial board for the journal Legal Writing: The Journal of the Legal Writing Institute. Professor Enquist is co-author of The Legal Writing Handbook, 3d edition, and four books: Just Writing, Just Briefs, Just Memos, and Just Research.

Of the many skills legal writers must have and hone, knowing what to quote and how to integrate quotations into a piece of writing is one of the most useful. Unskillful quoting creates clunky prose that reads like a cut-and-paste collage of other people’s words and ideas. Skillful quoting, by contrast, is a mark of an effective writer. The skillful quoter seamlessly meshes the author’s words with those of supporting voices. The blend seems natural, even effortless; the quote enhances rather than interrupts the writing’s smooth progression.

As legal writing professors, we are sometimes surprised that law students struggle with what and how to quote, but I suppose we shouldn’t be. As novices in the profession, some law students show their insecurity about what they are saying by over-quoting, which is a form of “playing it safe” by hiding behind the authority of the law. Others may show their lack of sophisticated analysis by picking the wrong things to quote. They are still groping in the dark analytically and are unsure what to emphasize. And still others have not mastered simple things, such as when to use single and double quotation marks. Fortunately, a well-crafted lesson on quoting can fill in lots of these gaps and help students at the top, middle, and bottom of the class take the next steps in their development as writers and legal thinkers.

The key to teaching effective quoting is to organize several examples around a few principles.

Principle 1: Quote Only When Your Reader Will Want the Exact Wording from the Source

Legal readers want to see the exact language of statutes, regulations, municipal codes, constitutions, amendments—any language that is “the law.” Consequently, legal writers can rest assured that a direct quotation, not a paraphrase, is the right choice when they are setting out enacted law.

For example, quoting the exact language of the Antiterrorism and Effective Death Penalty Act (AEDPA) is an essential first step in an office memorandum about whether individuals violate the Act when they provide foreign terrorist organizations with humanitarian aid.1 For the AEDPA memo example, the relevant subsection reads as follows:

§ 2339B. Providing material support or resources to designated foreign terrorist organizations

(a) Prohibited activities.

(1) Unlawful conduct. Whoever knowingly provides material support or resources to a

1 Thanks to Professors Laurel Oates and Connie Kronitz, who assigned the AEDPA memo and who, along with Professors Susan McClellan, Janet Chung, and Jessie Grearson, commented on this column.
foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (as defined in section 212(a)(3)(B) of the Immigration and Nationality Act [8 U.S.C.A. § 1182(a)(3)(B)], or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989 [22 U.S.C.A. § 2656f(d)(2)]).


Just now, when you saw that long block quote, were you tempted to skip over it? Many readers are. Showing students a lengthy block quote and letting them experience their own reader reaction to it helps them see writing through the eyes of their readers. Once they identify with their readers, they will understand why, as writers, they need to think through how much of the Act to quote.

OK, so how much of the Act to quote? The answer is always the same: only as much as the reader needs. If the writer quotes too much of the Act, the reader is left with the tough job of hunting through a thicket of statutory prose for the parts that are relevant to the current issue. This is the writer’s job. Through the judicious use of ellipses and brackets, the writer should trim the statute down in a way that focuses the reader’s attention on what will matter in this case.

Section 2339B(a)(1) provides that “[w]hoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization … , that the organization has engaged or engages in terrorist activity … , or that the organization has engaged or engages in terrorism … .”


Principle 2: Use All the Quotation Devices—Ellipses, Brackets, “Emphasis Added,” the Formal Lead-In—Judiciously

Like any sharp tool, ellipses and brackets must be used with care. To make that point, have students compare a couple of ways a writer may have edited the statute: (1) the statute trimmed to what is relevant by selective use of ellipses and brackets; (2) the statute massacred or skewed by overuse of ellipses and brackets.

You may also want to include one or more versions that italicize, underline, or bold key words or phrases and include an “emphasis added” at the end of the citation. Once again, you can demonstrate both appropriate use and overuse of the “emphasis added” option.

Appropriate Use of Emphasis Added

Congress found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1247 (1996) (emphasis added).
Ultimately what we really want students to know is the answer to the question, “What makes something quotable language?”

Overuse of Emphasis Added

Congress found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1247 (1996) (emphasis added).

With each version, ask your students how readers are likely to react. Excessive use of ellipses and brackets may make readers wonder if important things had been cut. Excessive use of emphasis added tends to make readers feel a bit browbeaten. Look at this, the writing screams, and this, and this! The goal is for students to learn to think through how readers may react to their choices, to see their writing through the eyes of their readers, and to develop good judgment about what those readers want and need.

Students will also need to see that Principles 1 and 2 apply to more than just statutory or regulatory language; legal readers may want to look at specific language in a lease, a contract, a letter, an e-mail, a corporate policy, or any other document that is at the heart of a legal issue. Similarly, it is often effective to quote exact language from a trial record, police reports, or witnesses’ testimony. Consequently, you may want to reprise the “what to quote” lesson when the class has moved from objective to persuasive writing.

The other half of Principle 1 is knowing what not to quote. In fact, for every student who does not understand the importance of quoting a statute, contract, or testimony, there seem to be two students who quote excessively. And it is not just that they include more of a statute or a cross-examination than they need. Excessive quoters include mundane language from court opinions that should be paraphrased, not quoted, and they are prone to including long quotations from law review articles that arguably provide helpful background but are more likely to wear on the patience of busy readers.

This is not to say that courts and law review articles should never be quoted. Sometimes they should be quoted, but more often than not, they should be paraphrased (and cited, of course). Here again, the trick is for students to develop judgment about what is quotable and what is not. And here again, examples from cases or secondary sources the students are using in their current assignment will generate a rich discussion of which words, phrases, and sentences can be effectively quoted and which are better paraphrased.

Start with a key case in front of them and ask questions such as, “Is there any language in the opinion that captures the essence of the court’s reasoning?” “What phrasing strikes you as particularly apt or memorable?” “Are there key words or phrases that later courts adopt, use, quote?” Ultimately what we really want students to know is the answer to the question, “What makes something quotable language?”

Another essential point in any quoting lesson concerns the mechanics of quoting. Most students have picked up some of this information along the way, but many are insecure about whether they are “doing it right.” Rather than leave this step to chance, consider having an explicit discussion about the two ways of including quotations in writing: (1) quotes that are formally introduced and (2) quotes that are structurally integrated into the writer’s sentence. Be sure the discussion includes specifics about how and where to place citations for both types of quotations, and be prepared for nitpicky questions such as whether to space between, as well as before and after, the periods in the ellipsis4 and when to use four periods.

For both types of quotations, show a few examples of better and worse attempts6 and open the floor to discussing why they are more successful or less successful. For example, consider showing an

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4 See Bluebook Rule 5.3 and ALWD Citation Manual Rule 49.2.
5 See Bluebook Rule 5.3 and ALWD Citation Manual Rule 49.4.
6 You may want to use real student examples for the effective versions and write representative ineffective ones yourself.
example of a formally introduced quotation that does little more than insert the quote into the text with a “then the court said” lead-in. Contrast that example with several other examples of formally introduced quotes that are more skillfully executed, noting how the writer’s lead-in to the quotation prepares the reader for the quoted material, often foreshadowing what the reader should find significant in the quote.7

Formally Introduced Quotation—Weak Lead-In
A district court in the Eleventh Circuit said the following: “[T]he government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO.” See United States v. Al-Arian, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004).

Formally Introduced Quotation—Improved Lead-In
A district court in the Eleventh Circuit construed § 2339B to require the same level of mens rea as § 2339A: “[T]he government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO.” See United States v. Al-Arian, 308 F. Supp. 2d 1322, 1339 (M.D. Fla. 2004).

Adding an example of an overdone lead-in that virtually repeats the point in the quotation should help underscore the idea that each of the quotation devices—ellipses, brackets, emphasis added, and the formal lead in—can be ineffective if overused.

Formally Introduced Quotation—Repetitive Lead-In
A district court in the Eleventh Circuit said that under § 2339B the government had to prove that the defendant knew its support would further the FTO’s illegal activities: “[T]he government must show that the defendant knew (had a specific intent) that the support would further the illegal activities of a FTO.” See United States v. Al-Arian, 308 F. Supp. 2d 1322, 1337–39 (M.D. Fla. 2004).

Principle 3: Quotations Should Mesh Naturally with the Writer’s Own Words
In your discussion of the second type of quotations, quotations that are integrated into the writer’s sentence, the most helpful tip you can share with your students is to read those sentences aloud. If the students do, they will hear when the structure of their sentence does and does not mesh with the structure of the quotation. When a quotation is skillfully integrated into the writer’s sentence, someone listening to the sentence read aloud should not be able to tell when the writer’s own words ended and the quoted material began. The desired effect is a natural integration of both content and sentence structure.

Structurally Integrated Quotes—Ineffective Blend
The current definition of “material support” is “(1) the term ‘material support or resources’ means any property … or service, including currency or monetary instruments …, lodging, training, expert advice or assistance, … communications equipment, facilities, weapons, lethal substances, explosives, personnel …, and transportation, except medicine or religious materials.” 18 U.S.C.A. § 2339A (West, Westlaw through Pub. L. No. 109-4).

Structurally Integrated Quotes—Effective Blend
The court in HLP presumed that Congress intended § 2339B to have a broad reach, regardless of a violator’s intent, because “giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts.” See id.

The court might allow the donation of humanitarian aid on policy grounds because groups designated as FTOs “often do much more than commit terrorist acts. They also

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7 If one of your examples of formally introduced quotations is 50 words or more, that example will create a natural opportunity to mention the rules about single spacing and indenting block quotations, placing the citation, and omitting the quotation marks. See Bluebook Rule 5.1 or ALWD Citation Manual Rule 47.5.

As with the earlier examples of formally introduced quotations, be sure to insert quick lessons about how to cite when a quotation is integrated into the writer’s own sentence structure. Include at least one example in which the citation applies only to the first part of the sentence. This type of example will allow you to discuss how to correct the common error of placing the citation at the end of the sentence when the citation does not support the whole sentence.

Incorrect—Citation Supports Only the First Half of Sentence
While one commentator has noted that “[c]haritable giving will have taken on previously unknown risks,” the government will argue that donors have no way of knowing how a foreign terrorist organization will use any given donation. Jonakait, supra at 873.

Corrected
While one commentator has noted that “[c]haritable giving will have taken on previously unknown risks,” Jonakait, supra at 873, the government will argue that donors have no way of knowing how a foreign terrorist organization will use any given donation.

The “principles plus examples” approach, particularly when the examples come from the students’ current assignment, is a surefire way to keep students engaged …
Why Is It So Hard to Front-Load?

BY STEPHEN V. ARMSTRONG AND TIMOTHY P. TERRELL

Tim Terrell is Professor of Law at Emory University School of Law. Steve Armstrong is the principal of Armstrong Talent Development, which provides consulting services and training programs to law firms. Both have conducted many programs on legal writing for law firms, bar associations, and federal and state judges. Together, they are the authors of Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing (3d ed. 2008) and regular contributors to the Writing Tips column.

We will bet whatever is left of our 401(k) plans that every law school graduate in the country—至少, all of them who have been taught by readers of this journal—believes that he or she “gets” the concept that goes under such labels as “point-first writing,” “front-loading,” or “beefing up introductions.” Most legal writing books and instructors spend a lot of time on the concept, as has the Writing Tips column over the years.

Yet, in our work with associates around the country, no problem shows up more often, or with more damaging effects, than the failure to apply this concept effectively, especially after the writer gets beyond the opening introduction.

This sad fact has led us to investigate why so many smart lawyers—lawyers who are, by most other criteria, very good writers—have such difficulties front-loading their writing. Here is our diagnosis.

We offer it because we are convinced that we will never cure this problem simply by raising the idea again and again, in an increasingly frustrated tone of voice. We have to understand the problem’s causes so we can address them head-on. A quick warning, however, before we get to our diagnosis.

Unlike most Writing Tips columns, this one will not include a lot of examples. We suspect you have all you need, and we plan to focus instead on why writers fail to front-load enough, not what it would look like if they succeeded all the time.

Judging by our experience as writing teachers and coaches, the problem has three primary causes.

1. Failing to Understand the Concept

Most legal writers don’t “get” the concept as well as they think. This is the case for two reasons.

First, it is a complex concept—or, at least, a multipart one. To front-load effectively, a writer has to keep in mind the several kinds of information a reader may need at the start:

- The conclusion or “bottom line.” To complicate matters, in letters or memos to clients, or in documents that will result in advice for a client, the bottom line should often include a practical, action-oriented component, not only a legal conclusion.

- A focus for the reader’s attention. That can be a conclusion, but it can also be a question or a thread to follow through the maze. (For example, “At the core of this dispute are the actions Mr. Smith took after learning of the discrepancy in the accounts.”)

- A map of the structure that lies ahead.

- A “label” or “frame” that allows readers to locate the topic within their mental universe, and to bring immediately to bear what they already know about it. (“The hearsay exclusion simply does not apply in this case.”)

These ingredients overlap, of course. And not every introduction—especially not every smaller-scale introduction within the document—requires all of them, or even most of them. But a skillful “front-


2 To Get to the Point, supra note 1.
Those of us who teach legal writing often give too short shrift to the qualms writers have about front-loading, and especially about front-loading conclusions.

Second, properly understood, “front-loading” is not a task to be performed here and there, in a few places in a document. It is a cast of mind that applies everywhere, because it has to do with how we insert new chunks of information—whatever the size of the chunk—into the flow of information streaming through a reader’s mind. Thus, the concept applies all the way down to paragraphs and sentences. They too should begin, for example, by focusing readers on their topic—even if, in a sentence, that means no more than naming the topic in the grammatical subject and placing the subject relatively close to the sentence’s start. Most writers are initially baffled if they are told they should be doing similar work when they “introduce” a sentence as when they introduce a document, even though the “introductions” will look very different. But, once they grasp this expansion of the front-loading concept, there is often an “ah ha” that turns them into much better editors.

2. Failing to Understand the Resistance

To identify the problem’s second cause, we need to look at ourselves rather than our students. Those of us who teach legal writing often give too short shrift to the qualms writers have about front-loading, and especially about front-loading conclusions. Not all of these qualms are rational, but some are, and even those that are not need to be taken seriously.

Even if lawyers had not been trained in the IRAC form of analysis, they would feel, as would most analytically inclined problem solvers, that the appropriate place for a conclusion is—well, at the conclusion. That’s the natural order of things, unless you are an ideologue or a genius who can dispense with all the usual steps between question and answer. Placing the conclusion at the beginning is a perversion of the normal thinking process, an unnatural act forced on us by the need to communicate with impatient readers. It feels especially unnatural to many lawyers, an introverted group often more interested in their own thinking than in their audience.

Whether to state a full, firm conclusion at the start is a judgment call, and sometimes one that novices find difficult. The call will often depend on the audience: We would give different advice to a lawyer writing for a judge than to an associate writing about a complex tax issue for a partner. In that situation, some partners will prefer to test every link in the analytical chain before they are presented with a conclusion. The call may also depend on how unpleasant or unexpected the conclusion will be. If it will seem to come out of left field, or is such bad news that readers will want to reject it out of hand, then the “conclusion-first” approach may not work. But the “conclusion-last” approach should always be considered an exception rather than the rule. The “default” position should be “conclusion first.”

When we encounter a section or subsection that lacks an adequate “map” at its start, we often hear from its author something like this: “I know I added a couple of points later in the section. But they’re not nearly as important as the main point, and I didn’t want to give them too much emphasis. So I didn’t mention them in the introduction.” This argument is usually wrong, but it is not wholly wrongheaded. The most common solution, of course, is to create a map that signals, as most maps should, the relative importance of its pieces. Sometimes, the solution is to drop the other points altogether, if they are in fact so unimportant.

Although we don’t recall ever having seen the first draft of a complex legal document that overdid the front-loading, novices sometimes go too far in the second draft, because their judgment is still inexpert. Here again, audience and circumstance matter a great deal. Most judges appreciate a lot of front-loading throughout a brief. Some partners, once they get past the initial introduction to an internal memo, prefer only enough “mapping” and “focusing” to keep them on track as they read, because they want to digest the analysis for themselves.

3. Failing to Understand Why the Work Is So Hard

Front-loading effectively is hard work, for several reasons.
First, some of the work is intellectually demanding. For example, if you are writing the introduction to a knotty, complex analysis, it is usually difficult enough to sum up your conclusion; it may be even more difficult to map the analysis by which you reached it. Similarly, if you are tackling a messy issue, it is often difficult to focus on the precise, end-of-the-road question, after the initial broad and vague issue has been peeled down to its core. But these are reasons, not justifications, for failing to respond to these challenges in an edit.

Second, even when the work of front-loading is not intellectually strenuous, doing that work throughout a document requires persistence and stamina. At some point in a draft, even the best writers tend to flag. The following example comes from a section of a memorandum of law in support of a preliminary injunction motion. The section begins many pages into the brief, and the writer—who usually front-loads rigorously—has begun to tire. Here is the section’s original introduction, along with the opening sentences of two paragraphs toward its end:

Plaintiffs are likely to succeed on the merits because Defendants have not paid Plaintiffs their lawful wages. As a plain reading of the relevant statutes makes apparent, Defendants are liable for Plaintiffs’ overtime, spread of hours, and minimum-wage pay.

[Six paragraphs omitted]

Plaintiffs also offer strong evidence of Defendants’ history of impulsive retaliation. … Plaintiffs have also raised claims of age and ethnicity discrimination. Here, as well, Plaintiffs have a probability of success on the merits. …

Here is the revised introduction, with a complete map:

Plaintiffs are likely to succeed on the merits of their wage claims because Defendants have not paid Plaintiffs their lawful wages. In addition, Plaintiffs offer strong evidence that creates a probability of success on two other claims: Defendants’ unlawful retaliation against them, and Defendants’ discrimination against them on the basis of age and ethnicity.

And here is a paragraph from within the section, first in its original form:

Both federal and state statutes impose strict recordkeeping requirements on employers to ensure compliance with the minimum wage and overtime laws. See [ ]. Failure to comply with these requirements results in an evidentiary presumption in favor of employees. See [ ]. Therefore, if the employer fails to keep accurate records and the employee seeking damages can provide credible testimony—even of a general nature—of the number of hours worked and the wages paid, the burden will shift to the employer to provide the exact number of hours worked. See [ ]. As there is reason to believe that Defendants failed to maintain accurate records, see [ ], and will be subject to an evidentiary presumption against them, Plaintiffs are even more likely to succeed on the merits of their wage claims.

Here is the revised, front-loaded version:

Plaintiffs are even more likely to succeed on the merits of their claim because, if an employer fails to keep accurate time records, the burden of proving the number of hours an employee worked shifts to the employer. Both federal and state statutes impose strict recordkeeping requirements on employers to ensure compliance with the minimum wage and overtime laws. See [ ]. If an employer fails to comply with these requirements, the failure results in an evidentiary presumption in favor of employees. See [ ]. In that circumstance, if the employee seeking damages can provide credible testimony—even of a general nature—of the number of hours worked and the wages paid, the burden will shift to the employer to provide the exact number of hours worked. See [ ]. As there is reason to believe that Defendants failed to maintain accurate records, see [ ], they are likely to be subject to an evidentiary presumption against them when the Plaintiffs’ wage claims are considered.
Third, front-loading is actually an act of intellectual courage, not only of intellectual labor, and many inexperienced writers are simply nervous about their professional status and circumstances. One of the hallmark features of a new legal writer, for example, is the frequency with which paragraphs begin with citations of authority. As natural as this opening seems—we are lawyers, after all, working through legal material to a conclusion—the initial reference to a case or a statute fails to tell readers why the authority matters or how it fits into the analysis. Instead, the citation requires them to take the authority “on faith” until the writer, having now worked through the authority, finally feels it is safe to venture an opinion about its point and relevance. Here is a passage that illustrates this problem:

Before:
To effect a valid pledge of an intangible chose in action such as a bank deposit, the pledgor must transfer possession of an “indispensable instrument” to the pledgee. Id. at 562; see Peoples Nat’l Bank of Washington v. United States, 777 F.2d 459, 461 (9th Cir. 1985).

Restatement of the Law, Security § 1 comment (e) defines an indispensable instrument as “formal written evidence of an interest in intangibles, so representing the intangible that the enjoyment, transfer or enforcement of the intangible depends upon possession of the instrument.” See also … [continuing analysis and citations omitted] Indispensable instruments have been held to include, for example, a passbook that is necessary to the control of the account. [citation omitted] On the other hand, they have been held not to include a telex key code. In Miller v. Wells Fargo, …

The transfer of an indispensable instrument may not be necessary to effect a valid pledge, however, when an account has been set up by agreement between creditor and debtor to secure the debtor’s obligations. In Duncan Box & Lumber Co. v. Applied Energies, Inc., 270 S.E.2d 140 (W. Va. 1980), …

Most legal writers will work hard on a document’s initial introduction. Many will also work almost as hard on the introductions to major sections. But far fewer have the stamina to front-load effectively all the way through the document. That is why we teach lawyers that, to front-load consistently, they should develop the habit of taking at least one editorial pass through a draft to focus on nothing but front-loading, especially in the document’s interior. The revisions above resulted from a good writer adopting that editing technique, with no need for anyone else to guide her.

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“[F]ront-loading is actually an act of intellectual courage, not only of intellectual labor, and many inexperienced writers are simply nervous about their professional status.”
ORGANIZING FACTS TO TELL STORIES

BY STEPHEN V. ARMSTRONG AND TIMOTHY P. TERRELL

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We have encountered very few writers—legal or otherwise—who have ever been taught how to organize and develop facts. Facts are just facts, right? You get them down on the page as best you can in some sort of order, usually chronological. Indeed, law school often reinforces this hasty approach with the unfortunate impression that facts are grubby little details that get in the way of the writer's true responsibility, which is to present "the law." In this atmosphere, fact sections of memos or briefs, for example, too often become rote, uninspiring sequences.

This temptation increases because chronology is, then, the bread and butter of fact writers. But precisely because it can so often be useful, chronology can become what we call a "default organization," structurally similar to the automatic moves a computer program will make unless the user instructs it otherwise. Defaults can be quite dangerous, and for facts, chronology can produce three different problems. In this short article we will cover one: habitual chronology can distract us from telling an effective story that complements and enhances our legal argument. In a future column we will discuss the other two: the tendency of chronological presentations to include too much distracting detail, and the occasional inconsistency between chronology and the key factual issues at the center of a matter.

Using Facts to Tell Stories

To someone not personally connected to an incident, the facts are, well, just the facts. Even when they are organized sequentially to show connected events, the facts are still just a string of facts. A story is much more. It leads us to infer motive, to judge the nature of the acts performed, to understand their consequences, and to empathize with or distance ourselves from the people involved. In other words, a story can show us who is in the right, and where justice lies. Not that an artfully told story distorts the facts or forces conclusions on us. It simply arranges facts to lead us toward inferences that favor the writer's position. All this can be done without violating any duty to describe the facts accurately and thoroughly.

Here, for example, are two stories crafted from the same facts, but leading us to quite different conclusions:

The prosecution version

On September 5, 1998, G.L., a minor, was arrested by the Smithville police and charged with trespass and destruction of property under Sections 250.17 and 137.55, respectively, of the West Carolina Criminal Code.

At approximately 9:00 p.m. on September 5, John and Julia Barr and their son, Roger, returned home from a PTA meeting. When they reached their front door, they found that it was ajar. Mr. Barr entered the house and...
noticed muddy footprints leading across the living room carpet toward the kitchen. In the kitchen, he found food strewn across the kitchen table, and a broken plate on the floor. He then looked through the other rooms on that floor and proceeded upstairs. In his son's bedroom, he saw that clothes had been pulled from an open drawer and dropped on the floor. In the master bedroom, he found G.L. asleep on the bed. As he entered, she awoke, knocked him over as she pushed by him, and ran out of the house. She was later found and arrested by the police on the nearby golf course.

**The defense version**

On September 4, 1998, G.L., a 15-year-old girl living in the Smithville Home for Orphans, had an argument with her dormitory supervisor and ran away from the Home. She had no money or food with her and only the clothes she was wearing. She spent the night of September 4 and most of September 5 hiding on the Smithville Country Club golf course. On the evening of September 5, it began to rain. Her clothing became drenched. At that point, she had not eaten since her lunch on September 4. She left the golf course and began to walk through the adjoining neighborhood. In the fourth block after leaving the golf course, she walked up the drive to the largest house she had so far passed. She rang the doorbell, but no one responded. She rang again and knocked, but still received no response. She then tried the door handle, and found the door unlocked.

Entering the house, she went directly to the kitchen, took some food from the refrigerator, and ate some of it. In the process, she dropped and broke a plate on which there had been a piece of chocolate cake. She then ran out of the house and back to the country club grounds, where she hid in a clump of bushes. After being apprehended by the Smithville police, she was incarcerated in the Smithville City Jail and charged with trespass and destruction of property under sections 250.17 and 137.55, respectively, of the West Carolina Criminal Code.

There are many other ways of telling an up-to-date version of “Goldilocks and the Three Bears.” But these two demonstrate how easy it is to construct different stories from the same facts without distorting them.1

At the core of a story—a legal one, at least—is a theme: a proposition about the nature and meaning of what happened. For example, “My client, desperate to find food and shelter, meant no harm—and did very little harm.” Or “Morissette took only what appeared to be old, valueless junk abandoned on uninhabited land.” At some point in a brief, you may want to state this theme explicitly. In the fact section, however, the rules of brief writing forbid you from characterizing facts or drawing explicit inferences from them. You have more leeway in introductions and preliminary statements but, even there, you will usually be more persuasive if you allow inferences about the equities of a situation to emerge as if spontaneously in your readers' minds. If you try to make those inferences explicit, your readers—lawyers and judges, at least—are likely to take that as a challenge: Does your characterization of the facts really hold up?

To organize facts to create inferences, lawyers need to think more methodically about how to tell a story than they are usually trained to do. Here is a framework for that thinking. The basic elements of a story are:

- **Opening situation**
- **Primary character**
- **Plot**
- **Secondary characters**
- **Closing situation**

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1 Our thanks to Paul Perrell, of the Toronto firm of Weir & Foulds, for introducing us to the Goldilocks litigation during a writing program in Toronto several years ago. We have since seen it used also in Steven Stark's *Writing to Win* (Doubleday, 1999).
With each of these components, your job is to create inferences that favor your client. More specifically, you want the reader to:
• characterize the plot in both legal and common-sense, human terms. Are we dealing with the malicious invasion of a home, or a desperate search for food and shelter?
• characterize the opening situation: What circumstances led the characters to act as they did?
• characterize the closing situation: What were the consequences?
• characterize the motives of the people involved, and feel empathy with or distance from them.

To achieve these goals, four choices turn out to be critical:

1. Where does the story begin? If we begin at the Smithville orphanage, as G.L. runs away with only the clothes she is wearing, we tell one story. If we begin with a list of G.L.'s alleged crimes, followed by a vignette of the Barrs' returning from a PTA meeting to find their home violated, we tell a very different story.

2. Where does the story end? With an intruder running out of the house, or with a frightened child hiding in the bushes, then captured and "incarcerated" by the police?

3. Through whose eyes do we see the story? Generally, though not always, we tend to empathize with someone when the story is told from his or her perspective. Are we looking through the eyes of family members coming home to find their house violated, or through the eyes of a wet, hungry child?

4. Where do we add detail, and where do we omit it? With important facts, we have no choice but to include them even if they are bad for our side. With "color" facts, the facts that add flavor and descriptive fullness, we usually have a good deal of choice. Do we add the details that suggest the Barrs are wealthy? What about the chocolate cake, which contributes to the portrait of G.L. as a child? Or, on the other hand, the muddy footprints, "strewed" food, and clothes dumped on the floor, which contribute to the portrait of a home invaded?

The following example shows how much trouble litigators can get into if they do not know how to tell a story, and instead fall back on a chronological recital of facts, especially facts drawn from a record. These facts come from a brief appealing the conviction of a prison guard who was caught carrying drugs into the prison. The brief makes two arguments:

• Although the guard had signed a form consenting to being searched by the prison authorities, the consent applied only if they had reason to suspect him of possessing drugs.

• Although he had drugs in his possession, there was no evidence that he intended to distribute them.

As you read these facts, think about how the first, third, and fourth of the decisions above were made. Where does the story begin? Through whose eyes are we looking? And where is detail added or omitted?

Statement of Facts

The evidence presented at the motion to suppress hearing showed that on Sunday, March 18, 1990, Drug Enforcement Administration (DEA) Agent Thomas Jones was called to the Sam Houston Correctional Facility in Hilltop, Texas. (3 R. 8) Jones indicated that Sandra Smith, the prison administrator in charge of security, had obtained information from an unidentified inmate that a number of correctional officers had been bringing narcotics into the facility. (3 R. 10) Prior to March 18, 1990, Jones had conducted surveillance of the facility on the basis of these communications, but he had not obtained any evidence or further information. (3 R. 18)

Smith had informed Jones on Friday, March 16, 1990, that she intended to conduct searches of all the officers at the prison as they arrived for work on the morning and evening duty shifts on March 18. (3 R. 12, 31) Jones was asked to remain in the area of the facility in the event that contraband was found during these searches. (3 R. 21)

Smith had also told Jones that there was a
facility policy that allowed the prison administrators to conduct searches of entire shifts. (3 R. 11–12) The policy was admitted into evidence at the hearing, as was Defendant's signature showing that he had read and understood it. (3 R. 6–7) In pertinent part, the manual stated as follows:

It is not the policy of [the prison] to routinely search its employees or their property. However, when the Facility Administrator has reason to suspect that an employee is in possession of contraband items, which, if introduced, could endanger the institution, the Facility Administrator may authorize the search of an employee or his personal property. Searches may also be authorized where the Facility Administrator has reason to suspect that an employee is removing contraband from the facility.

Secure Corrections Corporation, Standards of Employee Conduct, § D.2. Jones did not know whether a similar search of all employees had been conducted at any time before March 18, 1990, or at any time between that date and May 2, 1990, the day of the suppression hearing. (3 R. 18–19) No evidence of any other such search was presented to the district court at the suppression hearing or at trial. (6 R. 59)

Beginning with the morning shift, each of the officers appearing for work was searched. (3 R. 13. 30) The procedure followed during these searches was that each officer would be stopped in the “sally port,” an area between a barred outside door and a barred door leading to the inside of the facility. (3 R. 14) The searches were conducted by prison supervisors. (3 R. 29) At 8:00 a.m. Smith called Jones and told him that they had found contraband, including marijuana, syringes, and a balloon of heroin, during the search of James Green, a guard assigned to the morning shift. (3 R. 12) Green told Jones that he obtained the contraband from a person at a store across from the facility. (3 R. 21) This was consistent with the prior information that Jones had obtained from the prison employees. Id. Jones conducted surveillance of the store and of a residence, without result. (3 R. 13–14, 21)

At 3:15 p.m. Smith again called Jones and told him that controlled substances had been found during a search of Defendant. (3 R. 14) Defendant had been subjected to a pat-down search and to a search of his shoes and socks, during which marijuana was discovered. (3 R. 16) Defendant had been taken to the captain's office, and other contraband had been found in a wastebasket into which Defendant had thrown some tissue paper. (3 R. 17) Defendant was advised of his constitutional rights, and he admitted that the marijuana was his, but he denied that he had possessed any other contraband. (3 R. 18) Although Agent Jones searched and questioned Defendant after contraband had been found, (3 R. 26) he did not witness the circumstances of Defendant's initial and subsequent searches. (3 R. 22)

Because the writer relies so much on pure chronology, he falls into two traps. First, a key fact—the language in the prison manual about the circumstances under which the prison could search its employees, language that is at the core of the first issue on appeal—does not receive the emphasis it deserves. Even worse, because the writer begins with the first pieces of the chronology the record contained, and recites those facts from the perspective of the witnesses who described them, the story he tells creates exactly the wrong theme. The prison had a legitimate problem, and it tackled it energetically and professionally. The DEA agents were just going about their jobs. With whom, then, are we likely to be empathizing by the time we first see the defendant (especially, of course, because we are introduced to him as “Defendant,” not by name)?

Consider the different effect if the story had been told from the guard's perspective, beginning differently and focusing on different details:

Mr. McKay's limited consent to being searched.

When Robert McKay was hired as a guard at the Sam Houston Correctional Facility, he signed a form that provided [here follows a description of the form's language, with the emphasis on its limited scope].
The prison administration's grounds for searching Mr. McKay

[A brief summary of the prison's reasons for suspecting drugs were entering the prison, emphasizing that they had no reason to suspect the defendant individually—a key to his defense.]

The search of the defendant

On March 18, 1990, Mr. McKay arrived at the prison for his shift. He was immediately taken aside by [name] and subjected to a strip search. ...

This story was about the underlying facts of a case. But stories can be made out of the legal process as well. Here is a final example:

David Smith, a professional art dealer and an expert in prints, bought "The Blue Seal," a well-known print by Pablo Picasso (the "Print"), at an auction conducted by defendant Galerie Modern in June 1990. Galerie Modern shipped the Print to Smith shortly thereafter, but Smith never paid for it. For the next 16 months, Galerie Modern pursued Smith to collect the debt, but Smith consistently claimed he was unable to pay. Smith, meanwhile, attempted to sell the Print, but could not find a buyer at the price he was demanding, apparently because of the decline in the art market.

Finally, after extending the payment period again and again, Modern threatened to take action to collect the debt. Smith then made the charge that underlies every count of his Complaint: that the Picasso signature on the Print (the "Signature") was not authentic. Ten days after he first made this allegation, he filed suit in this Court seeking to rescind his purchase of the Print—that is, seeking to be relieved of his payment obligation—and claiming $20 million in alleged "punitive damages." The defendants later counterclaimed to recover the debt Smith still owes.

After these paragraphs, can you avoid a strong suspicion about why Smith is suing? Yet the story never makes this suspicion explicit. Instead, as effective stories will, it brings you around to that reaction as if you discovered it yourself. From the reader's perspective, the story's theme now seems legitimate rather than manipulative or heavy-handed.

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ALL RISE!

Atticus Finch, the fictional lawyer in Harper Lee’s *To Kill A Mockingbird* for whom this publication is named, dedicated his advocacy to creating a more just system. His psyche, perhaps like all of ours, would only be at peace if a more just and fair criminal justice system could be established; one that doesn’t discriminate against the poor or people of color. The recent New York State budget, containing historic criminal justice reforms, goes a long way towards granting us all some of that long-sought-after peace.

NYSACDL, on behalf of our members and the clients we all serve, has been dutifully advocating for criminal justice reforms for many years. To finally realize measures which will reduce mass incarceration, implicit bias, wrongful prosecutions and convictions ushers in a new era of accountability and fairness.

Before examining these reforms in detail, a brief synopsis of how we got here is in order. Ever since NYSACDL’s Legislative Committee played a significant role in Rockefeller Drug Law Reform, it has deservedly enjoyed the recognition and platform as the “voice” of the criminal defense community. Year after year, state government has invited our comment on proposed criminal justice legislation and, in many cases, we have submitted memos in support, or in opposition to legislative initiatives. Upon the New York State Senate switching from a Republican controlled house to a Democratic majority following the 2018 midterm election, an opportunity for true significant criminal justice reform was realized. This
Reform

Continued from previous page

Association partnered with several other lawyer groups, exonerees, and community grassroots/activist organizations to form the Repeal the Blindfold Coalition, a reference to attorneys and the accused being forced to make critical decisions without being sufficiently informed about the case against them. While primarily devoted to advocating for discovery reform, the Coalition also provided legislative input on bail and speedy trial reform.

Governor Cuomo pushed to have these criminal justice reforms made a part of his budget proposal rather than risk delay, inertia, and possible inaction this legislative session. The Governor succeeded and most of our preferred language was incorporated into the budget. These dramatic reforms will make the criminal justice system fairer, and fundamentally alter our practice in many ways.

The reforms are effective January 1, 2020. They will apply to all cases pending on that date – regardless of when the case commenced. Until then, with respect to some of the reforms (especially bail and discovery), we strongly encourage, and several courts have already voluntarily assumed compliance based on legislative intent and fairness. Judges and prosecutors have enormous amounts of discretion to enact these changes today.

Here is an overview of some of the principal changes:

Discovery

Discovery is automatic – not by written “demands” or discovery motions.

Statute requires true “open file” discovery from DA. The provision listing the DA’s discovery obligations states that DAs must disclose “all items and information that relate to the subject matter of the case” and that are in DAs or law enforcement’s possession, “including but not limited to” all the listed items. It also states that when interpreting DAs’s discovery obligations, there is a “presumption of openness” and “presumption in favor of disclosure.”

There is also a right to full discovery before withdrawal of plea offers by the DA (in situations where the offer requires a plea to a crime).

Discovery from the defense is also greatly expanded.

“ If there were no bad people, there would be no good lawyers.”

— Charles Dickens
These dramatic reforms will make the criminal justice system fairer, and fundamentally alter our practice in many ways.

Timing of DA’s Discovery:

DA’s discovery occurs “as soon as practicable but not later than 15 calendar days after defendant’s arraignment” on any accusatory instrument – including a misdemeanor complaint, felony complaint, or any other instrument. This means that the DA’s discovery clock starts to run at the town, village, city, or criminal court arraignment in almost all cases.

The DA’s fifteen-day period can be extended without motion by up to 30 calendar days if discoverable materials are exceptionally voluminous, or if they are not in the DA’s actual possession “despite diligent, good faith efforts.” If DAs are allowed to invoke this extension, full discovery will be required 45 days after first appearance.

There are certain automatic timing extensions for some types of evidence (grand jury minutes, expert witness information, exhibits, electronically stored information).

DA can seek court-ordered modification of discovery time periods “in an individual case” based on showing of “good cause.”

There is a special rule for the client’s statements to law enforcement. Where the client has been arraigned on a felony complaint, the DA must disclose all such statements no later than 48 hours before the scheduled time for defendant to testify at the grand jury.

DA must file and serve a “certificate of compliance” upon completion of discovery (aside from items under a protective order). Certificate must affirm due diligence and reasonable inquiries; turnover of all known information; and list disclosed items.

As noted in the “speedy trial” summary below, DAs cannot validly state “ready” to stop the CPL 30.30 clock until a proper certificate of compliance is filed/served (unless court finds “exceptional circumstances” – a high standard under existing 30.30 case law).

DA must disclose defendant’s prior bad acts that will be offered under either Molineux or Sandoval “not later than 15 calendar days before trial.”

DA’s Discovery (Within 15/45 Days of First Appearance) Includes:

Defendant’s and co-defendant(s)’ statements to a public servant engaged in law enforcement activity. This is no longer limited to “jointly tried” co-defendants, and no longer excludes statements made in course of criminal transaction.

Grand jury transcripts of any person who testified in relation to the subject matter of the case, including defendants. Obviously, in many cases, grand jury proceedings will not have occurred (or minutes will not have been transcribed) when discovery is due 15 (or 45) days after first appearance. The DA gets an additional automatic 30-day extension if grand jury transcripts are unavailable due to limited court reporter resources (so disclosure in that situation can occur 75 days after first appearance).
Reform
Continued from previous page

appearance). Beyond 75 days, DA must seek court-ordered modification of discovery time period, and the minutes are subject to the general “continuing duty to disclose.” Names and “adequate contact information” for all persons (not just testifying witnesses) whom DA knows have information relevant to any charged offense or potential defense. DA also must designate witnesses who “may be called.” Physical address not required, but defense can move for disclosure of physical address for “good cause.”

All written or recorded statements of all persons whom DA knows have information relevant to any charged offense or potential defense, including all police and law enforcement agency reports and notes of police and other investigators.

Expert opinion evidence, including credentials (CV, list of publications, and proficiency tests/results from past 10 years) and all written reports or, if no report exists, a written summary of facts/opinions in testimony and grounds for all opinions.

All electronic recordings, including all 911 calls and all other recordings up to 10 hours in total length. If more than 10 hours exist, DA must turn over those it intends to introduce at trial or hearing, plus known information describing additional recordings. Defense counsel then has right to obtain any of the other recordings it wants within 15 calendar days of request.

All photos and drawings.

All reports of scientific tests/examinations, including all records, underlying data, calculations and writings

All favorable evidence and information known to DAs and law enforcement personnel acting in the case. This provision uses the same categories as OCA’s “Brady Order,” but all disclosures are moved up to 15 days (or 45 days) after first appearance. It also specifies that DAs must disclose “expeditiously upon its receipt.”

List of all potentially suppressible tangible objects recovered from defendant or co-defendant, with DA’s designation of actual or constructive possession, or abandonment, and whether DA will rely on statutory presumption of possession, and location from where each item recovered if practicable. Right to inspect or test property as well.

Search warrants and related documents.

“All tangible property” that relates to subject matter of case, including designation of which exhibits DA will introduce at trial or pretrial hearing.

Complete record of judgments of conviction for all intended DA witnesses and all defendants.

DWI cases – records of calibration/inspection/repair/maintenance for all testing devices for the periods 6 months before and 6 months after the test, including gas chromatography reference standard records.

Electronically stored information (“ESI” – from computers, cell phones, social media accounts, etc.) seized or obtained by or on behalf of law enforcement, either from the defendant or from another source that relates to the subject matter of the case. If device/account belongs to the defendant, DA must disclose complete copy of all of the ESI on device/account.

Pre-Plea Discovery:

If the DA makes an offer that requires a plea to a crime (but not a violation), the DA must disclose all items and information that would be discoverable prior to trial not less than 3 days before the plea deadline for felony complaints or not less than 7 days before the plea deadline for other accusatory instruments. The shorter period for felony complaints is designed to accommodate CPL 180.80 deadlines. Note that the pre-plea discovery provisions do not seem to apply to a sentencing promise by the judge on a plea to the top charge.

DAs cannot condition making a plea offer on waiver of discovery rights.

Where the defendant has rejected the plea offer and a violation of this discovery requirement is discovered, then the judge must consider the impact of the violation on defendant’s decision to accept or reject the offer. If the violation “materially affected” the decision and DA refuses to reinstate the offer, the court “must” – “as a presumptive minimum sanction” – “preclude the admission at trial of any evidence not disclosed as required” by statute.

Courts may also take “other appropriate action as necessary” on pre-plea discovery violations. For example, if the discovery violation involved a defendant who entered a plea (as opposed to one who did not accept the offer), the remedy could be vacating the conviction when the discovery violation involved a Brady violation that would have changed the defendant’s decision.
Discovery From Defense:

Defense must provide its discovery to DA 30 calendar days after service of DA’s “certificate of compliance” affirming DA completed discovery. There are automatic timing extensions for certain types of evidence (expert witness information and exhibits).

Defense discovery obligations have been expanded to include witness names and statements within this 30-day period. But when the defense intends to call a witness for the “sole purpose of impeaching” a DA’s witness, it does not have to disclose the person’s name/address or statements until after DA’s witness has testified at trial.

Discovery from defense applies only to 8 specific things that defense “intends to introduce” at trial or hearing, including:

1. Names, addresses and birth dates of witnesses whom defense intends to call at trial or hearing.
2. Written and recorded statements of witnesses whom defense intends to call at trial or hearing (other than the defendant).
3. Expert opinion evidence for experts whom defense intends to call at trial or hearing, including credentials and reports and underlying documents. If no written report was made, a written statement of facts/opinions to which the expert will testify must be disclosed.
4. Recordings that defense intends to introduce at trial or hearing.
5. Photos/drawings that defense intends to introduce at trial or hearing.
6. Other exhibits (“tangible property”) that defense intends to introduce at trial or hearing.
7. Scientific testing/examination reports and documents that the defense intends to introduce at trial or hearing.
8. Summary of promises/rewards/inducements to intended defense witnesses, and requests for consideration by intended defense witnesses.

Defense counsel must file/serve a “certificate of compliance” upon completion of discovery (aside from items under a protective order). Certificate must affirm due diligence and reasonable inquiries; turnover of all required information; and list disclosed items.

Other Notable Discovery Provisions:

Every New York police or law enforcement agency must, upon DA’s request, make available to DA a “complete copy of its complete records and files” relating to case to facilitate discovery compliance.

Arresting officer or lead detective must expeditiously notify DA about all known 911 calls, police radio transmissions, and other police video and audio footage and body-cam recordings “made or received in connection with the investigation of an apparent criminal incident” – and DA must expeditiously take all reasonable steps to ensure all known recordings “made or available in connection with the case” are preserved. If DA fails to disclose a recording due to any failure to comply with this provision, court “shall” impose an appropriate sanction.

Defense may move for a court order that grants defense access to a relevant location or premises to inspect, take photographs, or make measurements.

Defense may move for a court order that grants discretionary discovery of any other items or information not covered by the statute.

There are newly codified standards for imposing sanctions/remedies for discovery violations, based on existing case law.

Either party can obtain expedited review by a single appellate justice of a ruling that grants or denies a protective order relating to the name, contact information or statements of a person.

Note on Varying Start Dates for Different Statutory Clocks:
It is imperative to remember that the new CPL Article 245 (discovery), CPL 710.30 (statement/identification notices), and CPL 30.30 (speedy trial) will each have different triggering dates! Specifically:

1. Under the discovery statute (Art. 245), the DA's 15-day (or 45-day) period to provide discovery starts to run upon defendant's arraignment on any accusatory instrument, including a misdemeanor complaint or felony complaint.

2. Under the statement/identification notice statute (710.30), the DA's 15-day period to give notices starts to run upon defendant's arraignment on an information or indictment.

3. Under the "speedy trial" statute (30.30), the clock starts to run upon filing of any accusatory instrument, including a misdemeanor or complaint or felony complaint.

4. But for DATs (which will be more common given the new bail reforms), the 30.30 clock starts to run on the date when the defendant first appears in court in response to the DAT [see 30.30(5)(b)] (for discovery in DAT cases, the DA's clock to provide discovery will still begin when defendant is arraigned on a complaint).

Bail

In honoring the presumption of innocence, the bill that passed does not include a “dangerousness” (community safety) consideration. The new bill drastically reduces the use of cash bail through mandatory release and provides additional procedural and due process safeguards.

The bill has a mandatory DAT provision that provides court notifications for everything up to an E Felony. At the arrest phase, the bill mandates that an arresting officer must issue a Desk Appearance Ticket in all cases except those where the arrest is for a Class A, B, C, or D felony or a violation of some sex offenses, escape, and bail jumping. There are circumstances where the police are not required to issues DATs even on eligible cases, for example if the court can issue an order of protection or suspend/revoke a driver's license. The arrestee “may” provide contact information to receive court notifications, including a phone number or email address.

The new bill drastically reduces the use of cash bail through mandatory release and provides additional procedural and due process safeguards.

The bill has a mandatory release or release with nonmonetary conditions for almost all misdemeanors and non-violent felonies. All persons charged with misdemeanors (except sex offenses and DV contempts), non-violent felonies, robbery in the second, and burglary in the second, must be released on their own recognizance unless it is demonstrated and the court makes a determination that the principal poses a risk of flight to avoid prosecution. Otherwise, they must be released with nonmonetary conditions (prertrial services) that are the least restrictive condition(s) that will reasonably assure the principal's return to court.

For all other charges the system will largely remain the same. When charged with a “qualifying offense” the court may release the person on his or her own recognizance or under nonmonetary conditions, fix bail, or if the offense is a qualifying felony, the court may remand the person. The offenses that qualify for money bail or remand are: violent felony offenses (except Rob 2 [aided] and Burg 2 [of a dwelling]); felony witness intimidation; felony witness tampering; Class A felonies other than drugs (except a “director of a drug organization” under 220.77); some felony sex offenses under 70.80; incest involving children; terrorism charges except 490.20; conspiracy to commit Class A felony under P.L. 125; and misdemeanor sex offenses and DV misdemeanor contempt (still not remand eligible, continue to be eligible for bail as under current law).

Money bail now has additional protections from abuse. If monetary bail is set on a person charged with a qualifying offense, the court must set it in three forms including either unsecured or partially secured security bond. When setting money bail, the court must consider the principal's financial circumstances, ability to post bail without posing an undue hardship, and the principal's ability to obtain a secured, unsecured or partially secured bond. Courts will now have to issue on the record findings to justify their decision-making.
New options will be available to courts to aid people in returning to court instead of using money bail. In all instances, the court or a designated pretrial service agency will notify all people ROR’d or released with conditions of all court appearances in advance by text messages, telephone call, email or first-class mail. Prior to issuing a bench warrant for a failure to appear for a scheduled court date, the court will provide 48 hours’ notice to the principal or principal’s counsel that the principal is required to appear in order to give him or her the opportunity to voluntarily appear.

Additionally, electronic monitoring will be available for a limited subset of cases but will be placed behind rigorous due process protections. Electronic monitoring is considered incarceration for 180.80 and 170.70 purposes and may only be imposed for 60 days with the option of continuing only upon a de novo review before a court. Electronic monitoring must also be the least restrictive means to ensure return to court and be “unobtrusive to the greatest extent possible.”

There are many more provisions in the bill. NYSACDL, Office of Court Administration, and other bar associations will undoubtedly be providing future trainings.

**Speedy Trial / CPL 30.30**

DA’s “ready” statement is not valid unless DA has filed a proper “certificate of compliance” affirming that discovery obligations under new CPL 245.20 discovery statute are complete (unless court finds “exceptional circumstances”).

“Partial readiness” / “partial conversion” is no longer a valid doctrine for misdemeanors – DA cannot state “ready” on some counts without certifying that all other counts are converted or dismissed.

VTL infractions are considered “offenses” for 30.30 purposes – this eliminates the problem of a lingering VTL 1192(1) or 509 count after a 30.30 dismissal of higher charges.

Where DA states “ready” for trial, the judge must make an inquiry on the record as to their actual readiness.

30.30 release motions no longer must follow the procedural rules for motions to dismiss – so they can be made orally and do not need to be on advance notice to DA. Where periods are in dispute, the judge must conduct a prompt hearing and DA has burden of proving excludability.

Denial of a 30.30 dismissal motion can be appealed following a guilty plea (and mandatory language indicates that the parties may not be able to waive such appellate review).

**Subpoenas**

The new statute discards the 24-hour notice requirement for defense subpoenas on government agencies, as well as any requirement of service on the DA. The defense now only needs a court-indorsed subpoena for governmental agencies, with minimum of 3 days for the agency to comply. The DA is not notified unless the agency voluntarily informs DA.

When a subpoena is challenged by a motion to quash or questioned by the judge prior to indorsement, the defense must only show a factual predicate that the item or witness is “reasonably likely to be relevant and material to the proceedings.” The prior standard set by case law was an advance showing that the item or witness was likely be “relevant and exculpatory.”

**364-Day Maximum Sentence for Misdemeanors**

The bill reduces the maximum sentence of Class A and certain unclassified misdemeanors from 1 year to 364 days. This law will benefit immigrant New Yorkers in several important ways.

It will eliminate the possibility of New York misdemeanors becoming aggravated felonies because of a one-year sentence. The Immigration and Nationality Act defines many aggravated felony offenses – including Theft offenses, Crimes of Violence, and counterfeiting offenses – by an actual sentence of one year or longer. By reducing the possible maximum sentence, the bill eliminates the potential plea bargain of “an A and a year” and the possibility of a non-citizen defendant receiving an aggravated felony as a result of being convicted of an A misdemeanor after trial. In addition to subjecting a non-citizen to mandatory detention while in removal proceedings and to barring a lawful permanent resident from applying for United States citizenship, an aggravated felony conviction after 1996 leads to certain deportation.

The new law will also mean that one New York misdemeanor conviction that is a crime involving moral turpitude will

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no longer render a lawful permanent resident deportable from the United States. As a result of this bill it will take at least two misdemeanor crimes involving moral turpitude – whether they be A or B misdemeanors – to trigger the deportation statute.

Finally, under current immigration law, one crime involving moral turpitude that is an A misdemeanor or more serious bars non-citizens from applying for Non-LPR Cancellation of Removal – the only form of relief available in removal proceedings to many undocumented individuals who have children, spouses, or parents who are U.S. citizens or lawful permanent residents. The new law should make it possible for many more of non-citizens to successfully defend themselves against deportation and to remain with their families as contributing members of our communities.

Mugshots

The budget legislation curbs the release of booking photos by police agencies. The legislation amends the State’s Freedom of Information Law, saying it would be an “unwarranted invasion of personal privacy” to allow disclosure of “law enforcement booking information about an individual, including booking photographs, unless public release of such information will serve a specific law enforcement purpose and disclosure is not precluded by any state or federal law.” How those changes to the State’s Freedom of Information Law will play out remains to be seen. It currently appears that the prohibition would certainly apply to State Police, which is a state agency governed by the Personal Privacy Protection Law. It might permit, but not require, local police to withhold booking photos. This measure drew criticism from news industry groups who assert that reporting on crimes in communities is an important function of the news media and the law, as well intended as it may be, constitutes a threat to the media’s ability to report arrests, information they argue the public should be entitled to receive.

Asset Forfeiture

Included as part of the state budget is an amendment to civil asset forfeiture, which is currently used by prosecutors in some cases to either freeze or collect the assets of a defendant throughout a criminal proceeding. These reforms become effective six months after passage (October 12, 2019) and won’t apply to alleged crimes committed before that date. There are three major provisions of the legislation, all of which are opposed by the District Attorneys Association of the State of New York.

1. Prosecutors are prevented from freezing a defendant’s assets unless they can show they’re “tainted” or the direct proceeds of the crime the accused is charged with. This aligns New York’s statute with federal case law. Previously, assets could be frozen that were not traceable to the criminal activity in situations where prosecutors would calculate what a defendant earned from their alleged crimes and then get a restraining order against all of the defendant’s assets up to that amount. This technique would often interfere with the defendant’s ability to pay for their legal defense.

2. Under current law, prosecutors can secure assets from a defendant to award to a victim regardless of whether those funds are the direct proceeds of the crime. The new law will only allow prosecutors to seize untainted funds if they can’t find the direct proceeds of the crime. At that point, it will be up to the judge overseeing the case to decide whether a prosecutor is able to require those funds be seized. In other words, if you obtain a money judgment and the DA can’t find the traceable assets, the DA must apply to the court for permission to attach untainted assets. Only tainted funds can be frozen pretrial by the claiming authority.

3. Judges are prohibited from considering whether funds were obtained illegally when deciding on a motion to release them to pay for attorney’s fees and reasonable living expenses. This allows those funds to be released to pay for defense counsel and the client’s day-to-day expenses, even if they’re alleged to be the direct proceeds of a crime.

Other Significant Reforms

An end to license suspension for non-driving drug convictions.

A prohibition on employment and housing discrimination against people with open ACDs.

Application of Article 23A protections against baseless discrimination for people with criminal records to certain state-operated professional licenses.
An expedited closure of 3 state prisons.

A requirement for local police chiefs to report to DCJS on police use of force with demographic data and for the latter agency to release it publicly annually, and a version of the Domestic Violence Survivors Justice Act.

Despite Governor Cuomo’s proposal to increase attorney biennial registration fee from $375 to $450 to help fund constitutionally mandated legal services, the state budget does not provide for the increase. Even without the fee increase, the budget still allocated almost $50 million more to the Office of Indigent Legal Services this year, an increase of more than 30% over last year’s budget. The additional funding is mostly directed at the state’s obligations under the 2014 landmark settlement in the Hurrell-Harring case. Unfortunately, the budget also does not increase the rate of pay for 18-B (assigned counsel) attorneys. Increasing assigned counsel rates is expected to be a legislative priority of NYSACDL next session.

Update On Prosecutorial Conduct Commission

The formal establishment of the new Commission on Prosecutorial Conduct which is to be tasked with reviewing complaints against the state’s prosecutors may be delayed (again) following the District Attorneys Association of the State of New York (DAASNY) having filed for a preliminary injunction against the Commission’s creation.

The new filing comes after Governor Cuomo signed an amended version of legislation into law in late March, despite an expected constitutional challenge to the legislation by state prosecutors, who continue to advocate that despite the “chapter amendments” to remedy earlier constitutional issues raised by DAASNY, the amended version still contains constitutional infirmities.

It is somewhat ironic that despite multiple organizations supporting this legislation, similar to other criminal justice reforms, there is only one Association which opposes it, just as they did all other recent measures to establish a more just system of justice – DAASNY. The New York State Association of Criminal Defense Lawyers is closely monitoring the litigation and will, if appropriate, submit an Amicus memorandum. We are also seeking to identify suitable candidates to nominate to be members of the panel when appointments begin.

Remaining Criminal Justice Issues

Despite what may be described as “criminal justice legislative exhaustion,” there are several issues which state government hopes to address before the close of this legislative session in June.

Repeal/Amendment of Civil Rights Law Section 50-a

The statute has been used by members of law enforcement to withhold personnel records, including reports of alleged misconduct, from public view. The defense community believes that state court decisions have misinterpreted the statute in favor of law enforcement. The statute wasn’t intended to shield police from making available their disciplinary records and history under the right circumstances. The legislature is discussing means to achieve more law enforcement accountability.

Tracking data on arrest and criminal patterns statewide

Consideration is being given to collecting and publicly reporting the total number of arrests and tickets for violations and misdemeanors, as well as the demographics of those individuals, including race, ethnicity, and sex. State Senator Brad Holyman (D-Manhattan) has advocated for the bill, known as the Police STAT Act. According to the New York Law Journal, Holyman was quoted as saying “New York cannot truly claim to be a progressive state so long as we have a criminal justice system that disproportionately impacts marginalized communities, including LGBTQ New Yorkers and people of color. We need to fundamentally rethink the way police departments engage with the communities they serve.”

Charitable Bail Fund

Under the new bail provisions, felonies will still be eligible for cash bail, so State Senator Gustavo Rivera (D – Bronx) aims to amend the current charitable bail bill by:

1. increasing the cap from $2,000.00 to $10,000.00
2. allowing felonies to be eligible for the charitable bail funds, and
3. allowing such funds to bail people out across different counties.

Those who wish to totally eliminate cash bail fear that passage of this statute may further entrench the use of money bail. Those supporting the bill believe that as long as cash bail is in play, enlarging options to post bail for those

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who would otherwise be remanded with no possibility of bail, is the right thing.

**Solitary Confinement**
Negotiations continue regarding reducing the use of solitary confinement for people who engage in misconduct within state prisons. The suggested reforms would direct DOCCS to limit the length of time spent in separation, provide for more humane conditions during separation, build dedicated housing units for rehabilitation and integration following a disciplinary sanction, and expand therapeutic programming to reinforce positive and social behavior.

**Adult Marijuana Legalization**
In January 2018, Governor Cuomo directed the Department of Health to launch a multi-agency study to review the potential impact of regulated cannabis in New York. The study, issued last July, concluded that the positive impact of a regulated cannabis program in New York State outweighs the potential negative aspects. Although legalization did not make it into the budget, state government appears determined to pass recreational use by the end of this legislative session. The legislation is expected to include the establishment of a regulated cannabis program for adults 21 and over that protects public health, provides consumer protection, ensures public safety, addresses social justice concerns, and invests tax revenue. Initiatives should include reducing impacts of criminalization affecting communities of color, the sealing of cannabis-related criminal records, and invite new case law regarding probable cause issues in connection with search and seizure.

**Criminal Mishchief**
Bill numbers A6951 - S2560, and A745 – S4321 seek to raise the monetary threshold for felony criminal mischief from $250 (established 104 years ago) to $1000 to comport with the felony threshold for larceny (established in 1985).

**Qualified Public Agencies**
This initiative would authorize qualified public defense institutional providers to access New York State’s criminal history database.

Thanks to the Legal Aid Society of New York City and attorney Steven L. Kessler (former NYSACDL Treasurer and noted authority on forfeiture) for contributing content to this article. As you can see, while much has been accomplished, there remains more to be done. Your Association is on the front lines in advocating for a better criminal justice system and improved attorney client advocacy. With your support, we will continue to try to do the right thing. As Atticus Finch pondered, “Sometimes just trying to do the right thing IS the right thing.”

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In the rather informal survey I have taken over the years on intensity of interest in food by profession, lawyers rank only a few trades below concert pianists....

— Calvin Trillin, The Tummy Trilogy
2020 Labor & Employment Update – Sexual Harassment, Reasonable Accommodations, Pay Equity, Medical Marijuana, Investigations, and other trends

Tanya N. Blocker, Esq.
Natalya G. Johnson, Esq.
Michael Yim, Esq.
#METOO
Evolution of Sexual Harassment Laws
Introduction

- 2019 was the two year anniversary of revival of the #METOO movement
  - created by Tawana Burke in 2006
  - revived with Alyssa Milano's tweet on 2017
- Unprecedented legislative response
- EEOC recently released statistics indicating an uptick in sexual harassment charges and lawsuits
  - The number of sexual harassment lawsuits filed by the EEOC increased by more than 50% in FY 2017
  - Overall, the EEOC recovered nearly $70 million for sexual harassment claimants through litigation and administrative enforcement in FY 2018 (up from $47.5 million in FY 2017)
Harassment & Discrimination – Notable Headlines

• Fox News agreed to pay Gretchen Carlson $20 million to settle her sexual harassment lawsuit against Roger Ailes, the network’s former Chairman and CEO, who resigned in the summer

• Wal-Mart to pay $11.7 million in EEOC gender bias suit

• McDonald’s Pays $90K to settle Disability Discrimination Lawsuit
Sexual Harassment

- A form of discrimination

- **Unwelcome** sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature when:
  - Submission to such conduct is made either *explicitly or implicitly* a term or condition of an individual’s employment;
  - Submission to or rejection of such conduct by an individual is used as the *basis for employment decisions* affecting such individual; or
  - Such conduct has the purpose or effect of *unreasonably interfering with an individual’s work performance* or creating an intimidating, hostile, or offensive working environment

- 2 Forms of Sexual Harassment:
  - 1. *Quid Pro Quo*
  - 2. *Hostile Work Environment*
Sexual Harassment

1. **Quid Pro Quo Sexual Harassment**
   - Something for something
   - Employee’s submission to sexual demands becomes a condition of employment
   - Implicit or explicit threats that an employee may perceive that he/she must tolerate sexual advances or engage in a sexual relationship to continue employment, to achieve advancement, to receive salary increases or preferred assignments or to avoid adverse employment consequences such as poor evaluations or demotions if the employee does not accede to the sexual demands of a supervisor
Sexual Harassment

2. Hostile Work Environment Harassment

- Employee is subjected to sexual, abusive, or offensive conduct because of his/her gender

- The conduct creates a hostile work environment when it is severe or pervasive enough to make a reasonable person of the employee’s gender believe that the conditions of employment have been altered and the working environment has become hostile or abusive

- The test of whether conduct may be considered offensive is based on the perspective of the person who is the recipient or observes the conduct and not on the perspective of the person who commits the conduct, but the standard is an objective one

- Anyone who observes the conduct may be considered a victim of harassment. The employee about whom the conduct was directed does not have to be present for the conduct to be considered harassment or discrimination

- Conduct does not have to be sexual in nature and does not have to involve physical contact. The conduct or treatment must be unwelcome and must be directed at the employee as the result of the employee’s gender
2. Hostile Work Environment Sexual Harassment (cont’d)

- A hostile work environment can occur in a variety of circumstances:
  - offensive touching or jokes
  - repeated obscene gesture
  - exhibiting inappropriate pictures or sexual reading materials via email or internet

- Less obvious sexual behavior could also violate the Township’s sexual harassment hostile work environment policy
  - conversations of a personal nature
  - commenting on appearance
  - flirting
  - repeated requests for a date
#METOO is No Fad:
The Cultural Shift
Thousands of Google employees in more than 20 offices around the world are staging walk-outs to protest what organizers describe as "a workplace culture that's not working for everyone."

In the wake of an explosive New York Times' report that detailed how Google shielded executives accused of sexual misconduct, either by keeping them on staff or allowing them amicable departures. For example, Google reportedly paid Android leader Andy Rubin a $90 million exit package despite asking for his resignation after finding sexual misconduct claims against him credible. (Through a spokesperson, Rubin denied any misconduct and on Twitter he called his reported compensation a "wild exaggeration.")
#METOO: Beyond Economics

**Increased**
- Employee complaints
- Client complaints
- Adverse publicity
- Costs (i.e., weakened profits)
- Legal counsel to resolve formal complaints
- Turnover
- Absenteeism
- Loss of trained and effective employees

**Decreased**
- Engagement
- Morale
- Attendance
- Client/customer satisfaction
- Reputation and organization’s image
Sexual Harassment

While **no substantive change in the law**, possible change in the culture.  
• Reaction to inappropriate workplace behavior “affects the well-being [of the legal workforce], and the atmospherics are driving people away even if what you’re doing isn’t technically illegal.” Law360

Culture...retention of female employees and fair responses to harassers could both be negatively impacted by decision-makers focused primarily on liability. Removing the fear of professional freezeout.

To narrowly focused - Consider both legal as well as “**solvable cultural problems**” – use as an opportunity – social vs. economic impact – reverberations from not being proactive.

Harassment Changing prevention requires:  
  Culture correction --indication of a larger problem that may or may not manifest as a lawsuit
  Leadership – buy-in from the top
  Accountability
  Strong policies
  Expanded training
  Effective complaint and investigation program
  Follow-up and monitoring
Sexual Harassment

Harassment prevention requires:

Employers are required to either adopt policies prohibiting sexual harassment promulgated by the New York State Department of Labor (the “NYSDOL”) in consultation with the New York State Division of Human Rights (“NYSDHR”) or have their own policies in place that equal or exceed the standards set by the NYSDOL, by October 9, 2018 effective date.

Employers must provide annual anti-sexual harassment training for all employees. Employer may now be held liable by non-employees such as contractors, “freelancers,” vendors or consultants for sexual harassment. “In reviewing such cases involving non-employees, the extent of the employer’s control and any other legal responsibility which the employer may have with respect to the conduct of the harasser shall be considered.” While the new law allows employers to limit their liability for the sexually harassing conduct of individuals beyond their direct control (for example, customers in a retail establishment), employers are advised to adopt, publish and enforce policies that make clear that they will not tolerate inappropriate conduct by anyone in their workplace.

Effective immediately, that part of New York City’s administrative code prohibiting workplace sexual harassment applies to all employers, regardless of size (previously, the law applied only to those employers with four or more employees). The City Commission on Human Rights now has jurisdiction over all such claims filed within three years of the alleged harassing conduct.

By September 6, 2018, employers where required to “conspicuously display” posters providing notice to employees of the unlawful nature of sexual harassment “in employee breakrooms or other common areas employees gather.”
Overview of NYC's Stop Sexual Harassment Act

• Effective **April 1, 2019**

• private employers with **15 or more employees** (including interns)

• annual interactive anti-sexual harassment training for all employees

  • Explanation/statement sexual harassment is unlawful under local, state and federal law
  • a description of sexual harassment and examples
  • internal employer, local, and state processes regarding sexual harassment complaints
Ensuring New Yorkers Know Their Rights

• **Intro. 614-A** requires the New York City Commission on Human Rights to clearly post resources about sexual harassment on its website, including an explanation that sexual harassment is a form of unlawful discrimination under local law.

• **Intro. 630-A** requires all employers in the city to display an anti-sexual harassment rights and responsibility poster designed by the Commission on Human Rights.
Expanding Protections

• **Intro. 657-A** – expansion to gender-based discrimination (regardless of employer size)

• **Intro. 660-A** – would amend City agency policy statement to include sexual harassment as a form of discrimination

• **Intro. 663-A** – increases statute of limitations for filing harassment or gender-based discrimination claims from one year to three years
Training Requirements

• Annual training

• Information concerning local and federal agency complaint processes

• Explanation of prohibited retaliation with examples

• Information regarding bystander intervention and how to engage in such intervention

• Specific responsibilities of supervisory and managerial employees

• Interactivity

• Signed employee acknowledgements

• Three-year recordkeeping period
Arbitration & Non-Disclosure Agreements

• prohibition of nondisclosure agreements in settlements, agreements, or other resolutions of claims involving sexual harassment, unless
  • confidentiality is the complainant’s preference and
  • the requisite twenty-one day review period and seven-day revocation period are provided

• prohibition of mandatory arbitration clauses in contracts regarding the resolution of sexual harassment complaints, except where inconsistent with federal law or with any collective bargaining agreement
NYS vs. NYC

Who must train
NYS — ALL Employers must train their employees (number of employees does not matter)
NYC- Employers with 15 or more employees must train their employees

When to train
NYS- Must train new employees as soon as possible
NYC- New employees must be trained within 90 days of hiring

Effective date & Deadline
NYS- Beginning October 9, 2018 all employees must be trained by October 9, 2019
NYC- Beginning April 1, 2019 all employees must be trained by April 1, 2020

Contractors
NYS- Beginning Jan 1, 2019 any contractor who bids on NYS contracts must certify that they have a sexual harassment policy and have provided training to employees, even those outside of NY
NYC- Contractors who bid on NYC contracts must describe their sexual harassment policies as part of their reporting requirements

Record keeping
NYS- There is no mandated record keeping of employees who have taken the training
NYC- Employers are required to keep acknowledgements of employee training completion for at least 3 years; these records should be readily available upon request.
The Gray Space
Physical
- Sexual Conduct or Assault
- Extensive hugging
- Offensive or unwanted touching or kissing (including groping)
- Intentionally bumping into another

Verbal
- Jokes
- Using offensive or derogatory slurs/terms
- Cursing or otherwise offensive language

Nonverbal/Visual
- Leering
- Watching/sending porn
- Making lewd gestures
Less obvious sexual behavior may not violate the law but rather a companies sexual harassment hostile work environment policy. For example policies prohibiting engaging in conversations of a personal nature, flirting, commenting on appearance, repeated requests for a date

Investigations:

- Good-faith investigation
- The investigation process must be treated in as “confidential a manner as possible”
Trade Flattery for Common Courtesy

• Be mindful of how certain types of compliments or gestures can create awkward dynamics

• If you would not say something about a man, rethink the appropriateness about saying it about a woman

• Focus on competencies, not looks
Reasonable Accommodations: The Cooperative Dialogue
Comparing **Reasonable Accommodation** Provisions under the ADA, NYSHRL and NYCHRL

<table>
<thead>
<tr>
<th>Provision</th>
<th>ADA</th>
<th>NYSHRL</th>
<th>NYCHRL</th>
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</table>
| Duty to Provide RA  | Employer has a duty to provide RA to a qualified individual with a disability (42 U.S.C § 12112(b)(5)(A)) | Employer must provide RA to qualified applicants or employees with known disabilities or pregnancy – related conditions, unless the accommodation would cause undue hardship (N.Y. Exec. Law §§ 292(21-e), 296(3)(a)) | Employer must provide RA for the known pregnancy or disabilities of any employee, long as the accommodation:  
  • Allows the employee to perform the essential requisites of the job  
  • Does not cause the employer undue hardship (N.Y.C. Admin. Code §§ 8-102(18), 8-107(15)(a)) |
| Types of RA         | Non-exhaustive list:  
  • Making existing facilities used by employees readily accessible to and usable by individuals with disabilities  
  • Job restructuring  
  • Modifying work schedules  
  • Reassignment to a vacant position (42 U.S.C. § 12111(9)) | Any action that permits an employee or prospective employee with a disability to reasonably perform the job’s activities (N.Y. Exec. Law § 292(21-e)) | Any accommodation that can be made without causing the employer undue hardship (Jacobsen v. New York City Health & Hosps. Corp., 988 N.Y.S.2d 86, 94 (2014)) |

*Chart adapted from Thomson Reuters ADA, NYSHRL, and NYCHRL Disability Comparison Chart (NY), Practical Law Checklist 5-555-0867*
## Comparing **Reasonable Accommodation** Provisions under the ADA, NYSHRL and NYCHRL (Continued)

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<tbody>
<tr>
<td>Interactive Process</td>
<td>Generally, employee must inform the employer that an accommodation is needed so the interactive process can begin (see 29 C.F.R., pt 1630, app., § 1630.9 and EEOC: Enforcement Guidance: Reasonable Accommodation and Undue Hardship, General Principles and Question 40)</td>
<td>Good faith, individualized interactive process that assesses the needs of the employee and reasonableness of the accommodation. Interactive process continues until, if possible, an accommodation is reached. (Phillips, 884 N.Y.S. 2d at 373.)</td>
<td>(Next Slide)</td>
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</table>

*Chart adapted from Thomson Reuters ADA, NYSHRL, and NYCHRL Disability Comparison Chart (NY), Practical Law Checklist 5-555-0867*
Cooperative Dialogue under the NYCHRL

• A ‘cooperative dialogue’ is any written or oral communication between the employer and employee that includes:
  • The employee’s accommodation needs,
  • Requested accommodations and potential alternatives that may address those needs, and
  • Any difficulties the potential accommodations may pose for the employer.

• What triggers the obligation?
  – The employee requests an accommodation
  – The employer is on notice that the employee may require an accommodation

• What types of accommodation requests are subject to the new requirements?
  – Religious accommodations
  – Disability accommodations
  – Pregnancy, childbirth and related medical conditions
  – Victims of domestic violence, sex offenses or stalking
Obligations and Risks

- An employer must provide the employee with a “written final determination identifying any accommodation granted or denied.”
- ONLY after engaging in a cooperative dialogue and providing a written determination may an employer conclude that there is no reasonable accommodation available.
- Employees can file a lawsuit or administrative charges with the New York City Commission on Human Rights.
- Remedies include: compensatory, punitive, equitable and injunctive relief, attorneys’ fees, and civil penalties up to $125K (per violation) and $250K (for a willful, wanton or malicious violation)

Practice Tips

- Update your reasonable accommodation policies to include ‘cooperative dialogue’ requirements under the NYCHRL.
- Establish a standard procedure for requesting accommodations and clearly communicate such procedure to all employees.
- Train management on the cooperative dialogue obligations.
- DOCUMENT EVERYTHING!
- Respond to all requests in writing.
Reasonable Accommodation Laws Impacting Women in the Workplace

• Enforcement of accommodations that afford pregnant workers with work restrictions the same accommodations made available to other, non-pregnant workers with the same category of restrictions.
  – Pregnancy Discrimination Act
  – Americans with Disabilities Act – pregnancy related
  – State and local laws
Reasonable Accommodations
Advancing Women in the Workplace

• Young v. UPS - The U.S. Supreme Court in a 2015 landmark ruling interpreted the federal Pregnancy Discrimination Act as requiring employers to offer a pregnant employee with work restrictions the same accommodations it makes available to other, non-pregnant employees “similar in their ability or inability to work.”

• Notable cases and those to watch:
  – Hostettler v. College of Wooster No. 17:-3406; ND Ohio No. 5:15 cv 01601 overturned on appeal- July 17, 2018
    • Sixth Circuit overturned a grant of summary judgement on pregnancy, disability and FMLA claims where an HR generalist, granted maternity leave pursuant to the FMLA leave (for which she was not eligible) and upon returning from leave was granted additional time off in connection with her PTSD and a limited schedule during the summer months upon transitioning back to work. When Wooster College requested that the plaintiff work full time—as one other HR professional had taken maternity leave and work was beginning to significantly increase (presumably due to the start of the semester, although not stated)—plaintiff responded that she was unable to return to full-time status. Instead, the plaintiff advised that she could increase her daily work hours by 1 or 2 hours each day. The College never responded to the counteroffer and terminated the employment, citing a hardship.
  – Notable facts to consider: Wosster went above and beyond to accommodate the plaintiff--previously granting her a part-time schedule and generous paid FMLA leave of which she was not eligible. Wosster also granted two years of leave to other, non-pregnant employees.
Reasonable Accommodations
Advancing Women in the Workplace

- **California:** *Katrina Perona v. Time Warner Cable Inc.*, case number [16-56897](#), Ninth Circuit affirmed a $160,000 jury verdict in a failure to provide a reasonable accommodate trial, citing the California law that finds that “[a]n employer's failure to engage in the process is separate from the failure to reasonably accommodate an employee's disability.”

- **New York:** Effective October 16, 2018, NYCHRL mandates that employers engage in a “cooperative dialogue” with employees “entitled to an accommodation or who may be entitled to an accommodation under the law.” The law specifically carves out disability, pregnancy and pregnancy related medical condition accommodations that trigger the cooperative dialogue requirement.
  - “Covered entities” include employers among other entities
  - Intrinsically “unlawful discriminatory practice” to fail to engage in a “cooperative dialogue,” – written or oral dialogue — regarding the employee’s accommodation needs, including the employee’s specific accommodation request, potential alternatives, and difficulties the proposed accommodations may pose for the business.
  - Cooperative dialogue requirement triggered by a direct request or by constructive notice that an accommodation may be needed.
  - Must provide a final written determination within a “reasonable time” of identifying any accommodation granted or denied.
Disability Accommodations - Notice

- Affirmative obligation: Knew or should have known of need for accommodation
  - Knowledge can be direct/indirect
- Do not ask if employee has a disability, just note performance problems and offer support
- The more frequently you talk about accommodations, the less awkward it will be to start the cooperative dialogue
Disability Accommodations - Documentation

Should

1) confirm the existence of a disability,
2) identify the limitation, and
3) explain the need

No diagnosis or complete medical records

Content over form
Disability Accommodations - Examples

- Policies and forms
- Schedule changes
- Reassignment
- Challenging requests
- When it doesn’t work out
Status as a Victim of DV, Sex Offenses, Stalking

• Definitions
  – Victim of domestic violence – broad definition
  – Victim of sex offenses or stalking – Penal Code

• Documentation

• Examples
How Laws on Pay Equity & Medical Marijuana are Reshaping Experiences in the Workplace

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Pay Equity: 
Equal Pay Legislation/Salary History Ban Inquiries
Salary History Bans: Around the Country
Salary History Bans: Around the Country

Michigan
- Michigan has prohibited salary history bans in the state (Effective June 24, 2018)
- State Departments and certain agencies may not ask about a job applicant’s salary history until a conditional offer of employment is extended (Effective Jan. 8, 2019)

Wisconsin
- Local governments may not prohibit employers from soliciting salary history of prospective employees (Effective April 18, 2018)
Around the Country

- Puerto Rico – March 8, 2017
- Oregon – October 6, 2017
- Delaware – December 14, 2017
- California - January 1, 2018
- Massachusetts – July 1, 2018
- Vermont – July 1, 2018
- Connecticut – January 1, 2019
- Hawaii – January 1, 2019
- Illinois – January 15, 2019
- Washington – July 28, 2019
- Alabama – September 1, 2019
- Maine – September 17, 2019
- **New York - January 6, 2020**
- New Jersey – January 1, 2020
- Colorado – January 1, 2021
NY Joins Ranks Of States To Ban Salary History Queries

By Vin Gurrieri

Law360 (January 6, 2020, 8:20 PM EST) -- New York state on Monday joined about a dozen other states in banning businesses from asking prospective employees and candidates for promotions about their salary history, as a law it passed last year designed to cut into the gender wage gap takes effect.

New York Latest State to Ban Employers’ Salary History Questions

Jan. 6, 2020, 10:30 AM
Pay Equity: Equal Pay Legislation and Ban on Salary History Inquiries

Senate Bill S6549
2019-2020 Legislative Session

Prohibits employers from seeking salary history from applicants

SPONSORED BY

David Carlucci
(D) 38TH SENATE DISTRICT

CURRENT BILL STATUS - SIGNED BY GOVERNOR

Passed Senate

- Signed by New York Governor Andrew Cuomo on July 10, 2019
- Effective January 6, 2020
PURPOSE: The purpose of this bill is to prevent further wage discrimination by prohibiting employers from asking for wage or salary history as a requirement for a job interview, job application, job offer, or promotion.
Labor Law § 194-a. Wage or salary history inquiries prohibited.

1. No employer shall:

a. rely on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual.

b. orally or in writing seek, request, or require the wage or salary history from an applicant or current employee as a condition to be interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion.

c. orally or in writing seek, request, or require the wage or salary history of an applicant or current employee from a current or former employer, current or former employee, or agent of the applicant or current employee's current or former employer . . .
Labor Law § 194-a. Wage or salary history inquiries prohibited.

1. No employer shall:

d. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee based upon prior wage or salary history.

d. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current employee because such applicant or current employee did not provide wage or salary history in accordance with this section.

d. refuse to interview, hire, promote, otherwise employ, or otherwise retaliate against an applicant or current or former employee because applicant or current or former employee filed a complaint with the department alleging a violation of this section.
Defining employer

- any person
- corporation
- limited liability company
- association
- labor organization
- entity employing any individual in any occupation, industry, trade, business or service
- the state
- any political subdivision
- public authority or other governmental entity or instrumentality
- employment agent, recruiter (connecting applicants with employers)
What can an employer ask?

- An employer may ask an applicant for their salary expectations for the position instead of asking what the applicant earned in the past.

- An employer may confirm wage or salary history only if at the time an offer of employment with compensation is made, the applicant or current employee responds to the offer by providing prior wage or salary information to support a wage or salary higher than offered by the employer.
New York State Releases Guidance on Salary History Ban

May a prospective employer ask an applicant about their current or past salary, compensation or benefits?

No. Effective January 6, 2020, Labor Law Section 194-a prohibits an employer from, either orally or in writing, personally or through an agent (directly or indirectly), asking any information concerning an applicant’s salary history information.

The law also prohibits an employer from relying on an applicant’s salary history information as a factor in determining whether to interview or offer employment at all or in determining what salary to offer.
New York State Releases Guidance on Salary History Ban

Does the law apply to current employees?

- Yes. Employers cannot request prior salary history information from current employees as a condition of being interviewed or considered for a promotion.
- Employers may consider information already in their possession for existing employees (i.e. a current employee’s current salary or benefits being paid by that employer).
  - For example, an employer may use an employee’s current salary to calculate a raise but may not ask that employee about pay from other jobs.
New York State Releases Guidance on Salary History Ban
Voluntary Disclosures

• The Labor Law permits an applicant to voluntarily disclose their salary history information to a prospective employer, for example, to justify a higher salary or wage, as long as it is being done without prompting from the prospective employer.
• If an applicant voluntarily and without prompting discloses salary history information, the prospective employer may factor in that voluntarily disclosed information in determining the salary for that person.
• An employer may not, for example, pose an “optional” salary history question on a job application seeking a voluntary response.
• An employer may seek to confirm wage or salary history only if an applicant voluntarily discloses such information.
New York State Releases Guidance on Salary History Ban

• What is Salary History Information:
  • compensation and benefits

• Who is an applicant?
  • An “applicant” is someone who took an affirmative step to seek employment with the employer and who is not currently employed with that employer, its parent company or a subsidiary.
  • includes part-time, seasonal and temporary workers, regardless of their immigration status.
New York State Releases Guidance on Salary History Ban

Does this law apply to New York City employers or to public employers?

• Yes. It applies to all public and private employers in New York State, including New York City and public authorities.
• An applicant or current or former employee aggrieved by a violation of this section may bring a civil action for compensation for any damages sustained as a result of such violation on behalf of such applicant, employee, or other persons similarly situated in any court of competent jurisdiction.

• The court may award injunctive relief as well as reasonable attorneys' fees to a plaintiff who prevails in a civil action brought under this paragraph.
NYC

Local Law 67
Prohibits employers from inquiring about a prospective employee’s salary history during all stages of the interview process.
• October 31, 2017 effective date
• Applies to new applicants
• Employer may inquire into an applicant’s desired salary
• Goal is to lessen the wage gap
Section A: Definitions

“Inquire” –

- covers direct questions or statements to the applicant, but also questions or statements to the applicant’s current or future employer
- prohibits an employer from conducting a search of publically available records or reports of salary history and in the instance salary information is accidently uncovered
Section A: Definitions

“Salary History” –

• includes the applicant’s current or prior wage, benefits or other compensation

• does not include any objective measure of the applicant’s productivity such as revenue, sales, production reports, or a book of business
Section B

• It is an unlawful discriminatory practice for an employer to
  • inquire about salary history during any point in the hiring process or
  • to rely on that information; even if the disclosure is accidental
Section C: What is Permissible?

- Employer may speak to an applicant about their expectations with respect to:
  - salary
  - benefits and other compensation
  - unvested equity
  - deferred compensation
Section D: Voluntary Disclosure

- Voluntary disclosure of salary history is permitted
- Information revealed on a voluntary basis can be used to set the salary
Section E: Carve Outs

- Actions taken pursuant to federal, state or local laws
- Inquiries for applicant’s for internal transfers or promotions are permissible
- The verification of non-salary related information
- Public employee positions determined pursuant to procedures established by collective bargaining agreements
Scope/Coverage

- Applies to all employers regardless of size
- Public and private sector
- Applies to most applicants:
  - new employment
  - part-time
  - internship
  - independent contractors
Penalties

• Up to $125,000 for an unintentional violation
• Up to $250,000 for an intentional violation
• NYCCHR can investigate claims and is empowered to enforce the law
• There is a private right of action
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<th></th>
<th>NYC</th>
<th>NYS</th>
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<tbody>
<tr>
<td></td>
<td>NYC law applies only to applicants</td>
<td>NYS law applies to applicants and current staff e.g., promotions and transfers</td>
</tr>
<tr>
<td></td>
<td>Voluntary disclosure – information can be used to set salary</td>
<td>NYS employer is prohibited from relying on prior salary to justify a pay difference between employees of different or various protected classes who are performing substantially similar work (violates Section 194 of the Labor Law.)</td>
</tr>
<tr>
<td></td>
<td>NYC allows employers to ask candidates about deferred compensation or unvested equity that an applicant would have to forego in taking a new job</td>
<td>NYS prohibits employers from seeking any information about compensation</td>
</tr>
<tr>
<td></td>
<td>NYC law covers all workers</td>
<td>NYS does not apply to bonafide independent contractors, freelance workers (unless they are to work through an employment agency)</td>
</tr>
<tr>
<td></td>
<td>NYC Commission of Human Rights</td>
<td>Department of Labor’s Division of Labor Standards</td>
</tr>
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Oregon

• Went into effect October 6, 2017
• Part of Oregon’s Equal Pay Act of 2017
• Absolute ban about inquiring into and use of an applicant’s pay history
• No private right of action until January 1, 2021
• Delayed enforcement by Oregon Bureau of Labor and Industries (BOLI) until January 1, 2019
• Noncompliance may be used as evidence to prove pay discrimination
Massachusetts

Law is part of a broader equal pay legislation

• The Act to Establish Pay Equity, amending G.L. c.149, §105A (MA Pay Equity Law)
• Effective July 1, 2018
• All employers, regardless of number of employees, whose employees perform all or the greater part of their work in Massachusetts, are required to comply with the MA Pay Equity Law
Philadelphia

- Preliminary injunction brought by local chamber of commerce
- Was supposed to take effect May 23, 2017
- Court issued order April 30, 2018
  - “Reliance Provision” – upheld
  - “Inquiry Provision” – stricken
NJ: Diane B. Allen Act

- Gov. Murphy signed New Jersey Senate Bill 104 on April 21, 2018
- **Diane B. Allen Equal Pay Act**
- Effective July 1, 2018
- Expands NJLAD
- Prohibits discrimination in pay practices across all protected classes under NJLAD
Tips

- Review and revise existing policies
- Alter and revise job applications /hiring forms
- Retrain HR personnel and hiring personnel
- Consider implementation of consistent policies across jurisdictions
- Eliminate questions seeking an applicant’s current or past salary from all job applications, unless required by law
- Additionally, an employer may wish to proactively state in job postings that it does not seek salary history information from job applicants
Medical Marijuana and Workplace Considerations
New York

Medical Marijuana in New York

• In July 2014, New York’s Compassionate Care Act ("CCA") was signed into law

• The law took effect in January 2016

• Contains a non-discrimination provision that provides some protections to certified medical marijuana patients in the employment context
“Being a certified patient shall be deemed to be having a ‘disability’ under article fifteen of the executive law (human rights law), section forty-c of the civil rights law, sections 240.00, 485.00, and 485.05 of the penal law, and section 200.50 of the criminal procedure law.

The subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance.

This subdivision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding.
“Nothing in these regulations is to be construed to encourage, prohibit, or authorize the conducting of drug tests for the illegal use of drugs by job applicants or employees, or the making of employment decisions based on the test results.”
New York

- New York employers are required to engage in the interactive process required by the NYSHRL to determine what reasonable accommodations may be necessary to accommodate an employee who is a certified medical marijuana patient.

- Employers are prohibited from discriminating against certified medical marijuana patients.
New Jersey

New Jersey’s Compassionate Use of Medical Marijuana Act (CUMMA)

• On January 18th, 2010, Governor Jon S. Corzine signed CUMMA.
• Allows seriously ill patients for whom currently available medications are not effective access to medical marijuana with a doctor's recommendation.

• N.J.S.A. § 24:6I-14

• “Nothing in this act shall be construed to require a government medical assistance program or private health insurer to reimburse a person for costs associated with the medical use of marijuana, or an employer to accommodate the medical use of marijuana in any workplace.”
New Jersey

Case Law

- Federal district court in New Jersey held that nothing in the Law Against Discrimination (NJLAD) or the CUMMA required an employer to waive a drug test for a federally prohibited substance as a condition of employment.

- Employer had been aware of the plaintiff’s disability but never took adverse action against the plaintiff until he requested to be exempted from a drug test because of his medical marijuana usage.

- The court ruled that: (i) nothing in the CUMMA requires employers to accommodate the use of medical marijuana; (ii) the adverse action was based on the treatment, not the disability; and (iii) the plaintiff failed to state a discrimination claim under the LAD or CUMMA.
New Jersey Case Law

• Trial court judge dismissed the disability discrimination claims of a funeral home worker who used medical marijuana.

• A cancer patient, who had been prescribed medical marijuana, was terminated after his employer learned of his medical marijuana use.

• He was unable to pass required drug test.

• Appellate Division reversed and held the employer could be liable for the LAD claim. Wild, 458 N.J. Super. 416 (App. Div. 2019)

• The Appellate Division rejected the company’s argument that nothing in the CUMMA shall be construed to require ... an employer to accommodate medical marijuana usage - meant it did not have to provide an accommodation.
New Jersey Case Law

• The Appellate Division held that the plaintiff could state a prima facie claim under discrimination laws.

• The Appellate Division concluded that the employee had pleaded a prima facie case of disability discrimination because: there was a disability, adverse action, and employer failed to provide accommodation for disability.

• New Jersey Supreme Court granted a petition for certiorari in the case.

• Question is whether: “the New Jersey Compassionate Use Medical Marijuana Act—which declares that ‘nothing’ in the Compassionate Use Act ‘require[s]’ an employer to accommodate a medical marijuana user, N.J.S.A. 24:6I-14—preclude[s] a claim by an employee against an employer based on, among other things, the Law Against Discrimination.”
On July 2, 2019, Governor Murphy signed into law the Jake Honig Compassionate Use Medical Cannabis Act, N.J.S.A. C24:6I-2, et seq.

The law expands the state’s existing medical marijuana law to include employment protections for authorized users of medical marijuana and create additional obligations for employers when drug testing.

The “nothing in this act” language has been replaced with a new section.

Amendments add a new section that states, “[i]t shall be unlawful to take any adverse employment action against an employee who is a registered qualifying patient based solely on the employee’s status as a registrant with the commission.”
New Jersey
Jake Honig Compassionate Use Medical Cannabis Act

- The amendments prohibit employers from taking any “adverse employment action” against an employee who is a “registered qualifying patient” based “solely on the employee’s status as a registrant with the commission.”

- A “registered qualifying patient” is an individual who both (1) has been authorized by a health care provider for the medical use of cannabis, and (2) has registered with the state’s Cannabis Regulatory Commission.
New Jersey
Jake Honig Compassionate Use Medical Cannabis Act

• The amendments impose new obligations on employers when an employee or applicant tests positive for marijuana.

• Employer must provide the employee or applicant with written notice of the positive test result and notify him or her of his or her right to explain the positive drug test result by presenting a “legitimate medical explanation” within three workdays.

• The notice also must inform the employee or applicant of the right to request a confirmatory retest of the original sample at his or her own expense within the three-day period.
Nothing in these materials should be relied upon as legal advice in any particular matter.

Thank you!

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The Financial Crimes Enforcement Network (FinCEN) is issuing this interpretive guidance to remind persons subject to the Bank Secrecy Act (BSA) how FinCEN regulations relating to money services businesses (MSBs) apply to certain business models involving money transmission denominated in value that substitutes for currency, specifically, convertible virtual currencies (CVCs).

This guidance does not establish any new regulatory expectations or requirements. Rather, it consolidates current FinCEN regulations, and related administrative rulings and guidance issued since 2011, and then applies these rules and interpretations to other common business models involving CVC engaging in the same underlying patterns of activity.

This guidance is intended to help financial institutions comply with their existing obligations under the BSA as they relate to current and emerging business models involving CVC by describing FinCEN’s existing regulatory approach to the issues most frequently raised by industry, law enforcement, and other regulatory bodies within this evolving financial environment. In this regard, it covers only certain business models and necessarily does not address every potential combination of facts and circumstances. Thus, a person working with a business model not specifically included in this guidance may still have BSA obligations.

The overall structure of this guidance is as follows:

Section 1 defines certain key concepts within the context of the guidance. Although the titles or names assigned to these key concepts may coincide with terms customarily used by industry and share similar attributes, for purposes of the guidance their meaning is limited to the definition provided in the guidance.

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1. For a discussion of the concept of “business model” as used within this guidance, see infra, Section 1.1.
2. For a discussion of the concepts of “value that substitutes for currency” and “convertible virtual currency” as used within this guidance, see infra, Sections 1.2. and 1.3.
Section 2 consolidates and explains current FinCEN regulations, previous administrative rulings, and guidance involving the regulation of money transmission under the BSA. By consolidating and summarizing rules and interpretation in a single Section, this guidance provides a resource to help financial institutions comply with their existing obligations under the BSA as they relate to current and emerging activities involving CVC.

Section 3 summarizes the development and content of FinCEN’s 2013 guidance on the application of money transmission regulations to transactions denominated in CVC.³

Sections 4 and 5 describe FinCEN’s existing regulatory approach to current and emerging business models using patterns of activity involving CVC. This approach illustrates how FinCEN fits existing interpretations about certain activities to other activities that at first may seem unrelated, but conform to the same combination of key facts and circumstances.

Finally, Section 6 contains a list of resources to which interested parties may refer for further explanation about the content of the guidance, or to assist in evaluating facts and circumstances not expressly covered in this guidance.

1. **Key Concepts**

The following subsections describe how FinCEN frames certain key concepts for purposes of this guidance.

1.1. **Business Model**

Whether a person is a money transmitter under FinCEN’s regulations is a matter of facts and circumstances.⁴ Within the context of this guidance, “business model” refers to the subset of key facts and circumstances relevant to FinCEN’s determination of (a) whether the specific person meets the definition of a particular type of financial institution and (b) what regulatory obligations are associated with the specific activities performed within the business model.

This guidance may refer to a pattern of activity as a business model using a title or name (“label”) that may coincide with a label used by industry to designate a general type of product or service. The label, however, will not determine the regulatory application. Rather, this guidance applies to any business model that fits the same key facts and circumstances described in the guidance, regardless of its label. Conversely, the regulatory interpretations in this guidance will not apply to a business model using the same label, but involving different key facts and circumstances.

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⁴. 31 CFR § 1010.100(ff)(5)(ii).
In addition, differences in similar business models may lead to different regulatory applications. The regulatory interpretations contained in this guidance may extend only to other business models consisting of the same key facts and circumstances as the business models described herein. Therefore, a particular regulatory interpretation may not apply to a person if their business model contains fewer, additional, or different features than those described in this guidance.

Lastly, a person who is engaged in more than one type of business model at the same time may be subject to more than one type of regulatory obligation or exemption. For example, a developer or seller of either a software application or a new CVC platform may be exempt from BSA obligations associated with creating or selling the application or CVC platform, but may still have BSA obligations as a money transmitter if the seller or developer also uses the new application to engage as a business in accepting and transmitting currency, funds, or value that substitutes for currency, or uses the new platform to engage as a business in accepting and transmitting the new CVC. Likewise, an exemption may apply to a person performing a certain role in the development or sale of a software application, while a different person using the same application to accept and transmit currency, funds, or value that substitutes for currency would be still subject to BSA obligations.

1.2. Value that Substitutes for Currency

1.2.1. Definitions

In 2011, FinCEN issued a final rule (“2011 MSB Final Rule”) defining a money services business as, “a person wherever located doing business, whether or not on a regular basis or as an organized or licensed business concern, wholly or in substantial part within the United States,” operating directly, or through an agent, agency, branch, or office, who functions as, among other things, a “money transmitter.”

FinCEN’s regulations define the term “money transmitter” to include a “person that provides money transmission services,” or “any other person engaged in the transfer of funds.” A “transmittor,” on the other hand, is “[t]he sender of the first transmittal order in a transmittal of funds. The term transmittor includes an originator, except where the transmittor’s financial institution is a financial institution or foreign financial agency other than a bank or foreign bank.” In other words, a transmittor initiates a transaction that the money transmitter actually executes.

6. 31 CFR § 1010.100(ff).
7. 31 CFR § 1010.100(ff)(5).
8. 31 CFR § 1010.100(fff).
The term “money transmission services” is defined to mean the acceptance of currency, funds, or other value that substitutes for currency from one person and the transmission of currency, funds, or other value that substitutes for currency to another location or person by any means.\(^9\) The term “other value that substitutes for currency” encompasses situations in which the transmission does not involve currency,\(^10\) or funds, but instead involves something that the parties to a transaction recognize has value that is equivalent to or can substitute for currency.

FinCEN’s regulation does not limit or qualify the scope of the term “value that substitutes for currency.” It can be created either (a) specifically for the purpose of being used as a currency substitute or (b) originally for another purpose but then repurposed to be used as a currency substitute by an administrator (in centralized payment systems) or an unincorporated organization, such as a software agency (in decentralized payment systems).\(^11\) In either case, the persons involved in the creation and subsequent distribution of the value (either for the original purpose or for another purpose) may be subject to additional regulatory frameworks (other than the BSA) that govern licensing and chartering obligations, safety and soundness regulations, minimum capital and reserve requirements, general and financial consumer and investor protection, etc. When subject to these other regulatory frameworks, the person may be exempted from MSB status but be covered as a different type of financial institution under FinCEN regulations.

1.2.2. Application of BSA regulations to persons exempt from MSB status engaged in transactions denominated in any type of value that substitutes for currency

The term “money services business” does not include: (a) a bank or foreign bank; (b) a person registered with, and functionally regulated or examined by, the U.S. Securities and Exchange Commission (SEC) or the U.S. Commodity Futures Trading Commission (CFTC), or a foreign financial agency that engages in financial activities that, if conducted in the United States, would require the foreign financial agency to be registered with the SEC or CFTC; or, (c) a natural person who engages in certain identified MSB activity (i.e., dealing in foreign exchange, check cashing, issuing or selling traveler’s checks or money orders, providing prepaid access, or money

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9. 31 CFR § 1010.100(ff)(5)(i)(A) (emphasis added).
10. 31 CFR § 1010.100(m) (defining currency as “[t]he coin and paper money of the United States or of any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issuance. Currency includes U.S. silver certificates, U.S. notes and Federal Reserve notes. Currency also includes official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country.”)
11. See 2013 VC Guidance, at 4-5 (discussing centralized and decentralized payment systems).
transmission) but does so on an infrequent basis and not for gain or profit. Banks and persons registered with, and functionally regulated or examined by, the SEC or the CFTC, that engage in transactions denominated in value that substitutes for currency will be subject to BSA regulations according to the applicable section of 31 CFR Chapter X.

1.2.3. Application of BSA regulations to persons not exempt from MSB status engaged in transactions denominated in any type of value that substitutes for currency

A person not exempt from MSB status under 31 CFR § 1010.100(ff)(8) may be a money transmitter when the person engages in transactions covered by FinCEN’s definition of money transmission, regardless of the technology employed for the transmittal of value or the type of asset the person uses as value that substitutes for currency, or whether such asset is physical or virtual. In general, persons not covered by 1010.100(ff)(8)(ii) who issue securities and futures, or purchase and sell securities, commodities, and futures, are outside the scope of the BSA. However, such persons could be covered by BSA money transmission regulations under certain facts and circumstances, in accordance with (a) the regulatory definition of money transmitter, (b) any applicable exemption from the definition (see Section 2 below), and (c) regulatory interpretations such as those contained in FIN-2008-G008 and FIN-2015-R001:

a) FIN-2008-G008, “Application of the Definition of Money Transmitter to Brokers and Dealers in Currency and other Commodities,” September 10, 2008, states that as long as a broker or dealer in real currency or other commodities accepts and transmits funds solely for the purpose of effecting a bona fide purchase or sale of the real currency or other commodities for or with a customer, such person is not acting as a money transmitter under the regulations. However, if the broker or dealer transfers funds between a customer and a third party that is not part of the currency or commodity transaction, such transmission of funds is no longer a fundamental element of the actual transaction necessary to execute the contract for the purchase or sale of the currency or the other

12. 31 CFR § 1010.100(ff)(8). In the case of 1010.100(ff)(8)(ii), the exemption applies only if the person itself is registered with, and functionally regulated or examined by the SEC or CFTC; the exemption may not apply if it is, for example, the document instrumenting the offer or sale of an asset (and not the person offering or selling the asset) that must be registered.

13. The appropriate definitions and specific regulations may be found as follows: banks (31 CFR §§ 1010.100(d) and 1020, respectively); brokers or dealers in securities (31 CFR §§ 1010.100(h) and 1023, respectively); futures commission merchants (31 CFR §§ 1010.100(x) and 1026, respectively); introducing brokers in commodities (31 CFR §§ 1010.100(bb) and 1026, respectively); and mutual funds (31 CFR §§ 1010.100(gg) and 1024, respectively).
commodity, and the broker or dealer becomes a money transmitter. This regulatory interpretation extends to persons intermediating in the purchase and sale of securities or futures.  

b) FIN-2015-R001, “Application of FinCEN’s Regulations to Persons Issuing Physical or Digital Negotiable Certificates of Ownership of Precious Metals,” August 14, 2015, applies a similar interpretation to digital certificates evidencing the ownership of a certain amount of a commodity. This regulatory interpretation also extends to physical or digital certificates of ownership of securities or futures contracts.

In the regulatory interpretations above, money transmission could involve either (a) the movement of currency of legal tender to or from accounts originally set up to buy or sell commodities (or securities, or futures); or (b) the issuance and subsequent acceptance and transmission of a digital token that evidenced ownership of a certain amount of a commodity, security, or futures contract. At the time of the rulings mentioned above, the commodity, security, or futures contract itself was not used to engage in money transmission primarily because such contracts were fractioned in relatively large individual amounts not suitable for money transmission. However, if assets that other regulatory frameworks define as commodities, securities, or futures contracts were to be specifically issued or later repurposed to serve as a currency substitute, then the asset itself could be a type of value that substitutes for currency, the transfer of which could constitute money transmission.

Therefore, as explained above, money transmission may occur when a person (or an agent, or a mechanical or software agency owned or operated by such person) not exempt from MSB status:

a) uses any representation of currency of legal tender (paper money, coins, Federal Reserve Bank notes, United States notes, funds credited to an account) associated with the purchase or sale of commodities, securities, or futures contracts to engage in money transmission;

14. See also 2011 MSB Final Rule, 76 FR at 43594 (stating “[P]ersons that sell goods or provide services other than money transmission services, and only transmit funds as an integral part of that sale of goods or provision of services, are not money transmitters. For example, brokering the sale of securities, commodity contracts, or similar instruments is not money transmission notwithstanding the fact that the person brokering the sale may move funds back and forth between the buyer and seller to effect the transaction.”). The 2011 MSB Final Rule updated, streamlined, and clarified MSB regulations based on FinCEN’s large body of guidance and administrative rulings previously issued. 2011 MSB Final Rule, 76 FR at 43386. Such previous guidance or administrative rulings, which FinCEN has not withdrawn, remain instructive and are cited herein to assist in understanding FinCEN’s current interpretation of its MSB regulations.
b) issues physical or digital tokens evidencing ownership of commodities, securities, or futures contracts that serve as value that substitutes for currency in money transmission transactions; or

c) issues or employs commodities, securities, or futures contracts by themselves as value that substitutes for currency in money transmission transactions.

1.3. Convertible Virtual Currency (CVC)

The term “virtual currency” refers to a medium of exchange that can operate like currency but does not have all the attributes of “real” currency, as defined in 31 CFR § 1010.100(m), including legal tender status.\(^\text{15}\) CVC is a type of virtual currency that either has an equivalent value as currency, or acts as a substitute for currency, and is therefore a type of “value that substitutes for currency.”

As mentioned above, the label applied to any particular type of CVC (such as “digital currency,” “cryptocurrency,” “cryptoasset,” “digital asset,” etc.) is not dispositive of its regulatory treatment under the BSA. Similarly, as money transmission involves the acceptance and transmission of value that substitutes for currency by any means, transactions denominated in CVC will be subject to FinCEN regulations regardless of whether the CVC is represented by a physical or digital token, whether the type of ledger used to record the transactions is centralized or distributed, or the type of technology utilized for the transmission of value.

2. General Application of BSA Regulations to Money Transmission

Under the BSA, the term “person” means “[a]n individual, a corporation, a partnership, a trust or estate, a joint stock company, an association, a syndicate, joint venture, or other unincorporated organization or group, an Indian Tribe (as that term is defined in the Indian Gaming Regulatory Act), and all entities cognizable as legal personalities.”\(^\text{16}\)

In general, whether a person qualifies as an MSB subject to BSA regulation depends on the person’s activities and not its formal business status. Thus, whether a person is an MSB will not depend on whether the person: (a) is a natural person or legal entity; (b) is licensed as a business by any state; (c) has employees or other natural persons acting as agents; (d) operates at a brick-and-mortar branch, or through mechanical or software agents or agencies; or (e) is a for profit or nonprofit service.\(^\text{17}\)

\(^{15}\) 2013 VC Guidance, at 1; see also, \textit{infra}, section 3.
\(^{16}\) 31 CFR § 1010.100(mm).
\(^{17}\) FinCEN clarified these points in the Preamble to the 2011 MSB Final Rule, 76 FR, at 43587.
At the same time, a person still qualifies as a money transmitter if that person’s activities include receiving one form of value (currency, funds, prepaid value, value that substitutes for currency – such as CVC, etc.) from one person and transmitting either the same or a different form of value to another person or location, by any means.\textsuperscript{18} Similarly, a money transmitter may accept and transmit value in either order. That is, a person is still a money transmitter under FinCEN regulations if the person transmits value first, and only later accepts corresponding value for this transfer.\textsuperscript{19}

Likewise, a person may be a money transmitter when operating either on a transactional basis or on an account basis.\textsuperscript{20} A transactional basis includes one-off transactions where there is no expectation that the money transmitter will establish an ongoing relationship with the transactor, and the money transmitter retains the currency, funds, or other value that substitutes for currency, only for the time required to effect the transmission. By contrast, an account basis includes circumstances where the transactor is an established customer of the money transmitter, as defined in 31 CFR § 1010.100(p), and the money transmitter may maintain an account for the transactor to store funds or value that substitutes for currency, from which the transactor can instruct the money transmitter to transfer them in whole or in part.

Finally, a person will qualify as a money transmitter if that person accepts value with the intent of transmitting it only under certain conditions. For example, if a person operates a platform that facilitates the conditional exchange of value between two parties—such as the exchange of CVC against currency only when an agreed upon exchange rate and amount is met—such person will be engaged in money transmission every time the conditions (such as the exchange rate and amount) are met and the person completes the reciprocal transfers.\textsuperscript{21}

\textsuperscript{18} 2011 MSB Final Rule, 76 FR, at 43592.  
\textsuperscript{19} Ibid.  
\textsuperscript{20} Amendment to the Bank Secrecy Act Regulations Relating to Recordkeeping for Funds Transfers and Transmittals of Funds by Financial Institutions, 60 FR 220, Jan. 3, 1995 (stating “An established customer is defined as a person with an account with a financial institution or a person with respect to which the financial institution has obtained and maintains on file the name and address, as well as the customer’s taxpayer identification number or, if none, alien identification number or passport number and country of issuance, and to which the financial institution provides financial services relying on that information…. Such relationships with nonbank financial institutions may include, but are not limited to, accounts with broker/dealers and ongoing contractual relationships between providers of money transmitting services and business customers.”)  
As discussed above, whether a person is a money transmitter depends on the facts and circumstances of a given case. FinCEN regulations, however, specify certain activities are excluded from the definition of “money transmitter.” Specifically, a person is not a money transmitter if that person only:

a) provides the delivery, communication, or network access services used by a money transmitter to support money transmission services;

b) acts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller;

c) operates a clearance and settlement system or otherwise acts as an intermediary solely between BSA regulated institutions;

d) physically transports currency, other monetary instruments, other commercial paper, or other value that substitutes for currency as a person primarily engaged in such business, such as an armored car, from one person to the same person at another location or to an account belonging to the same person at a financial institution, provided that the person engaged in physical transportation has no more than a custodial interest in the currency, other monetary instruments, other commercial paper, or other value at any time during the transportation;

e) provides prepaid access, as defined in 31 CFR § 1010.100(ff)(4); or

f) accepts and transmits funds only integral to the sale of goods or the provision of services, other than money transmission services, by the person who is accepting and transmitting the funds.\(^22\)

FinCEN interprets these exemptions strictly. Therefore, a person may not take advantage of a particular exemption if the activity it engages in does not conform fully to an exemption.\(^23\)

### 2.1. BSA Obligations of Money Transmitters

The BSA regulatory framework begins with the expectation that financial institutions will operate under a culture of compliance supported by senior leadership, including owners, boards of directors, and senior executives. This culture of compliance will dictate the basic norms of behavior, knowledge, and transparency under which the management team, employees, and service providers will be held accountable.\(^24\)

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22. 31 CFR § 1010.100(ff)(5)(ii)(A)-(F).


The BSA and its implementing regulations require MSBs to develop, implement, and maintain an effective written anti-money laundering program ("AML program") that is reasonably designed to prevent the MSB from being used to facilitate money laundering and the financing of terrorist activities. The AML program must, at a minimum: (a) incorporate policies, procedures and internal controls reasonably designed to assure ongoing compliance (including verifying customer identification, filing reports, creating and retaining records, and responding to law enforcement requests); (b) designate an individual responsible to assure day-to-day compliance with the program and BSA requirements; (c) provide training for appropriate personnel, including training in the detection of suspicious transactions; and, (d) provide for independent review to monitor and maintain an adequate program. The AML program must be approved by the owner of the financial institution, or by the owner’s representative (in the case of a corporation, such representative is the Board of Directors).

To assure that an AML compliance program is reasonably designed to meet the requirements of the BSA, MSBs should structure their programs to be risk-based. MSBs should assess their individual exposure to the risk of money laundering, terrorism finance, and financial crime based on the composition of customer base, the geographies served, and the financial products and services offered. MSBs must properly manage customer relationships and effectively mitigate risks by implementing controls commensurate with those risks.

A well-developed risk assessment is part of sound risk management and assists MSBs in identifying and providing a comprehensive analysis of their individual risk profile. As part of its risk assessment, an MSB should determine both the identity and the profile of its customers and MSBs must know enough about their customers to be able to determine the risk level they represent to the institution.

As an MSB, any non-exempt person engaged in money transmission must register with FinCEN within 180 days of starting to engage in money transmission. Money transmitters must also comply with the recordkeeping, reporting, and transaction monitoring obligations set forth in Parts 1010 and 1022 of 31 CFR Chapter X.

25. 31 U.S.C. § 5318(g)(1); 31 CFR. § 1022.320(a)(2).
26. 31 CFR § 1022.210(b).
27. 31 CFR § 1022.380.
28. Examples of such requirements include the filing of Currency Transaction Reports (31 CFR § 1022.310) and Suspicious Activity Reports (31 CFR § 1022.320), whenever applicable, general recordkeeping maintenance (31 CFR § 1010.410), and recordkeeping related to the sale of negotiable instruments (31 CFR § 1010.415).
To the extent that any of the money transmitter’s transactions constitute a “transmittal of funds” under FinCEN’s regulations, then the money transmitter must also comply with the “Funds Transfer Rule” and the “Funds Travel Rule.” Additionally, as an MSB, the money transmitter must register with FinCEN within 180 days of starting to engage in money transmission.

FinCEN regulations define a “transmittal of funds” as a series of transmittal orders, and define a “transmittal order” as an instruction to pay, among other things “a fixed or determinable amount of money…” FinCEN has stated that transmittal of funds are not limited to wire transfers or electronic transfers. Examples provided in guidance are credits and debits to correspondent accounts, and using a check as a transmittal order within a transmittal of funds, in which case the check and any accompanying instructions are the transmittal order effecting the transmittal of funds.

Because a transmittal order involving CVC is an instruction to pay “a determinable amount of money,” transactions involving CVC qualify as transmittals of funds, and thus may fall within the Funds Travel Rule. Under the Funds Travel Rule, a transmittal of funds of $3,000 or more (or its equivalent in CVC) may trigger certain requirements on a money transmitter acting as either the financial institution for the transmittor or recipient, or as an intermediary financial institution.

The money transmitter must obtain or provide the required regulatory information either before or at the time of the transmittal of value, regardless of how a money transmitter sets up their system for clearing and settling transactions, including those involving CVC. In meeting this obligation, the parties to the transmittal of funds are not required to use the same system or protocol for both the actual transmission of value and the reception or transmission of the required regulatory information. As long as the obligated person provides the required regulatory information either

29. 31 CFR § 1010.100(ddd).
30. See 31 CFR § 1010.410(e).
31. See 31 CFR § 1010.410(f).
32. 31 CFR § 1022.380.
33. 31 CFR § 1010.100(ddd).
34. 31 CFR § 1010.100(eee).
35. Ibid.
37. “Funds Travel Rule,” see 31 CFR § 1010.410(f).
38. In general, a person that chooses to set up a transaction system that makes it difficult to comply with existing regulations may not invoke such difficulty as a justification for non-compliance or as a reason for preferential treatment.
before or at the time of the transmittal of value, if a given transmission protocol is unable to accommodate such information, the obligated person may provide such information in a message different from the transmittal order itself.\textsuperscript{39}

Persons interested in determining whether a certain new activity or variation on an existing activity may subject them to FinCEN’s regulatory requirements, or that find that FinCEN published regulation or guidance does not clearly reflect their business model, have several options for obtaining preliminary, general guidance, or definitive regulatory interpretation.\textsuperscript{40}

3. Application of BSA Regulations to Money Transmission Involving CVC

The 2011 MSB Final Rule made clear that persons accepting and transmitting value that substitutes for currency, such as virtual currency, are money transmitters. Persons accepting and transmitting CVC are required (like any money transmitter) to register with FinCEN as an MSB and comply with AML program, recordkeeping, monitoring, and reporting requirements (including the filing of SARs and CTRs). These requirements apply equally to domestic and foreign-located CVC money transmitters doing business in whole or in substantial part within the United States, even if the foreign-located entity has no physical presence in the United States.

After the issuance of the 2011 MSB Final Rule, FinCEN received questions from industry on whether the new rule applied to transactions denominated in all types of virtual currency, including, for example, virtual currency that could only be used inside video games. Some persons involved in transactions denominated in CVC sought to register with FinCEN as either currency exchangers or prepaid access providers or sellers, rather than as money transmitters. FinCEN also received questions from persons purchasing CVCs to pay for goods or services, or planning to accept CVCs in payment of goods and services sold, concerned about their potential BSA obligations.

To address these and other issues, on March 18, 2013, FinCEN issued interpretive guidance on the application of FinCEN’s regulations to transactions involving the acceptance of currency or funds and the transmission of CVC (“2013 VC Guidance”).\textsuperscript{41} The 2013 VC Guidance described what CVC is for purposes of FinCEN regulations,

\textsuperscript{39} See 31 CFR \S 1010.410(f).
\textsuperscript{40} See infra, Section 6 – Available Resources; see also MSB Examination Materials, available at https://www.fincen.gov/msb-examination-materials
and reminded the public that persons not exempted from MSB status that accept and transmit either real currency or anything of value that substitutes for currency, including virtual currency, are covered by the definition of money transmitter.42

The 2013 VC Guidance also identified the participants to generic CVC arrangements, including an “exchanger,” “administrator,” and “user,” and further clarified that exchangers and administrators generally qualify as money transmitters under the BSA, while users do not. An exchanger is a person engaged as a business in the exchange of virtual currency for real currency, funds, or other virtual currency, while an administrator is a person engaged as a business in issuing (putting into circulation) a virtual currency, and who has the authority to redeem (to withdraw from circulation) such virtual currency.43 A user is “a person that obtains virtual currency to purchase goods or services” on the user’s own behalf.44

The 2013 VC Guidance explained that the method of obtaining virtual currency (e.g., “earning,” “harvesting,” “mining,” “creating,” “auto-generating,” “manufacturing,” or “purchasing”) does not control whether a person qualifies as a “user,” an “administrator” or an “exchanger.”45 In addition, it confirmed that exchangers are subject to the same obligations under FinCEN regulations regardless of whether the exchangers are directly brokering the transactions between two or more persons, or whether the exchangers are parties to the transactions using their own reserves, in either CVC or real currency.46 The 2013 VC Guidance also discussed the appropriate regulatory treatment of administrators and exchangers under three common scenarios: brokers and dealers of e-currencies and e-precious metals; centralized CVCs; and decentralized CVCs.47

The 2013 VC Guidance also clarified that FinCEN interprets the term “another location” broadly. The definition of money transmitter includes a person that accepts and transmits value that substitutes for currency from one person to another person or to “another location.” For example, transmission to another location occurs when an exchanger selling CVC accepts real currency or its equivalent from a person and

42. See, supra, Section 1.3.
43. See 2013 VC Guidance, at 2.
44. Ibid.
45. See also FIN-2014-R001, “Application of FinCEN’s Regulations to Virtual Currency Mining Operations,” Jan. 30, 2014 (clarifying that a user is a person that obtains virtual currency to purchase goods or services on the user’s own behalf).
47. See 2013 VC Guidance, at 4-5 (discussing centralized and decentralized payment systems).
transmits the CVC equivalent of the real currency to the person’s CVC account with
the exchanger. This circumstance constitutes transmission to another location because
it involves a transmission from the person’s account at one location (e.g., a user’s real
currency account at a bank) to the person’s CVC account with the exchanger.48

4. Guidance on Application of BSA Regulations to Common
Business Models Involving the Transmission of CVC

This guidance sets forth examples of how FinCEN’s money transmission
regulations apply to several common business models involving transactions in
CVC.49 The description of each business model does not intend to reflect an industry
standard or cover all varieties of products or services generally referred by the same
label, but only highlight the key facts and circumstances of a specific product or
service on which FinCEN based its regulatory interpretation.

4.1. Natural Persons Providing CVC Money Transmission (P2P Exchangers)

FinCEN’s definition of an MSB includes both natural and legal persons engaged as
a business in covered activities, “whether or not on a regular basis or as an organized
business concern.”50 Peer-to-Peer (P2P) exchangers are (typically) natural persons
engaged in the business of buying and selling CVCs. P2P exchangers generally
advertise and market their services through classified advertisements, specifically
designed platform websites, online forums, other social media, and word of mouth.
P2P exchangers facilitate transfers from one type of CVC to a different type of CVC,
as well as exchanges between CVC and other types of value (such as monetary
instruments or payment products denominated in real currency). P2P exchangers
may provide their services online or may arrange to meet prospective customers in
person to purchase or sell CVC. Generally, once there is confirmation that the buyer
has delivered or deposited the requested currency or CVC, the P2P exchanger will
electronically provide the buyer with the requested CVC or other value.

49. Although when describing a business model this guidance may use a label by which the general type
of product or service may be commonly known, the interpretation provided herein applies only to
the business model the guidance describes, and may not apply to any other variety or combination of
factors that falls under the same generic label. For example, when in Section 4.4, FinCEN discusses
how its regulations apply to certain money transmission in CVC executed within the context of ICOs,
this interpretation applies exclusively to those transactions described in the guidance and may not
apply to any other transactions may also be referred to as ICOs but follow a different business model.
50. 31 CFR § 1010.100(ff).
A natural person operating as a P2P exchanger that engages in money transmission services involving real currency or CVCs must comply with BSA regulations as a money transmitter acting as principal. This is so regardless of the regularity or formality of such transactions or the location from which the person is operating. However, a natural person engaging in such activity on an infrequent basis and not for profit or gain would be exempt from the scope of money transmission.\(^{51}\)

As a money transmitter, P2P exchangers are required to comply with the BSA obligations that apply to money transmitters, including registering with FinCEN as an MSB and complying with AML program, recordkeeping, and reporting requirements (including filing SARs and CTRs).\(^{52}\)

### 4.2. CVC Wallets

CVC wallets are interfaces for storing and transferring CVCs. There are different wallet types that vary according to the technology employed, where and how the value is stored, and who controls access to the value. Current examples of different types of CVC wallets that vary by technology employed are mobile wallets, software wallets, and hardware wallets. Wallets may store value locally, or store a private key that will control access to value stored on an external server. Wallets may also use multiple private keys stored in multiple locations. Wallets where user funds are controlled by third parties are called “hosted wallets” whereas wallets where users control the funds are called “unhosted wallets.”

The regulatory interpretation of the BSA obligations of persons that act as intermediaries between the owner of the value and the value itself is not technology-dependent. The regulatory treatment of such intermediaries depends on four criteria: (a) who owns the value; (b) where the value is stored; (c) whether the owner interacts directly with the payment system where the CVC runs; and, (d) whether the person acting as intermediary has total independent control over the value. The regulatory treatment of each type of CVC wallet based on these factors is described in the next subsection.

#### 4.2.1. Hosted and Unhosted Wallet Providers

Hosted wallet providers are account-based money transmitters that receive, store, and transmit CVCs on behalf of their accountholders, generally interacting with them through websites or mobile applications. In this business model, the money transmitter is the host, the account is the wallet, and the accountholder is the wallet

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51. 31 CFR § 1010.100(ff)(8)(iii).

owner. In addition, (a) the value belongs to the owner; (b) the value may be stored in a wallet or represented as an entry in the accounts of the host; (c) the owner interacts directly with the host, and not with the payment system; and (d) the host has total independent control over the value (although it is contractually obligated to access the value only on instructions from the owner).

The regulatory framework applicable to the host, including the due diligence or enhanced due diligence procedures the host must follow regarding the wallet owner, varies depending on: (a) whether the wallet owner is a non-financial institution (in this context, a user, according to the 2013 VC Guidance), agent, or foreign or domestic counterparty; and (b) the type of transactions channeled through the hosted wallet, and their U.S. dollar equivalent.

When the wallet owner is a user, the host must follow the procedures for identifying, verifying and monitoring both the user’s identity and profile, consistent with the host’s AML program. When the wallet owner is an agent of the host, the host must comply with regulations and internal policies, procedures and controls governing a principal MSB’s obligation to monitor the activities of its agent.53 When the wallet owner is a financial institution other than an agent, the host must comply with the regulatory requirements applicable to correspondent accounts (or their MSB equivalents).

Similarly, the regulatory requirements that apply to the transactions that host channels from or for the wallet owner will depend on the nature of the transaction. For example, where the transactions fall under the definition of “transmittal of funds,” the host must comply with the Funds Travel Rule based on the host’s position in the transmission chain (either as a transmittor’s, intermediary, or recipient’s financial institution), regardless of whether the regulatory information may be included in the transmittal order itself or must be transmitted separately.55

Unhosted wallets are software hosted on a person’s computer, phone, or other device that allow the person to store and conduct transactions in CVC. Unhosted wallets do not require an additional third party to conduct transactions. In the case of unhosted, single-signature wallets, (a) the value (by definition) is the property of the owner and is stored in a wallet, while (b) the owner interacts with the payment system directly and has total independent control over the value. In so far as the person conducting a transaction through the unhosted wallet is doing so to purchase goods or services on the user’s own behalf, they are not a money transmitter.


55. See 31 CFR § 1010.410(f).
4.2.2. Multiple-signature wallet providers

Multiple-signature wallet providers are entities that facilitate the creation of wallets specifically for CVC that, for enhanced security, require more than one private key for the wallet owner(s) to effect transactions. Typically, multiple-signature wallet providers maintain in their possession one key for additional validation, while the wallet owner maintains the other private key locally. When a wallet owner wishes to effect a transaction from the owner’s multiple-signature wallet, the wallet owner will generally submit to the provider a request signed with the wallet owner’s private key, and once the provider verifies this request, the provider validates and executes the transaction using the second key it houses. With respect to an un-hosted multiple-signature wallet, (a) the value belongs to the owner and is stored in the wallet; (b) the owner interacts with the wallet software and/or payment system to initiate a transaction, supplying part of the credentials required to access the value; and (c) the person participating in the transaction to provide additional validation at the request of the owner does not have total independent control over the value.

If the multiple-signature wallet provider restricts its role to creating un-hosted wallets that require adding a second authorization key to the wallet owner’s private key in order to validate and complete transactions, the provider is not a money transmitter because it does not accept and transmit value.\(^{56}\) On the other hand, if the person combines the services of a multiple-signature wallet provider and a hosted wallet provider, that person will then qualify as a money transmitter. Likewise, if the value is represented as an entry in the accounts of the provider, the owner does not interact with the payment system directly, or the provider maintains total independent control of the value, the provider will also qualify as a money transmitter, regardless of the label the person applies to itself or its activities.

4.3. CVC Money Transmission Services Provided Through Electronic Terminals (CVC Kiosks)

CVC kiosks (commonly called “CVC automated teller machines (ATMs)” or “CVC vending machines”) are electronic terminals that act as mechanical agencies of the owner-operator, to enable the owner-operator to facilitate the exchange of CVC for currency or other CVC. These kiosks may connect directly to a separate CVC exchanger, which performs the actual CVC transmission, or they may draw upon the CVC in the possession of the owner-operator of the electronic terminal.

An owner-operator of a CVC kiosk who uses an electronic terminal to accept currency from a customer and transmit the equivalent value in CVC (or vice versa) qualifies as a money transmitter both for transactions receiving and dispensing real

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56. 31 CFR § 1010.100(ff)(5)(ii)(A).
currency or CVC. FinCEN issued guidance clarifying that owners/operators of ATMs that link an accountholder with his or her account at a regulated depository institution solely to verify balances and dispense currency do not meet the definition of a money transmitter.\textsuperscript{57} The guidance addressing BSA coverage of private ATMs does not apply to the owner-operator of a CVC kiosk because CVC kiosks do not link accountholders to their respective accounts at a regulated depository institution. Accordingly, owners-operators of CVC kiosks that accept and transmit value must comply with FinCEN regulations governing money transmitters.

\textbf{4.4. CVC Money Transmission Services Provided Through Decentralized Applications (DApps)}

Decentralized (distributed) application (DApp) is a term that refers to software programs that operate on a P2P network of computers running a blockchain platform (a type of distributed public ledger that allows the development of secondary blockchains), designed such that they are not controlled by a single person or group of persons (that is, they do not have an identifiable administrator). An owner/operator of a DApp may deploy it to perform a wide variety of functions, including acting as an unincorporated organization, such as a software agency to provide financial services.\textsuperscript{58} Generally, a DApp user must pay a fee to the DApp (for the ultimate benefit of the owner/operator) in order to run the software. The fee is commonly paid in CVC.

The same regulatory interpretation that applies to mechanical agencies such as CVC kiosks applies to DApps that accept and transmit value, regardless of whether they operate for profit. Accordingly, when DApps perform money transmission, the definition of money transmitter will apply to the DApp, the owners/operators of the DApp, or both.

\textbf{4.5. Anonymity-Enhanced CVC Transactions}

Anonymity-enhanced CVC transactions are transactions either (a) denominated in regular types of CVC, but structured to conceal information otherwise generally available through the CVC’s native distributed public ledger; or (b) denominated in types of CVC specifically engineered to prevent their tracing through distributed public ledgers (also called privacy coins).


A money transmitter that operates in anonymity-enhanced CVCs for its own account or for the accounts of others (regardless of the frequency) is subject to the same regulatory obligations as when operating in currency, funds, or non-anonymized CVCs. In other words, a money transmitter cannot avoid its regulatory obligations because it chooses to provide money transmission services using anonymity-enhanced CVC. The regulatory framework that applies to a person participating in anonymity-enhanced CVC transactions depends on the specific role performed by the person, as set forth below in Section 4.5.1.

4.5.1. Providers of anonymizing services for CVCs

Providers of anonymizing services, commonly referred to as “mixers” or “tumblers,” are either persons that accept CVCs and retransmit them in a manner designed to prevent others from tracing the transmission back to its source (anonymizing services provider), or suppliers of software a transmitter would use for the same purpose (anonymizing software provider).

4.5.1(a) Anonymizing services provider

An anonymizing services provider is a money transmitter under FinCEN regulations. The added feature of concealing the source of the transaction does not change that person’s status under the BSA.

FinCEN previously issued a regulatory interpretation that concluded that persons who accept and transmit value in a way ostensibly designed to protect the privacy of the transmitter are providers of secure money transmission services and are not eligible for the integral exemption. In order to be exempt from status as a money transmitter under the integral exemption, the person’s business must be different from money transmission itself, and the money transmission activity must be necessary for the business to operate. The subject of this previous regulatory interpretation accepted and transmitted funds in a way designed to protect a consumer’s personal and financial information from a merchant, when the consumer purchased goods or services through the Internet. FinCEN determined that the added feature of protecting consumers’ information did not constitute an activity separate from the funds transmission itself, because the need to protect the consumers’ personal and financial information only arose in connection with the transmission of funds. FinCEN concluded that the company was engaged in the business of offering secure money transmission, rather than security for which money transmission is integrally required. Accordingly, the company qualified as a money transmitter subject to BSA obligations.

The same analysis applies to anonymizing services providers: their business consists exclusively of providing secured money transmission. Therefore, a person (acting by itself, through employees or agents, or by using mechanical or software agencies) who provides anonymizing services by accepting value from a customer and transmitting the same or another type of value to the recipient, in a way designed to mask the identity of the transmittor, is a money transmitter under FinCEN regulations.

4.5.1(b) Anonymizing software provider

An anonymizing software provider is not a money transmitter. FinCEN regulations exempt from the definition of money transmitter those persons providing “the delivery, communication, or network access services used by a money transmitter to support money transmission services.” This is because suppliers of tools (communications, hardware, or software) that may be utilized in money transmission, like anonymizing software, are engaged in trade and not money transmission.

By contrast, a person that utilizes the software to anonymize the person’s own transactions will be either a user or a money transmitter, depending on the purpose of each transaction. For example, a user would employ the software when paying for goods or services on its own behalf, while a money transmitter would use it to engage as a business in the acceptance and transmission of value as a transmittor’s or intermediary’s financial institution.

Lastly, FinCEN issued guidance stating that originating or intermediary financial institutions that replace the proper identity of a transmittor or recipient in the transmittal order with a pseudonym or reference that may not be decoded by the receiving financial institution (i.e., substituting the full name of the transmittor with a numeric code) are not complying with their obligations under the Funds Travel Rule.

4.5.2. Providers of anonymity-enhanced CVCs

A person that creates or sells anonymity-enhanced CVCs designed to prevent their tracing through publicly visible ledgers would be a money transmitter under FinCEN regulations depending on the type of payment system and the person’s activity. For example:

(a) a person operating as the administrator of a centralized CVC payment system will become a money transmitter the moment that person issues anonymity-enhanced CVC against the receipt of another type of value;

60. 31 CFR § 1010.100(ff)(5)(ii).


62. See, supra, Section 1.1.

63. A payment system may change from centralized to decentralized (see Section 5.2). This operational change does not alter the obligations of the person acting as administrator of the system, while the system worked on a centralized basis.
(b) a person that uses anonymity-enhanced CVCs to pay for goods or services on his or her own behalf would not be a money transmitter under the BSA. However, if the person uses the CVC to accept and transmit value from one person to another person or location, the person will fall under the definition of money transmitter, if not otherwise exempted.

(c) a person that develops a decentralized CVC payment system will become a money transmitter if that person also engages as a business in the acceptance and transmission of value denominated in the CVC it developed (even if the CVC value was mined at an earlier date). The person would not be a money transmitter if that person uses the CVC it mined to pay for goods and services on his or her own behalf.  

4.5.3. Money Transmitters that accept or transmit anonymity-enhanced CVCs

Many money transmitters involved in CVC transactions comply with their BSA obligations, in part, by incorporating procedures into their AML Programs that allow them to track and monitor the transaction history of a CVC through publicly visible ledgers.

As mentioned above, FinCEN has issued guidance stating that transmittor’s or intermediary’s financial institutions that replace the proper identity of a transmittor or recipient in the transmittal order with a pseudonym or reference that may not be decoded by the receiving financial institution (i.e., substituting the full name of the transmittor with a numeric code) are not complying with their obligations under the Funds Travel Rule. A money transmitter must follow its AML risk assessment policies and procedures to determine under which circumstances the money transmitter will accept or transmit value already denominated in anonymity-enhanced CVCs. When knowingly accepting anonymity-enhanced CVCs (or regular CVC that has been anonymized), money transmitters engaged in CVC transactions subject to the Funds Travel Rule must not only track a CVC through the different transactions, but must also implement procedures to obtain the identity of the transmittor or recipient of the value.

4.6. Payment Processing Services Involving CVC Money Transmission

CVC payment processors are financial intermediaries that enable traditional merchants to accept CVC from customers in exchange for goods and services sold. CVC payment processors sometimes integrate with a merchant’s point of sale or

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64. See 2013 VC Guidance, at 4-5 (discussing centralized and decentralized payment systems).

65. See, supra, at 19 n. 59.
online shopping cart solution so that the value of goods being purchased is quoted in CVC. The CVC payment processor may collect the CVC from the customer and then transmit currency or funds to the merchant, or vice versa.

CVC payment processors fall within the definition of a money transmitter and are not eligible for the payment processor exemption because they do not satisfy all the required conditions for the exemption. Under the payment processor exemption, a person is exempt from the definition of “money transmitter” when that person only “[a]cts as a payment processor to facilitate the purchase of, or payment of a bill for, a good or service through a clearance and settlement system by agreement with the creditor or seller.”\(^66\) To be eligible for the payment processor exemption, a person must:

(a) facilitate the purchase of goods or services, or the payment of bills for goods or services (not just the money transmission itself);

(b) operate through clearance and settlement systems that admit only BSA-regulated financial institutions;

(c) provide its service pursuant to a formal agreement; and

(d) enter a formal agreement with, at a minimum, the seller or creditor that provided the goods or services and also receives the funds.\(^67\)

A person providing payment processing services through CVC money transmission generally is unable to satisfy the second condition because such money transmitters do not operate, either in whole or in part, through clearing and settlement systems that only admit BSA-regulated financial institutions as members. This condition is critical, because BSA-regulated financial institutions have greater visibility into the complete pattern of activities of the buyer or debtor, on the one hand, and the seller or creditor, on the other hand. Having BSA-regulated financial institutions at either end of the clearance and settlement of transactions reduces the need to impose additional obligations on the payment processor.\(^68\) This same

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\(^{68}\) Id. The CVC payment processor in that ruling received real currency payments from the buyer through a clearing and settlement system that only admits BSA-regulated financial institutions as members (specifically, a credit card network), but made payment of the Bitcoin equivalent to the merchant, to a merchant-owned virtual currency wallet or to a larger virtual currency exchange that admits both financial institution and non-financial institution members, for the account of the merchant.
visibility simply does not exist when a CVC payment processor operates through a clearance and settlement system involving non-BSA regulated entities unless the CVC payment processor complies with the reporting obligations of a money transmitter.

Accordingly, in general, persons providing payment processing services in CVC will be money transmitters under the BSA, regardless of whether they accept and transmit the same type of CVC, or they accept one type of value (such as currency or funds) and transmit another (such as CVC). 69

4.7. CVC Money Transmission Performed by Internet Casinos

Internet casinos are virtual platforms created for betting on the possible outcome of events related to a number of gaming models (e.g., traditional casinos), but accepting deposits and bets and issuing payouts denominated in CVC. Internet casinos may also include entities known as predictive markets, information markets, decision markets, idea futures, and event derivatives.

FinCEN regulations define a casino, gambling casino or card club, as a person duly licensed or authorized to do business as such in the United States, whether under the laws of a State or a Territory or Insular Possession of the United States, or under the Indian Gaming Regulatory Act or other Federal, State, or tribal law or arrangement affecting tribal land, having gross annual gaming revenue in excess of $1 million, whether denominated in CVC or other value. 70 Any person engaged in the business of gambling that is not covered by the regulatory definition of casino, gambling casino, or card club, but accepts and transmits value denominated in CVC, may still be regulated under the BSA as a money transmitter. Indeed, even when the original transmission or the payout are done on a conditional basis (that is, only if a certain event occurs), money transmission under BSA regulations still occurs at the moment the condition is satisfied and the acceptance or transmission takes place. 71

5. Specific Business Models Involving CVC Transactions that May be Exempt From the Definition of Money Transmission

5.1. CVC Trading Platforms and Decentralized Exchanges

CVC P2P trading platforms are websites that enable buyers and sellers of CVC to find each other. Sometimes, trading platforms also facilitate trades as an intermediary.

69. A CVC payment processor will be eligible for the payment processor exemption only when it meets all criteria as described above. See also, supra, at 21 n. 64.
70. 31 CFR § 1010.100(t)(5) and (6).
71. Casinos, as defined above, have their own set of BSA/AML obligations (see 31 CFR Part 1010 –General Provisions – and Part 1021 –Rules for Casinos and Card Clubs). While not specifically exempted from MSB status, when a person falls under FinCEN’s definitions for both casino and MSB, in general the regulatory obligations of a casino satisfy the obligations of an MSB, with the exception of registration.
Under FinCEN regulations, a person is exempt from money transmitter status if the person only provides the delivery, communication, or network access services used by a money transmitter to support money transmission services. Consistent with this exemption, if a CVC trading platform only provides a forum where buyers and sellers of CVC post their bids and offers (with or without automatic matching of counterparties), and the parties themselves settle any matched transactions through an outside venue (either through individual wallets or other wallets not hosted by the trading platform), the trading platform does not qualify as a money transmitter under FinCEN regulations. By contrast, if, when transactions are matched, a trading platform purchases the CVC from the seller and sells it to the buyer, then the trading platform is acting as a CVC exchanger, and thus falls within the definition of money transmitter and its accompanying BSA obligations.

5.2. CVC Money Transmission Performed in the Context of Raising Funding for Development or Other Projects—Initial Coin Offerings

Initial coin offerings (ICOs) are generally a means to raise funds for new projects from early backers. Whether an ICO is subject to BSA obligations is a matter of facts and circumstances. This guidance will address, as an example, the BSA obligations of two common business models involving ICOs: (a) ICOs conducting a preferential sale of CVC to a select group of buyers (sometimes referred to as investors); and (b) ICOs raising funds by offering digital debt or equity instruments among a group of lenders or investors to finance a future project (which in turn may consist of the creation of a new CVC). This discussion does not attempt to address every possible ICO business model.

In the first business model, the ICO consists of a group sale of CVC to a distinct set of preferred buyers. The exchange of CVC for another type of value may be instantaneous or deferred to a later date. The CVC and its application or platform may be already operational or it may be the seller’s purpose to use the value received from the sale, in whole or in part, to develop such CVC, application, or platform. In some cases, after the initial centralized offering, any future creation of the CVC may

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72. 31 CFR § 1010.100(ff)(5)(ii)(A).
73. The obligations of the hosted wallet provider that utilizes the forum as a money transmitter under the BSA remain as described, supra, Section 3.2.
occur through mining using a decentralized model. In any of these scenarios, the seller of the CVC is a money transmitter, acting in the role of administrator, because at the time of the initial offering the seller is the only person authorized to issue and redeem (permanently retire from circulation) the new units of CVC.\textsuperscript{76} The status of the seller as a money transmitter is not impacted by the coordinated or simultaneous sales; the timing of acceptance of one type of value and transmission of the other type (i.e., whether the exchange happens instantaneously or at a later date); or by the fact that the payment system may migrate from one operational status to another at any point in its lifetime (for example, changing from a centralized, administrator-controlled system at origin to a decentralized, protocol-driven system after the initial sale).

In the second business model, the ICO raises funds for new projects by selling an equity stake or a debt instrument to early backers, or hedges a previous investment in CVC through a derivative, such as a futures contract. The funded project generally involves the creation of DApps,\textsuperscript{77} new CVCs (as well as the applications or platforms on which the CVCs will run), or new hedging instruments. ICOs are accomplished using distributed ledger platforms, in which investors receive a digital token as proof of investment. Depending on the purpose of the funded project and the seller’s obligations to the investor, when the project is concluded the investor may: (a) receive new CVC in exchange for the token; (b) exchange the token for a DApp coin, which is a digital token that unlocks the use of DApps that provide various services; (c) use the original token itself as a new CVC or DApp coin; or (d) receive some other type of return on the original equity investment or debt instrument.\textsuperscript{78} How BSA regulations apply to each of these scenarios will vary, as set forth below in Sections 5.2.1. to 5.2.3.

5.2.1. Status of Fundraising or Hedging Activity — Overview

Involvement of banks or persons registered with, and functionally regulated or examined by the SEC or CFTC

The applicable AML regulations governing persons involved in an ICO through selling an equity stake or a debt instrument to early backers or through hedging a previous investment will depend on whether such persons are MSBs or exempt from MSB status under FinCEN regulations or rulings. Persons may be exempt from MSB status in two situations. First, FinCEN regulations expressly exempt from the

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\textsuperscript{76} Whether by contractual agreement or business strategy an administrator declines to exercise such authorities is not relevant to the person’s status as a money transmitter.

\textsuperscript{77} As discussed, supra, Section 4.4, DApps refer to software programs that run on distributed computing platforms—that is, platforms built across dispersed networks of computers designed to accomplish a shared objective.

\textsuperscript{78} A transaction where a person accepts currency, funds, or value that substitutes for currency in exchange for a new CVC at a preferential rate for a group of initial purchasers, before making the CVC available to the rest of the public, is simply engaging in money transmission, regardless of any specific label (such as “early investors”) applied to the initial purchasers.
definition of an MSB, among other things, (a) a bank or foreign bank; or (b) a person registered with, and functionally regulated or examined by, the SEC or CFTC, or a foreign financial agency that engages in financial activities that, if conducted in the United States, would require the foreign financial agency to be registered with the SEC or CFTC. Therefore, a person involved in ICO fundraising activity as issuer, intermediary, or investor that is a bank, foreign bank, or a person registered with, and functionally regulated or examined by the SEC or CFTC will not be an MSB under FinCEN regulations. The person’s AML obligations will flow from FinCEN regulations governing those types of financial institutions.

Second, FinCEN regulations exempt persons from the definition of money transmitter under certain identified facts and circumstances, the most relevant of which is when the acceptance and transmission of value is only integral to the sale of goods or services different from money transmission. Thus, if the person involved in the fundraising activity as an issuer, intermediary, or investor is not a bank, foreign bank, or a person registered with, and functionally regulated or examined by the SEC or CFTC, then any money transmission connected to the fundraising activity performed by the person generally will fall under the integral exemption, unless the asset is issued to serve as value that substitutes for currency.

Purchase and re-sale of digital tokens

The investor may hold the digital token or derivative until the underlying project is complete, or the investor may sell the digital token or derivative during the project’s development. A re-sale can occur through a P2P transaction, or through a financial intermediary or secondary market. In general, the re-sale of the token or derivative does not create any BSA obligations for the initial investor. However, if a regulatory framework other than the BSA requires a person that either (a) purchases the token or derivative, or (b) intermediates in transactions in a primary or secondary market, to register as a broker or dealer in securities, futures commission merchant, or introducing broker in commodities, then the person will have the BSA obligations related to its status under these other regulatory frameworks.

79. 31 CFR § 1010.100(ff)(8). See also, supra, Section 1.2.2.
80. See, supra, at 5 n. 13.
82. For additional discussion of the scope of the integral exemption, see FIN-2008-R004 “Whether a Foreign Exchange Consultant is a Currency Dealer or Exchanger or Money Transmitter,” May 9, 2008, FIN-2008-R003 “Whether a Person that is Engaged in the Business of Foreign Exchange Risk Management is a Currency Dealer or Exchanger or Money Transmitter,” May 9, 2008.
83. See, supra, Section 1.2.3.
84. See, supra, Section 1.2.2.
5.2.2. Status of a DApp Developer

The development of a DApp financed through ICO fundraising activity consists of the production of goods or services, and therefore is outside the definition of money transmission. Thus, the developer of a DApp is not a money transmitter for the mere act of creating the application, even if the purpose of the DApp is to issue a CVC or otherwise facilitate financial activities denominated in CVC. However, if the developer of the DApp uses or deploys it to engage in money transmission, then the developer will qualify as a money transmitter under the BSA.

5.2.3. Status of a DApp User conducting financial activities

Once the DApp is finalized and in production, FinCEN regulations may apply to persons who use the DApp to conduct certain financial activities. For example, if an investor or an owner/operator uses or deploys the DApp to engage in money transmission denominated in CVC, then the investor or the owner/operator generally qualifies as a money transmitter under the BSA. Likewise, as mentioned above, if the developer of the DApp uses or deploys the DApp to engage in money transmission, then the developer will also qualify as a money transmitter.

5.3. Status of Creators of CVC and Distributed Applications Conducting CVC Transactions

The creators of a CVC sometimes issue (or “pre-mine”) a certain number of CVC units in advance and then either distribute those units as payment for goods or services or repayment of obligations (such as amounts owed to project investors), or sell the units against currency, funds or another type of CVC once a market is established. To the extent that a person mines CVC and uses it solely to purchase goods or services on its own behalf, the person is not an MSB under FinCEN regulations, because these activities involve neither acceptance nor transmission of the CVC within the regulatory definition of money transmission services. However, if a person mines CVC and uses it to engage in money transmission, such person will be subject to FinCEN’s registration, reporting, monitoring, and recordkeeping regulations for MSBs, as is the case with all money transmitters.


5.4. CVC Money Transmission Performed by Mining Pools and Cloud Miners

In certain cases, persons (pool members) combine their computer processing resources to form a mining pool to enhance their chances of receiving a reward by being the first ones to verify the authenticity of a block of transactions denominated in CVC. A block reward would entitle them to receive consistent payouts, which are fees paid by the parties to a transaction for the service of authenticating its individual CVC transmission. Mining pools may be managed by a controlling person (centralized mining pools) or they may operate on a P2P basis (decentralized mining pools). In some centralized models, the person acting as the leader of the pool claims the total amount of CVC mined or received as fees from participants to the authenticated transactions. The leader then distributes this amount to the pool members in subsequent transfers, presumably in proportion to the computer processing provided, minus its own fee for managing the pool. In other centralized models, such as cloud mining, persons (contract purchasers) may purchase “mining contracts” from a seller of computer processing (the cloud miner) that grants these purchasers permission to use the cloud miner’s computers to mine CVCs on the purchaser’s behalf.

When the leader of the pool, the cloud miner, or the unincorporated organization or software agency acting on behalf of its owner/administrator transfer CVC to the pool members or contract purchasers to distribute the amount earned, this distribution does not qualify as money transmission under the BSA, as these transfers are integral to the provision of services (the authentication of blocks of transactions through the combined efforts of a group of providers, or through the equipment of the cloud miner). However, if the leader, the cloud miner, or the software agency combine their managing and renting services with the service of hosting CVC wallets on behalf of the pool members or contract purchasers, the leader, cloud miner, unincorporated organization or software agency, or the owner-administrator will fall under FinCEN’s definition of money transmitter for engaging in account-based money transmission.

6. Available Resources

FinCEN expects that persons introducing innovative products or services to a highly regulated activity, such as money transmission, will ensure that the innovation complies with the regulatory framework applicable to such activity before the innovation is taken to market. Persons interested in determining whether a certain new activity or variation on an existing activity may subject them to FinCEN’s regulatory requirements have several options for obtaining preliminary, general guidance or definitive regulatory interpretation.
Financial institutions with questions about this guidance, other guidance, administrative rulings or other matters related to compliance with the BSA and its implementing regulations may contact FinCEN’s Resource Center Helpline at (800) 949-2732 or FRC@fincen.gov.

Persons requiring general information about the risk assessment, risk mitigation, recordkeeping, reporting, and transaction monitoring requirements applicable to money services businesses may consult the outreach material, including examiners’ expectations about compliance contained in the Bank Secrecy Act / Anti-Money Laundering Examination Manual for Money Services Businesses (Dec. 2008).

For examples of previous interpretations on the application of FinCEN regulations to specific sets of facts and circumstances, interested persons may review the collection of guidance and administrative rulings.

Finally, in circumstances where neither the general and interpretive material available at FinCEN’s public website, nor the information provided by FinCEN’s Resource Center staff is sufficient to address the particulars of a situation, interested persons or their legal representatives may request FinCEN to provide individual guidance or an administrative ruling, by following the Requirements for Requesting an Administrative Ruling. 87

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87. See also 31 CFR §§ 1010.710 - 1010.717.
For convenience, the following chart contains a list of guidance and administrative rulings referencing CVC:

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Framework for “Investment Contract” Analysis of Digital Assets

I. Introduction

If you are considering an Initial Coin Offering, sometimes referred to as an “ICO,” or otherwise engaging in the offer, sale, or distribution of a digital asset, you need to consider whether the U.S. federal securities laws apply. A threshold issue is whether the digital asset is a “security” under those laws. The term “security” includes an “investment contract,” as well as other instruments such as stocks, bonds, and transferable shares. A digital asset should be analyzed to determine whether it has the characteristics of any product that meets the definition of “security” under the federal securities laws. In this guidance, we provide a framework for analyzing whether a digital asset has the characteristics of one particular type of security – an “investment contract.” Both the Commission and the federal courts frequently use the “investment contract” analysis to determine whether unique or novel instruments or arrangements, such as digital assets, are securities subject to the federal securities laws.

The U.S. Supreme Court’s Howey case and subsequent case law have found that an “investment contract” exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. The so-called “Howey test” applies to any contract, scheme, or transaction, regardless of whether it has any of the characteristics of typical securities. The focus of the Howey analysis is not only on the form and terms of the instrument itself (in this case, the digital asset) but also on the circumstances surrounding the digital asset and the manner in which it is offered, sold, or resold (which includes secondary market sales). Therefore, issuers and other persons and entities engaged in the marketing, offer, sale, resale, or distribution of any digital asset will need to analyze the relevant transactions to determine if the federal securities laws apply.

The federal securities laws require all offers and sales of securities, including those involving a digital asset, to either be registered under its provisions or to qualify for an exemption from registration. The registration provisions require persons to disclose certain information to investors, and that information must be complete and not materially misleading. This requirement for disclosure furthers the federal securities laws’ goal of providing investors with the information necessary to make informed investment decisions. Among the information
that must be disclosed is information relating to the essential managerial efforts that affect the success of the enterprise.\textsuperscript{7} This is true in the case of a corporation, for example, but also may be true for other types of enterprises regardless of their organizational structure or form.\textsuperscript{8} Absent the disclosures required by law about those efforts and the progress and prospects of the enterprise, significant informational asymmetries may exist between the management and promoters of the enterprise on the one hand, and investors and prospective investors on the other hand. The reduction of these information asymmetries through required disclosures protects investors and is one of the primary purposes of the federal securities laws.

II. \textbf{Application of Howey to Digital Assets}

In this guidance, we provide a framework for analyzing whether a digital asset is an investment contract and whether offers and sales of a digital asset are securities transactions. As noted above, under the \textit{Howey} test, an “investment contract” exists when there is the investment of money in a common enterprise with a reasonable expectation of profits to be derived from the efforts of others. Whether a particular digital asset at the time of its offer or sale satisfies the \textit{Howey} test depends on the specific facts and circumstances. We address each of the elements of the \textit{Howey} test below.

\textbf{A. The Investment of Money}

The first prong of the \textit{Howey} test is typically satisfied in an offer and sale of a digital asset because the digital asset is purchased or otherwise acquired in exchange for value, whether in the form of real (or fiat) currency, another digital asset, or other type of consideration.\textsuperscript{9}

\textbf{B. Common Enterprise}

Courts generally have analyzed a “common enterprise” as a distinct element of an investment contract.\textsuperscript{10} In evaluating digital assets, we have found that a “common enterprise” typically exists.\textsuperscript{11}

\textbf{C. Reasonable Expectation of Profits Derived from Efforts of Others}

Usually, the main issue in analyzing a digital asset under the \textit{Howey} test is whether a purchaser has a reasonable expectation of profits (or other financial returns) derived from the efforts of others. A purchaser may expect to realize a return through participating in
distributions or through other methods of realizing appreciation on the asset, such as selling at a
gain in a secondary market. When a promoter, sponsor, or other third party (or affiliated group of third parties) (each, an “Active Participant” or “AP”) provides essential managerial efforts that affect the success of the enterprise, and investors reasonably expect to derive profit from those efforts, then this prong of the test is met. Relevant to this inquiry is the “economic reality” of the transaction and “what character the instrument is given in commerce by the terms of the offer, the plan of distribution, and the economic inducements held out to the prospect.” The inquiry, therefore, is an objective one, focused on the transaction itself and the manner in which the digital asset is offered and sold.

The following characteristics are especially relevant in an analysis of whether the third prong of the Howey test is satisfied.

1. Reliance on the Efforts of Others

The inquiry into whether a purchaser is relying on the efforts of others focuses on two key issues:

- Does the purchaser reasonably expect to rely on the efforts of an AP?
- Are those efforts “the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise,” as opposed to efforts that are more ministerial in nature?

Although no one of the following characteristics is necessarily determinative, the stronger their presence, the more likely it is that a purchaser of a digital asset is relying on the “efforts of others”:

- An AP is responsible for the development, improvement (or enhancement), operation, or promotion of the network, particularly if purchasers of the digital asset expect an AP to be performing or overseeing tasks that are necessary for the network or digital asset to achieve or retain its intended purpose or functionality.
  - Where the network or the digital asset is still in development and the network or digital asset is not fully functional at the time of the offer or sale, purchasers
would reasonably expect an AP to further develop the functionality of the network or digital asset (directly or indirectly). This particularly would be the case where an AP promises further developmental efforts in order for the digital asset to attain or grow in value.

- There are essential tasks or responsibilities performed and expected to be performed by an AP, rather than an unaffiliated, dispersed community of network users (commonly known as a “decentralized” network).

- An AP creates or supports a market for, or the price of, the digital asset. This can include, for example, an AP that: (1) controls the creation and issuance of the digital asset; or (2) takes other actions to support a market price of the digital asset, such as by limiting supply or ensuring scarcity, through, for example, buybacks, “burning,” or other activities.

- An AP has a lead or central role in the direction of the ongoing development of the network or the digital asset. In particular, an AP plays a lead or central role in deciding governance issues, code updates, or how third parties participate in the validation of transactions that occur with respect to the digital asset.

- An AP has a continuing managerial role in making decisions about or exercising judgment concerning the network or the characteristics or rights the digital asset represents including, for example:
  - Determining whether and how to compensate persons providing services to the network or to the entity or entities charged with oversight of the network.
  - Determining whether and where the digital asset will trade. For example, purchasers may reasonably rely on an AP for liquidity, such as where the AP has arranged, or promised to arrange for, the trading of the digital asset on a secondary market or platform.
  - Determining who will receive additional digital assets and under what conditions.
  - Making or contributing to managerial level business decisions, such as how to deploy funds raised from sales of the digital asset.
Playing a leading role in the validation or confirmation of transactions on the network, or in some other way having responsibility for the ongoing security of the network.

Making other managerial judgements or decisions that will directly or indirectly impact the success of the network or the value of the digital asset generally.

- Purchasers would reasonably expect the AP to undertake efforts to promote its own interests and enhance the value of the network or digital asset, such as where:
  - The AP has the ability to realize capital appreciation from the value of the digital asset. This can be demonstrated, for example, if the AP retains a stake or interest in the digital asset. In these instances, purchasers would reasonably expect the AP to undertake efforts to promote its own interests and enhance the value of the network or digital asset.
  - The AP distributes the digital asset as compensation to management or the AP’s compensation is tied to the price of the digital asset in the secondary market. To the extent these facts are present, the compensated individuals can be expected to take steps to build the value of the digital asset.
  - The AP owns or controls ownership of intellectual property rights of the network or digital asset, directly or indirectly.
  - The AP monetizes the value of the digital asset, especially where the digital asset has limited functionality.

In evaluating whether a digital asset previously sold as a security should be reevaluated at the time of later offers or sales, there would be additional considerations as they relate to the “efforts of others,” including but not limited to:

- Whether or not the efforts of an AP, including any successor AP, continue to be important to the value of an investment in the digital asset.
- Whether the network on which the digital asset is to function operates in such a manner that purchasers would no longer reasonably expect an AP to carry out essential managerial or entrepreneurial efforts.
- Whether the efforts of an AP are no longer affecting the enterprise’s success.
2. Reasonable Expectation of Profits

An evaluation of the digital asset should also consider whether there is a reasonable expectation of profits. Profits can be, among other things, capital appreciation resulting from the development of the initial investment or business enterprise or a participation in earnings resulting from the use of purchasers’ funds.\(^{18}\) Price appreciation resulting \textit{solely} from external market forces (such as general inflationary trends or the economy) impacting the supply and demand for an underlying asset generally is not considered “profit” under the \textit{Howey} test.

The more the following characteristics are present, the more likely it is that there is a reasonable expectation of profit:

- The digital asset gives the holder rights to share in the enterprise’s income or profits or to realize gain from capital appreciation of the digital asset.
  - The opportunity may result from appreciation in the value of the digital asset that comes, at least in part, from the operation, promotion, improvement, or other positive developments in the network, particularly if there is a secondary trading market that enables digital asset holders to resell their digital assets and realize gains.
  - This also can be the case where the digital asset gives the holder rights to dividends or distributions.

- The digital asset is transferable or traded on or through a secondary market or platform, or is expected to be in the future.\(^{19}\)

- Purchasers reasonably would expect that an AP’s efforts will result in capital appreciation of the digital asset and therefore be able to earn a return on their purchase.

- The digital asset is offered broadly to potential purchasers as compared to being targeted to expected users of the goods or services or those who have a need for the functionality of the network.
- The digital asset is offered and purchased in quantities indicative of investment intent instead of quantities indicative of a user of the network. For example, it is offered and purchased in quantities significantly greater than any likely user would reasonably need, or so small as to make actual use of the asset in the network impractical.

- There is little apparent correlation between the purchase/offering price of the digital asset and the market price of the particular goods or services that can be acquired in exchange for the digital asset.

- There is little apparent correlation between quantities the digital asset typically trades in (or the amounts that purchasers typically purchase) and the amount of the underlying goods or services a typical consumer would purchase for use or consumption.

- The AP has raised an amount of funds in excess of what may be needed to establish a functional network or digital asset.

- The AP is able to benefit from its efforts as a result of holding the same class of digital assets as those being distributed to the public.

- The AP continues to expend funds from proceeds or operations to enhance the functionality or value of the network or digital asset.

- The digital asset is marketed, directly or indirectly, using any of the following:
  - The expertise of an AP or its ability to build or grow the value of the network or digital asset.
  - The digital asset is marketed in terms that indicate it is an investment or that the solicited holders are investors.
  - The intended use of the proceeds from the sale of the digital asset is to develop the network or digital asset.
  - The future (and not present) functionality of the network or digital asset, and the prospect that an AP will deliver that functionality.
o The promise (implied or explicit) to build a business or operation as opposed to
delivering currently available goods or services for use on an existing network.

o The ready transferability of the digital asset is a key selling feature.

o The potential profitability of the operations of the network, or the potential
appreciation in the value of the digital asset, is emphasized in marketing or other
promotional materials.

o The availability of a market for the trading of the digital asset, particularly where
the AP implicitly or explicitly promises to create or otherwise support a trading
market for the digital asset.

In evaluating whether a digital asset previously sold as a security should be reevaluated at
the time of later offers or sales, there would be additional considerations as they relate to the
“reasonable expectation of profits,” including but not limited to:

- Purchasers of the digital asset no longer reasonably expect that continued
development efforts of an AP will be a key factor for determining the value of the
digital asset.

- The value of the digital asset has shown a direct and stable correlation to the value of
the good or service for which it may be exchanged or redeemed.

- The trading volume for the digital asset corresponds to the level of demand for the
good or service for which it may be exchanged or redeemed.

- Whether holders are then able to use the digital asset for its intended functionality,
such as to acquire goods and services on or through the network or platform.

- Whether any economic benefit that may be derived from appreciation in the value of
the digital asset is incidental to obtaining the right to use it for its intended
functionality.

- No AP has access to material, non-public information or could otherwise be deemed
to hold material inside information about the digital asset.
3. Other Relevant Considerations

When assessing whether there is a reasonable expectation of profit derived from the efforts of others, federal courts look to the economic reality of the transaction. In doing so, the courts also have considered whether the instrument is offered and sold for use or consumption by purchasers.

Although no one of the following characteristics of use or consumption is necessarily determinative, the stronger their presence, the less likely the Howey test is met:

- The distributed ledger network and digital asset are fully developed and operational.
- Holders of the digital asset are immediately able to use it for its intended functionality on the network, particularly where there are built-in incentives to encourage such use.
- The digital assets’ creation and structure is designed and implemented to meet the needs of its users, rather than to feed speculation as to its value or development of its network. For example, the digital asset can only be used on the network and generally can be held or transferred only in amounts that correspond to a purchaser’s expected use.
- Prospects for appreciation in the value of the digital asset are limited. For example, the design of the digital asset provides that its value will remain constant or even degrade over time, and, therefore, a reasonable purchaser would not be expected to hold the digital asset for extended periods as an investment.
- With respect to a digital asset referred to as a virtual currency, it can immediately be used to make payments in a wide variety of contexts, or acts as a substitute for real (or fiat) currency.
  - This means that it is possible to pay for goods or services with the digital asset without first having to convert it to another digital asset or real currency.
  - If it is characterized as a virtual currency, the digital asset actually operates as a store of value that can be saved, retrieved, and exchanged for something of value at a later time.
With respect to a digital asset that represents rights to a good or service, it currently can be redeemed within a developed network or platform to acquire or otherwise use those goods or services. Relevant factors may include:

- There is a correlation between the purchase price of the digital asset and a market price of the particular good or service for which it may be redeemed or exchanged.

- The digital asset is available in increments that correlate with a consumptive intent versus an investment or speculative purpose.

- An intent to consume the digital asset may also be more evident if the good or service underlying the digital asset can only be acquired, or more efficiently acquired, through the use of the digital asset on the network.

- Any economic benefit that may be derived from appreciation in the value of the digital asset is incidental to obtaining the right to use it for its intended functionality.

- The digital asset is marketed in a manner that emphasizes the functionality of the digital asset, and not the potential for the increase in market value of the digital asset.

- Potential purchasers have the ability to use the network and use (or have used) the digital asset for its intended functionality.

- Restrictions on the transferability of the digital asset are consistent with the asset’s use and not facilitating a speculative market.

- If the AP facilitates the creation of a secondary market, transfers of the digital asset may only be made by and among users of the platform.

Digital assets with these types of use or consumption characteristics are less likely to be investment contracts. For example, take the case of an online retailer with a fully-developed operating business. The retailer creates a digital asset to be used by consumers to purchase products only on the retailer’s network, offers the digital asset for sale in exchange for real currency, and the digital asset is redeemable for products commensurately priced in that real currency. The retailer continues to market its products to its existing customer base, advertises
its digital asset payment method as part of those efforts, and may “reward” customers with digital assets based on product purchases. Upon receipt of the digital asset, consumers immediately are able to purchase products on the network using the digital asset. The digital assets are not transferable; rather, consumers can only use them to purchase products from the retailer or sell them back to the retailer at a discount to the original purchase price. Under these facts, the digital asset would not be an investment contract.

Even in cases where a digital asset can be used to purchase goods or services on a network, where that network’s or digital asset’s functionality is being developed or improved, there may be securities transactions if, among other factors, the following is present: the digital asset is offered or sold to purchasers at a discount to the value of the goods or services; the digital asset is offered or sold to purchasers in quantities that exceed reasonable use; and/or there are limited or no restrictions on reselling those digital assets, particularly where an AP is continuing in its efforts to increase the value of the digital assets or has facilitated a secondary market.

III. Conclusion

The discussion above identifies some of the factors market participants should consider in assessing whether a digital asset is offered or sold as an investment contract and, therefore, is a security. It also identifies some of the factors to be considered in determining whether and when a digital asset may no longer be a security. These factors are not intended to be exhaustive in evaluating whether a digital asset is an investment contract or any other type of security, and no single factor is determinative; rather, we are providing them to assist those engaging in the offer, sale, or distribution of a digital asset, and their counsel, as they consider these issues. We encourage market participants to seek the advice of securities counsel and engage with the Staff through www.sec.gov/finhub.

1 This framework represents the views of the Strategic Hub for Innovation and Financial Technology (“FinHub,” the “Staff,” or “we”) of the Securities and Exchange Commission (the “Commission”). It is not a rule, regulation, or statement of the Commission, and the Commission has neither approved nor disapproved its content. Further, this framework does not replace or supersede existing case law, legal requirements, or statements or guidance from the

2 The term “digital asset,” as used in this framework, refers to an asset that is issued and transferred using distributed ledger or blockchain technology, including, but not limited to, so-called “virtual currencies,” “coins,” and “tokens.”

3 The term “security” is defined in Section 2(a)(1) of the Securities Act of 1933 (the “Securities Act”), Section 3(a)(10) of the Securities Exchange Act of 1934, Section 2(a)(36) of the Investment Company Act of 1940, and Section 202(a)(18) of the Investment Advisers Act of 1940.

4 This framework is intended to be instructive and is based on the Staff’s experiences to date and relevant law and legal precedent. It is not an exhaustive treatment of the legal and regulatory issues relevant to conducting an analysis of whether a product is a security, including an investment contract analysis with respect to digital assets generally. We expect that analysis concerning digital assets as securities may evolve over time as the digital asset market matures. Also, no one factor is necessarily dispositive as to whether or not an investment contract exists.


6 Whether a contract, scheme, or transaction is an investment contract is a matter of federal, not state, law and does not turn on whether there is a formal contract between parties. Rather, under the Howey test, “form [is] disregarded for substance and the emphasis [is] on economic reality.” Howey, 328 U.S. at 298. The Supreme Court has further explained that that the term security “embodies a flexible rather than a static principle” in order to meet the “variable schemes devised by those who seek the use of the money of others on the promise of profits.” Id. at 299.

7 Issuers of digital assets, like all issuers, must provide full and fair disclosure of material information consistent with the requirements of the federal securities laws. Issuers of digital assets should be guided by the regulatory framework and concepts of materiality. What is material depends upon the nature and structure of the issuer’s particular network and circumstances. See TSC Industries v. Northway, 426 U.S. 438, 449 (1976) (a fact is material “if there is a substantial likelihood that a reasonable shareholder would consider it important” in making an investment decision or if it “would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available” to the shareholder).

8 See The DAO Report.

9 The lack of monetary consideration for digital assets, such as those distributed via a so-called “bounty program” does not mean that the investment of money prong is not satisfied. As the Commission explained in The DAO Report, “[i]n determining whether an investment contract exists, the investment of ‘money’ need not take the form of cash” and “in spite of Howey's reference to an ‘investment of money,’ it is well established that cash is not the only form of contribution or investment that will create an investment contract.” The DAO Report at 11 (citation omitted). See In re Tomahawk Exploration LLC, Securities Act Rel. 10530 (Aug. 14, 2018) (issuance of tokens under a so-called “bounty program” constituted an offer and sale of securities because the issuer provided tokens to investors in exchange for services designed to advance the issuer’s economic interests and foster a trading market for its securities). Further, the lack of monetary consideration for digital assets, such as those distributed via a so-called “airdrop,” does not mean that the investment of money prong is not satisfied; therefore, an airdrop may constitute a sale or distribution of securities. In a so-called “airdrop,” a digital asset is distributed to holders of another digital asset, typically to promote its circulation.
In order to satisfy the “common enterprise” aspect of the Howey test, federal courts require that there be either “horizontal commonality” or “vertical commonality.” See Revak v. SEC Realty Corp., 18 F.3d. 81, 87-88 (2d Cir. 1994) (discussing horizontal commonality as “the tying of each individual investor’s fortunes to the fortunes of the other investors by the pooling of assets, usually combined with the pro-rata distribution of profits” and two variants of vertical commonality, which focus “on the relationship between the promoter and the body of investors”). The Commission, on the other hand, does not require vertical or horizontal commonality per se, nor does it view a “common enterprise” as a distinct element of the term “investment contract.” In re Barkate, 57 S.E.C. 488, 496 n.13 (Apr. 8, 2004); see also the Commission’s Supplemental Brief at 14 in SEC v. Edwards, 540 U.S. 389 (2004) (on remand to the 11th Circuit).

Based on our experiences to date, investments in digital assets have constituted investments in a common enterprise because the fortunes of digital asset purchasers have been linked to each other or to the success of the promoter’s efforts. See SEC v. Int’l Loan Network, Inc., 968 F.2d 1304, 1307 (D.C. Cir. 1992).

Howey, 328 U.S. at 298. See also Tcherepnin, 389 U.S. at 336 (“in searching for the meaning and scope of the word ‘security’ in the [Acts], form should be disregarded for substance and the emphasis should be on economic reality.”)

Joiner, 320 U.S. at 352-53.


In this guidance, we are using the term “network” broadly to encompass the various elements that comprise a digital asset’s network, enterprise, platform, or application.

We recognize that holders of digital assets may put forth some effort in the operations of the network, but those efforts do not negate the fact that the holders of digital assets are relying on the efforts of the AP. That a scheme assigns “nominal or limited responsibilities to the [investor] does not negate the existence of an investment contract.” SEC v. Koscot Interplanetary, Inc., 497 F.2d 473, 483 n.15 (5th Cir. 1974) (citation and quotation marks omitted). If the AP provides efforts that are “the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise,” and the AP is not merely performing ministerial or routine tasks, then there likely is an investment contract. See Turner, 474 U.S. at 482; see also The DAO Report (although DAO token holders had certain voting rights, they nonetheless reasonably relied on the managerial efforts of others). Managerial and entrepreneurial efforts typically are characterized as involving expertise and decision-making that impacts the success of the business or enterprise through the application of skill and judgment.


See Forman, 421 U.S. at 852.

Situations where the digital asset is exchangeable or redeemable solely for goods or services within the network or on a platform, and may not otherwise be transferred or sold, may more likely be a payment for a good or service in which the purchaser is motivated to use or consume the digital asset. See discussion of “Other Relevant Considerations.”

As noted above, under Howey, courts conduct an objective inquiry focused on the transaction itself and the manner in which it is offered.

See Forman, 421 U.S. at 852-53 (where a purchaser is not “attracted solely by the prospects of a return’ on his investment . . . [but] is motivated by a desire to use or consume the item purchased . . . the securities laws do not apply.’”).
This Session will describe the process of estate planning. The process includes: i) identification of intended beneficiaries and assets to be transferred; ii) outline of the plan, including tax considerations; iii) preparation of the documents for the client; iv) execution of the documents; and v) completing the estate planning project. The goal of the estate planning process is to confirm the client’s intention to achieve the result obtained.
I. Introduction

Trusts and Estate is one of the most interesting practice areas that exists. As a lawyer, you get to deal with all sorts of clients, discussing with them their most personal and intimate issues, while addressing matters concerning their assets, and legal issues involving the body of law unique to wills and trusts, as well as tax issues.

Estate planning is a process of identifying the client’s assets and intended beneficiaries, outlining a plan to achieve the desired result, and preparing and executing the documents to achieve the result. The purpose of the process is to create a record, i.e. an estate planning file that confirms the result. The role of attorney is to follow the process and to create a file that confirming that the client intended the result achieved.

As a legal matter, estate planning may be tested by three types of litigation: 1) a will contest; 2) a construction proceeding; or 3) a malpractice claim. All of these types of litigation become reference points for structuring the estate planning process and our discussion today.

Will contests are based on three different claims:
- Lack of capacity to make a Will
- Exercise of Undue Influence in making a Will
- Lack of Due Execution

Construction of a Will involves the resolution of an ambiguity to avoid a result asserted to be contrary to the client’s intent. In New Jersey, the Courts apply the Doctrine of Probable Intent, which is the strongest legal doctrine in the country for considering evidence outside the four corners of the Will or Trust Agreement to determine its meaning. The Probable Intent Doctrine was first articulated by the N.J. Supreme Court in Fidelity Union Trust Co. v. Robert, 36 N.J. 561 (1962), and has been recognized by statute at NJSA 3B:3-33.1. To determine Probable Intent, the Courts apply a three prong analysis: 1) the terms and provisions of the governing document taken as a whole; 2) the surrounding facts and circumstances; and 3) the impulse common to human nature. The estate planner’s file are evidence of the surrounding facts and circumstances.

Malpractice claims can arise when matters go awry in an unusual way.

Practical advice: Man plans, and God laughs (old Jewish saying).

It should be remembered that an estate plan is only a plan: it is a projection for what is desired to happen in the future; it is not a guarantee. Inevitably, every plan is aimed at a moving target, because of the changes that occur over time. In the area of estate planning, assets may change, either increasing or decreasing, human relationships can change, which can be as simple as beneficiaries maturing or as dramatic as changes in family members, and the applicable law can change, including moving from one state to another.

Because of these changes, a standard recommendation is for clients to review and reconsider their estate planning every five years.
II. Where to Find the Law

Statutes:
- Title 3B, Administration of Estates, Decedents and Others (Gann single volume available)
- N.J.S.A. 26:2H-53 Advance Directives for Health Care
- N.J.S.A. 26:2H-102 et seq. Advance Directives for Mental Health Care
- Title 54, Taxation, Subtitle 5, Transfer Inheritance and Estate Taxes
- IRC, Subtitle B, Estate and Gift Taxes, Sec. 2001 et seq.

Rules:
- Generally, Part IV of the New Jersey Court Rules, and specifically Chapter IX, Probate Matters, R. 4:80 to R. 4:96 (Gann single volume available)

Treatises
- New Jersey Practice Series, Estate Planning and Probate (Clapp)
III. Ethical Aspects of Estate Administration

A. Competence: RPC 1.1. A lawyer shall not: (a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence. (b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters.

B. Who is your client? The person for whom you are rendering the estate planning services. It is not the referral source, either a friend a business colleague. It is not the family member who send the client to you. It is not the person who pays the legal fee.

C. Documenting the Client-Attorney relationship:

   1. Retainer Letter Rule:

      - R.P.C. 1.5(b): “When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.”

      - As a business practice, always best to have a separate fee letter for each estate administration which identifies the client and the scope of representation.

D. Conflicts of Interest:

   1. R.P.C. 1.7 provides:

      (a) 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:

         (1) the representation of one client will be directly adverse to another client; or

         (2) 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.

      (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

         (1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;
(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) 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.

2. Conflict Checks:

- Usually, in an estate planning matter, there are no adverse parties, or potentially adverse parties. However, if the client expresses an intention to favor some beneficiaries over other similarly situated beneficiaries, consideration should be given to potential conflicts of interest with regard to all of the beneficiaries.

- Estate planning clients should be added to the conflict check data base in the usual course.

E. Conflicts of Interest: Spouses: What if there is more than one client, such as spouses married to one another? A potential conflict of interest arises, requiring disclosure and waiver to proceed. In estate planning, two disclosures are common: 1) if one client transfers assets to the other client, the other client can transfer those assets to whomever they wish; and 2) information that becomes available to the lawyer with regard to one client will become available to the other client. *A. v. B.*, 158 N.J. 51 (1999) (Court authorized disclosure of the existence, but not the identity, of an out of wedlock child on the grounds that husband had committed a fraud on his wife).

F. Conflicts of Interest: Beneficiaries: What if lawyer represents both the person making a Will and one of several beneficiaries, such as a parent and one of the children? *Haynes v. First Nat’l State Bank*, 87 N.J. 163 (1981) (Grandmother’s use of daughter’s estate planning attorney created a presumption of undue influence required to be overcome by clear and convincing evidence).

G. Conflict Waiver letter:

- if you represent two or more clients, advise of potential conflicts, confirm that information that becomes available in the representation becomes equally available to each client, and request in advance consent to continue to represent one if the other wishes to withdraw as a client

H. Legal Fees: Usual practice is to charge for time and disbursements, either estimating a fee, or placing a cap on the fee, are setting a fixed fee.
Standards are set forth at R.P.C. 1.5(a): *time and labor, novelty and difficulty, skill requisite, preclusion of other employment, fee customarily charged in locality, amount involved and results obtained, time limitations imposed, nature and length of relationship with client, experience, reputation and ability of lawyers, whether fee is fixed or continent.*

General rule of thumb: fees should be proportional to the subject matter. Clearly, more substantial matters, involving blended families or tax planning require more extensive services. Client pressure to limit the costs of estate planning can be addressed by adopting certain efficiencies in the estate planning process. At the same time, the revenue obtained has to support the basic steps necessary to compliance with ethical obligations of competence.

I. Confidentiality:

RPC 1.6. Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another;

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or
disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or

(3) to prevent the client from causing death or substantial bodily harm to himself or herself; or

(4) to comply with other law.

(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).


Rule 26. (1) General rule. Subject to Rule 37 and except as otherwise provided by paragraph 2 of this rule communications between a lawyer and his client in the course of that relationship and in professional confidence, are privileged, and a client has a privilege (a) to refuse to disclose any such communication, and (b) to prevent his lawyer from disclosing it, and (c) to prevent any other witness from disclosing such communication if it came to the knowledge of such witness (i) in the course of its transmittal between the client and the lawyer, or (ii) in a manner not reasonably to be anticipated, or (iii) as a result of a breach of the lawyer-client relationship, or (iv) in the course of a recognized confidential or privileged communication between the client and such witness. The privilege shall be claimed by the lawyer unless otherwise instructed by the client or his representative; the privilege may be claimed by the client in person, or if the client is incapacitated or deceased, by his guardian or personal representative. Where a corporation or association is the client having the privilege and it has been dissolved, the privilege may be claimed by its successors, assigns, or trustees in dissolution.

(2) Exceptions. Such privilege shall not extend (a) to a communication in the course of legal service sought or obtained in aid of the commission of a crime or a fraud, or (b) to a communication relevant to an issue between parties all of whom claim through the client, regardless of whether the respective claims are by testate or intestate succession or by inter vivos transaction, or (c) to a communication relevant to an issue of breach of duty by the lawyer to his client, or by the client to his lawyer. Where 2 or more persons have employed a lawyer to act for them in common, none of them can assert such privilege as against the others as to communications with respect to that matter.

(3) Definitions. As used in this rule (a) “client” means a person or corporation or other association that, directly or through an authorized representative, consults a lawyer or the lawyer’s representative for the purpose of retaining the lawyer or securing legal service or advice from him in his professional capacity; and includes a person who is incapacitated whose guardian so consults the lawyer or the lawyer’s
representative on behalf of the person who is incapacitated, (b) “lawyer” means a person authorized, or reasonably believed by the client to be authorized to practice law in any State or nation the law of which recognizes a privilege against disclosure of confidential communications between client and lawyer. A communication made in the course of the relationship between lawyer and client shall be presumed to have been made in professional confidence unless knowingly made within the hearing of some person whose presence nullified the privilege.

There is no evidentiary privilege for estate planning services rendered to a client after the client has died. As a matter of public policy, the law presumes that the decedent wants the information known either to overcome any claims to void a Will or to resolve any ambiguity regarding the meaning of a Will. In the event of a dispute over the disposition of a trust or an estate, the estate planners client file becomes fair game for discovery.

J. Duty of Care runs to third parties, including intended beneficiaries of a client in their estate planning. Privity with the client is not necessary to create a duty of care:

“Privity between an attorney and a non-client is not necessary for a duty to attach "where the attorney had reason to foresee the specific harm which occurred." Albright v. Burns, 206 N.J. Super. 625, 633 (App. Div. 1986); see also Petrillo, supra, 139 N.J. at 478. Further, “attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorney's representations and the non-clients are not too remote from the attorneys to be entitled to protection." Petrillo, supra, 139 N.J. at 483-84, see also Stewart, supra, 142 N.J. Super. at 593. To determine if that duty exists, a court conducts an "inquiry [that] involves a weighing of the relationship of the parties, the nature of the risk, and the public interest in the proposed solution." Barner, supra, 292 N.J. Super. at 261 (quoting Goldberg v. Hous. Auth. of Newark, 38 N.J. 578, 583 (1962)). The primary question in this inquiry is one of fairness. Id.; see also Estate of Fitzgerald, supra, 336 N.J. Super. at 468.

IV. Starting the Process: Collecting Information

The estate planning file needs to confirm that the client was competent to make a Will, that the client was not under any undue influence, and that the estate planning documents were duly executed to comply with the legal requirements to dispose of assets at death.

Standard of Competence to Make Will

To identifying information to collect requires an understanding of competence to make a Will.

N.J.S.A. § 3B:3-1. Individuals competent to make a will and appoint a testamentary guardian: Any individual 18 or more years of age who is of sound mind may make a will and may appoint a testamentary guardian.

The test for "testamentary capacity" in New Jersey has a relatively low threshold.

“If the testator is capable of recollecting of what his property consists, and who, either in consequence of ties of blood or friendship, should be objects of his bounty and has a mind sufficiently sound to enable him to know and understand what disposition he wants to make of his property after his death, he is competent to make a valid will. In re Phillips, 139 N.J.Eq. 257 (1947).” In re Estate of Frisch, 250 N.J. Super. 438, 447-8 (Law Div. 1991).

The test for competence to make a Will is traditionally thought of as knowing the natural objects of one’s bounty and the nature and extent of one’s assets.

ESTATE PLANNING QUESTIONNAIRE - SEE ATTACHEMENT

A. Next of Kin

While the case law uses the phrase “ties of blood or friendship,” persons that the estate planning needs to ask about include the client’s “next of kin” or intestate heirs. The intestate heirs are the persons who are entitled to take the clients estate if there is no Will. When the Will is filed for probate, the next of kin are required to be given notice so that they can, if they wish, file a lawsuit objecting to the probate of the Will. Ct. R. 4:80-6.

The intestate heirs are: i) the surviving spouse; ii) the children, if either the decedent or the spouse has a child who is not the child of the other, or if the spouse does not survive, iii) the parents, if either the children do not survive, or if children and spouse do not survive; iv) the descendants of the parents (siblings and issue of any deceased siblings), if no spouse, children or parents survive, and v) the descendants of the grandparents (aunts, uncles and cousins) if none of the others survive.

INTESTACY - SEE ATTACHEMENT from Bergen County Surrogate’s Court
What happens in intestacy is also important to understanding the benefits of a Will. Typically, intestacy will give property to persons or in shares that are not desired, it will not provide the protections of a trust for spouses or for children, and it will require a fiduciary bond increasing the cost and burdens of the estate administration.

Stated more simply, the client needs to be asked about his or her family, whoever they may be. The information is important to obtain even if the client does not want to benefit those persons. Of, any other persons or charities the client wants to benefit should also be identified.

**B. Nature and Extent of Bounty: Probate and Non-Probate Assets**

The client also needs to be asked to provide information about all assets passing as a result of his or her death. Common categories of include:

- Real Estate
- Cash and Bank Accounts
- Securities Accounts
- Retirement Accounts
- Business Interests
- Life Insurance
- Tangibles, including vehicles or collections
- Other, including deferred compensation

Values should be reasonably estimated, both for purposes of projecting the distribution of the estate and any estate or inheritance tax liabilities.

The assets need to be divided into probate assets and non-probate assets.

Probate assets are owned by the client in his or her own name and pass under the Will.

Non-probate assets do not pass under the Will but rather pass by operation of law or by beneficiary designation. Non-probate assets include real estate owned as tenants by the entirety and joint bank accounts, passing to the surviving owner, and life insurance and retirement accounts passing by beneficiary designation, or bank or securities accounts having a payable on death designation.

CAVEAT: sometimes a joint bank account with a specific family member is for convenience purposes so that family member can help pay bills and manage finances. When a client identifies a joint bank account is a child or other relative, the client should be asked whether the account is a so-called “convenience account.”

**C. Other Information**

Other information to be obtained includes:
- Liabilities, including any claims in lawsuits
  - Marital history
  - Any divorce obligations?
  - Any prenuptial obligations?
  - Contract to make a Will is valid, N.J.S.A. 3B:1-4.

- Trusts
  - Did client create any trusts?
  - Is client beneficiary of any trusts?
  - Is client trustee of any trusts?
  - Does client have a power of appointment over any trusts?

- Copies of existing documents, including Wills, trusts, marital agreements, business agreements.

  CAVEAT: never prepare a codicil or a trust amendment without reviewing the documents that are being changed.

**D. Maintaining the Estate Planning File**

What does the Estate Planning file look like? What happens to the information and the documents that you collect?

Traditionally, paper files would be kept with folders:

- Attorney Notes, including Questionnaire
- Correspondence, including Retainer Agreement
- Emails
- Drafts Documents
- Signed documents
- Client documents
- Third party documents

In current practice, the same folders can be maintained electronically, with original signed documents separately preserved.

**E. Meeting with the client**

Meeting with the client is an important part of the estate planning process. It provides the opportunity to confirm that 1) the client knows his or her next of kin, and the nature and extent of his or her assets; 2) that the client is not subject to undue influence; and 3) that the client understands the results of the documents to be signed.

**Standard of Care.** A malpractice case decided in 2019 highlights the importance of meeting with the client as a standard of care.
Avoiding Undue Influence. “Undue influence is "defined as 'mental, moral or physical' exertion which has destroyed the 'free agency of a testator' by preventing the testator 'from following the dictates of his own mind and will and accepting instead the domination and influence of another."" Haynes v. First Nat'l State Bank, supra, 87 N.J. at 176, (quoting In re Neuman, 133 N.J. Eq. 532, 534 (E. & A.1943)). Where the will benefits one who enjoyed a confidential relationship with the testator, and where there are suspicious circumstances surrounding the will, the law presumes undue influence and the burden is upon the proponent of the will to disprove the presumption. In re Rittenhouse’s Will, 19 N.J. 376, 378-79 (1955).” In re Will of Catelli, 361 N.J. Super. 478, 486 (App. Div. 2003).

Number of Client Meetings. How many times should the estate planning attorney meet with the client? Two or three meetings are usually necessary to confirm competence and lack of undue influence.

- Initial meeting to review EPQ, and ask follow up questions, and to confirm and clarify the plan.
- After draft documents are sent out, a second meeting is usually appropriate to review the drafts, and to answer any questions the client has. A telephone conference is often adequate to address these issues.
- Once the client is satisfied with the draft documents, then a meeting should be scheduled to execute the documents. Execution of the documents is addressed below.
CAVEAT: If the client presents circumstances that may result in allegations of undue influence, avoid any meetings with both the client and any persons who may be accused of participating in the undue influence. Advise the client to travel to the meeting alone or at least without the assistance of the person who may be accused of undue influence. Exclude the person who may be accused of undue influence from any meetings with the client.

F. **Client Types: issue spotting**

**Social background.** People from all social backgrounds will need estate planning. Not much point to talking about different social backgrounds, whether they be religion, ethnicity, gender, or wealth based. Death and taxation do not discriminate. They apply across the board. Every client is not appropriate for every lawyer, and vice versa. Nonetheless, the need for estate planning services is sufficiently broad that a compatible clientele should exist for every lawyer.

**Wealth Profiles.** Whatever the social background, the more the wealth the greater the need for estate planning services. I segment high net worth clients in one of three categories:

- Entrepreneurial, where wealth has been created in founding a company or in developing real estate;
- Highly compensated executives, where the assets include retirement accounts, deferred compensation, and life insurance; and
- Inherited Wealth, where assets are subject to trusts and other estate planning vehicles designed to avoid taxes sometime in the past, as long as 50 or 60 years ago.

**Personality Types.** My partner Steven Scherzer does trust and estate litigation and he has his own set of profiles for clients whose estates become subject to litigation, particularly in blended families. Each will present challenges in providing them with services and getting them through the estate planning process.

- I want attention
- I want to please everyone so they will be happy and get along
- Old and feeble

**Specific Planning Issues.**

- Estate subject to taxes: Federal estate tax; State estate or inheritance taxes
- Assets located in more than one jurisdiction
- Blended families
- Disinheritance of a family member
- No next of kin
V. Outlining the plan

A. What Does the Will Provide: Basic Questions who gets what property? who is responsible for administering the estate?

B. Disposing of the Estate

a. Tangibles
b. Real estate
c. Bequests: specific and general (cash)
d. Residue: percentages or shares
e. Survivorship: what if a beneficiary dies? who gets the property?
   - Is bequest contingent on beneficiary surviving?
   - If no, then state that bequest is to the person and heir and assigns
   - If yes, state that survivorship is required, and make provision if no survivorship. Name successor or say that bequest lapses.
f. Class gifts
g. Trusts for beneficiaries
h. Remote Contingency: what if all the beneficiaries die?
   - parents, siblings, nieces and nephews, charities

C. Naming Fiduciaries: family, friends, professionals

a. Executor: get will admitted to probate, collects and liquidates assets, including house and contents, pay bills and taxes, distributes balance to beneficiaries

b. Trustee: receives property as a beneficiary, invests the property, makes decisions about distributions, and does compliance tasks including record keeping and filing tax returns

c. Guardian: makes decisions about the care and education of minors

D. Non-Probate Property: disposition needs to be coordinated with the Will.

E. Right of Election: In most states, a spouse cannot be disinherited. To avoid disinheritance, a spouse is given a statutory right to elect to take a share of an estate contrary to the terms of the Will.

The New Jersey Right of Election is set forth at N.J.S.A. 3B:8-1 et seq. The spouse is entitled to claim the excess of one-third the “augmented” estate, which includes transfers during the marriage and non-testamentary assets passing at death, and excludes transfers the surviving spouse consented to and life insurance. New Jersey has two unusual provisions in its Right of Election statute, reflecting the public policy of the statute assuring support for a surviving spouse. First, assets held in to pay income to the spouse count towards the right of election at a rate of $.50 per $1.00 of
value. Second, the surviving spouses own assets count towards the right of election, so that a spouse with assets may not have any right of election.

F. Attorney as Executor or Beneficiary. N.J.S.A. § 3B:18-6, Ethic Opinions 487 (1981) and 1551 (1994) address these issues. Service of an attorney as a fiduciary is generally viewed as not raising issues of over-reaching or undue influence, particularly when the attorney has had a long standing relationship with the client. When an attorney executor intends to retain his or her own law firm to provide the legal services, disclosure should be made to the client when the estate planning is done. A bequest to an attorney draftsman raises an issue of undue influence, indicating the Will project should be referred to another lawyer.

N.J.S.A. § 3B:18-6. Legal fees for attorney also serving as fiduciary: If the fiduciary is a duly licensed attorney of this State and shall have performed professional services in addition to his fiduciary duties, the court shall, in addition to the commissions provided by this chapter, allow him a just counsel fee. If more than one fiduciary shall have performed the professional services, the court shall apportion the fee among them according to the services rendered by them respectively. L. 1981, c. 405, 3B:18-6, eff. May 1, 1982.

G. Public Policy Limitations. Public policy limitations do exist on what may be provided in a Will. By way of example, a penalty or “In Terrorem” clause is not enforceable to disinherit a beneficiary who has reasonable cause to challenge the validity of a Will. N.J.S.A. 3B:3-47. Also, executors and trustees cannot be excused from liability for serving as a fiduciary. Rather, the Courts retain their supervisory power over executors and trustees. Courts also may decline to enforce provisions offensive to public policy.
VI. Tax planning issues

A. Estate and Inheritance Taxes are imposed on two different premises

a. Estate Tax: a tax on the privilege of transferring wealth: add up the assets, allow some deductions, and impose a tax on the decedent’s net estate.

i. In 2019, Federal Estate tax applies to estate in excess of $11,400,000 at a top rate of 40%.

ii. Federal Deceased Spousal Unused Exclusion (DSUE) amount is portable between spouses, which requires timely filing of Federal estate tax return. IRC 2010(c)(4) and (5).

New Jersey Estate Tax Repealed as of 2018

iii. Prior to 2017, the New Jersey estate tax applied to decedents leaving net estate in excess of $675,000, at rates beginning at 5.6% and increasing to 16% on assets in excess of $10,100,000. When an estate exceeded the $675,000 threshold, the tax on the first $675,000 was collected at a rate of 37% on assets in excess of $615,000 until fully paid.

iv. In 2017, the New Jersey estate tax applies to decedents leaving net estate in excess of $2,000,000, at rates beginning at 7.2% and increasing to 16% on assets in excess of $10,100,000. Once the $2,000,000 threshold is crossed, the initial exemption of $2,000,000 is lost.

v. The New Jersey taxable estate is defined by the Federal taxable estate under the Internal Revenue Code as in effect in 2001. The New Jersey Estate tax does not apply to non-residents of New Jersey.

b. Inheritance Tax: a tax on the privilege of receiving wealth: identify the recipient, total how much that recipient inherits, and impose a tax based upon the relationship between the recipient and the decedent.

i. New Jersey inheritance tax allocates heirs to different classes:

- Class A: spouse, ancestors and descendants - exempt
- Class C: siblings, sons-in-law and daughters-in-law – first $25,000 exempt, then 11% up to $1,100,000, 13% up to $1,400,000, 14% up to $1,700,000 and 16% over $1,700,000
- Class D: all other individuals – no exemption - 15% up to $700,000 and 16% over $700,000
- Class E: charities – exempt
ii. New Jersey Inheritance Tax benefits:

- Definition of who is Class A, which includes:
  - step-children, but not step-grandchildren N.J.A.C. 18:26-1.1
  - a person who stands in the relationship of a mutually acknowledged child: ten year relationship that began before age 15. N.J.S.A. 54:34-2.1

- Definition of Property Subject to Inheritance Tax
  - Gifts other than transfers in Contemplation of Death are not subject to the inheritance tax. N.J.S.A. 54:34-1. New Jersey does not have a gift tax.
  - Life Insurance payable to a beneficiary and not the estate is not subject to the inheritance tax. N.J.S.A. 54:34-4.f. N.J.A.C. 18:26-6.8.

B. Income Tax matters

a. Basis step up. Assets included in the estate get a step up in basis for capital gains purposes to the date of death value IRC 1014.

b. Basis step up does not apply to assets gifted during lifetime. IRC 1015. Gifts preserve capital gains taxes. Avoid gifts of low basis assets.

c. Income in Respect of a Decedent (IRD). It remains subject to income taxes. IRC 691. The classic example is unpaid compensation, including distributions from IRA’s, 401K’s and other pension and retirement accounts.

d. Planning for the disposition of retirement accounts raises income tax issues in making the beneficiary designation to continue income tax deferral.

  - Surviving spouse as beneficiary can roll over account into own IRA tax free.
  
  - Other individual beneficiary may transfer account to an Inherited IRA with required minimum distributions beginning the year after death and continuing over the life expectancy of the beneficiary.
- A trust as a beneficiary is required to take minimum required distributions based on the life expectancy of the oldest beneficiary.

- Estate as beneficiary is required to withdraw entire balance of account within five years of death, unless Decedent attained age 70 and a half and began minimum required distributions, in which case minimum required distributions are based on the life expectancy of the Decedent.
VII. Preparing the Will

A. What is a Will?

N.J.S.A. 3B:1-2: Definitions: “Will” means the last will and testament of a testator or testatrix and includes any codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of a person or class to succeed to property of the decedent passing by intestate succession.

- appoints an executor
- revokes or revises another Will
- nominates a guardian
- limits or revokes the rights of any person who would take by intestate succession

N.J.S.A. § 3B:1-3. Devolution of property upon death. Upon the death of an individual, his real and personal property devolves to the persons to whom it is devised by his will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estates, or in the absence of testamentary disposition, to his heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to rights of creditors and to administration.

§ 3B:3-2. Execution; witnessed wills; writings intended as wills.

a. Except as provided in subsection b. and in N.J.S.3B:3-3, a will shall be:

(1) in writing;

(2) signed by the testator or in the testator’s name by some other individual in the testator’s conscious presence and at the testator’s direction; and

(3) signed by at least two individuals, each of whom signed within a reasonable time after each witnessed either the signing of the will as described in paragraph (2) or the testator’s acknowledgment of that signature or acknowledgment of the will.

b. A will that does not comply with subsection a. is valid as a writing intended as a will, whether or not witnessed, if the signature and material portions of the document are in the testator’s handwriting.

c. Intent that the document constitutes the testator’s will can be established by extrinsic evidence, including for writings intended as wills, portions of the document that are not in the testator’s handwriting.
- Holographic wills recognized by statute.
- Writing intended to be a Will also recognized by statute; excuses strict compliance with the formalities of a Will. Requires a clear and convincing standard of evidence. N.J.S.A. 3B:2-3.

B. What every Will may or should contain

1. Pre-residuary bequests:

2. Specific bequests: namely specific items of property, which can be real property (land), tangible personal property (personal effects and possession, or intangible property (shares of stock or other interests in business entities, or financial accounts or intellectual property)

3. Tangibles, including pets - statute authorizes separate letter to dispose of tangibles NJSA 3B:3-11. Give them away - not a good idea to make them marry off the residue

4. General bequests - cash

5. Exercise of power of appointment

6. Residuary bequest: all the rest and residue of the estate

   - Class gifts; survivorship and unusual order of death, lapse and per stirpes distribution. See N.J.S.A. 3B:3-48 (class gifts), 41 (representation), and 35 (anti-lapse)

7. Trust provisions for beneficiaries: avoids guardianships; protects assets against the claims of third party creditors


9. Tax clauses

   - allocation of estate taxes
   - GST language
   - Qualified plan language

10. Fiduciaries

   - Successors
   - Compensation
   - No bond


11. Powers clauses

12. Simultaneous death and survivorship

13. Definitions: Class gifts, inclusion of adopteds, IRC, pronouns

C. Malpractice issues:
   - estate tax allocation, N.J.S.A. 3B:24-1 et seq.
   - survivorship N.J.S.A. 3B:6-1 et seq.

D. Formalities of execution: NJSA 3B:2-1 to 3:
   - Two witnesses required. NJSA 3B:2-7 and 8. Why? Higher standard of proof due to death of testator.
   - Self-proving affidavit authorized by N.J.S.A. 3B:2-4 and 5. Proof required for admission of Will to probate may be created at the time the Will is signed.
   - Holographic wills recognized by statute. N.J.S.A. 3B:2-2
   - E-signatures: The Uniform - uniform law

E. Drafting software. Where to find the language for Wills.
   - Formbooks, used to be published by the banks.
   - Legal publishing companies publish treatises with forms.
   - Specialized estate planning software also exists in the marketplace.
VIII. Ancillary Documents: Powers of Attorney and Living Wills


NJ does not have a statutory form but it does have statutory provisions that should be included in any New Jersey Power of attorney.

For estate planning purposes, the goal of the power of attorney is to avoid a guardianship proceeding to manage the client's property if the client becomes disabled during lifetime. To achieve this goal, the power of Attorney is required to include statutory language that makes it DURABLE:

§ 46:2B-8.2. Powers of attorney; durable powers of attorney; disability defined

a. A power of attorney is a written instrument by which an individual known as the principal authorizes another individual or individuals or a qualified bank within the meaning of P.L. 1948, c. 67, § 28 (C. 17:9A-28) known as the attorney-in-fact to perform specified acts on behalf of the principal as the principal’s agent.

b. A durable power of attorney is a power of attorney which contains the words “this power of attorney shall not be affected by subsequent disability or incapacity of the principal, or lapse of time,” or “this power of attorney shall become effective upon the disability or incapacity of the principal,” or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal’s subsequent disability or incapacity, and unless it states a time of termination, notwithstanding the lapse of time since the execution of the instrument.

“Springing” powers of attorney require proof of disability, which creates an item of proof that may be an inconvenience.

Formality Required:

N.J.S.A. § 46:2B-8.9. Formality: A power of attorney must be in writing, duly signed and acknowledged in the manner set forth in R.S. 46:14-2.1. [Acknowledgement, which is the form required for recording a deed].

The New Jersey power of attorney for estate planning purposes will set forth in detail the powers being granted.

Provisions to be to comply with the statute:


- Gifting Power:
§ 46:2B-8.13a. Power of attorney; gift of principal’s property; prohibited: A power of attorney shall not be construed to authorize the attorney-in-fact to gratuitously transfer property of the principal to the attorney-in-fact or to others except to the extent that the power of attorney expressly and specifically so authorizes. An authorization in a power of attorney to generally perform all acts which the principal could perform if personally present and capable of acting, or words of like effect or meaning, is not an express or specific authorization to make gifts.

Other aspects of Powers of Attorney in NJ:

- The Attorney in fact is a fiduciary with a duty to account to the principal, the personal representative of the principal’s estate, and any guardian or conservator appointed for the principal. N.J.S.A. § 46:2B-8.4 and 8.13.

- More than one attorney in fact can be appointed, to act severally or jointly, and the attorney in fact can be authorized to delegate powers. N.J.S.A. § 46:2B-8.7 and 8.8.
B. **Living Will.** N.J.S.A. 26:2H-53 Advance Directives for Health Care

Formality for execution: two witnesses or an acknowledgement:

§ 26:2H-56. Advance directive for health care; execution

A declarant may execute an advance directive for health care at any time. The advance directive shall be signed and dated by, or at the direction of, the declarant in the presence of two subscribing adult witnesses, who shall attest that the declarant is of sound mind and free of duress and undue influence. A designated health care representative shall not act as a witness to the execution of an advance directive. Alternatively, the advance directive shall be signed and dated by, or at the direction of, the declarant and be acknowledged by the declarant before a notary public, attorney at law, or other person authorized to administer oaths. An advance directive may be supplemented by a video or audio tape recording. A female declarant may include in an advance directive executed by her, information as to what effect the advance directive shall have if she is pregnant.

Two parts set forth in statute: advance directive and designation of agent.

§ 26:2H-58. Designation of health care representative; limitations

a. A declarant may execute a proxy directive, pursuant to the requirements of section 4 of P.L.1991, c.201 (C.26:2H-56), designating an adult with mental capacity to act as the declarant’s health care representative.

(1) An adult who has mental capacity, including, but not limited to, a declarant’s spouse, partner in a civil union as defined in section 2 of P.L.2006, c.103 (C.37:1-29), domestic partner as defined in section 3 of P.L.2003, c.246 (C.26:8A-3), adult child, parent, or other family member, friend, religious or spiritual advisor, or other person of the declarant’s choosing, may be designated as a health care representative.

(2) An operator, administrator, or employee of a health care institution in which the declarant is a patient or resident shall not serve as the declarant’s health care representative unless the operator, administrator, or employee is related to the declarant by blood, marriage, domestic partnership, civil union, or adoption.

This restriction does not apply to a physician, if the physician does not serve as the patient’s attending physician and the patient’s health care representative at the same time.

(3) A declarant may designate one or more alternate health care representatives, listed in order of priority. In the event the primary designee is
unavailable, unable, or unwilling to serve as health care representative, or is
disqualified from such service pursuant to this section or any other law, the
next designated alternate shall serve as health care representative. In the event
the primary designee subsequently becomes available and able to serve as
health care representative, the primary designee may, insofar as then
practicable, serve as health care representative.

(4) A declarant may direct the health care representative to consult with
specified individuals, including alternate designees, family members, and
friends, in the course of the decision making process.

(5) A declarant shall state the limitations, if any, to be placed upon the
authority of the health care representative including the limitations, if any,
which may be applicable if the declarant is pregnant.

b. A declarant may execute an instruction directive, pursuant to the
requirements of section 4 of P.L.1991, c.201 (C.26:2H-56), stating the
declarant’s general treatment philosophy and objectives; or the declarant’s
specific wishes regarding the provision, withholding, or withdrawal of any
form of health care, including life-sustaining treatment; or both. An
instruction directive may, but need not, be executed contemporaneously with,
or be attached to, a proxy directive.

Observations on Living Wills in NJ:

- No Statutory form.
- Only one health care representative at a time.
- Additional wishes may be expressed.
- HIPAA authority to release information may be included.
IX. **Execution of Documents**

A. Once draft documents are prepared, they should be sent to the client, and a meeting or phone conference schedule to review them. Once all of the clients questions have been answered and revisions made, the execution of the documents can be scheduled.

B. Execution: persons needed: the clients, two witnesses, and a notary. The lawyer can serve as a witness or the notary.

C. Follow standard practices in the execution of the Wills, so that the business practice rule can be followed if testimony is ever required concerning the validity of the documents.

D. After the client arrives for the signing, review with the clients the documents to be signed, and give the client the chance to ask any additional questions before having the witnesses and the notary join the meeting.

E. Have all the participants in the conference together at the same time when the document is signed.

F. Ask the client directly: do you sign this as your will, ask the two witnesses to sign the attached affidavit that says you are over the age of 18 years and can read and write in the English language, and that you do this off you own free will. Prompt the client to say yes if you have to, and not just to nod.

G. Have the witnesses sign at the same time in the presence of each other.

H. For the documents that have to be acknowledged or notarized, have the client sign those documents in the presence of the notary, and have the notary complete the acknowledgements or jurats.

I. The witnesses and notary can leave after their part is done.

J. Discuss with the client who is to hold the original documents and who should get copies of documents.
X. Completing the Estate Planning Project

A. What happens to original documents?

B. Better practice is for the law firm to retain custody of the documents in a fire proof safe while maintaining a Will log.

C. If clients take them and they are lost, they are presumed revoked.

D. If lawyer keeps them and they cannot be found, a copy can be proven.

E. Scan the documents once they are signed so that ready access to them exists.

F. Send to the client copies, both paper and pdf, with instructions to keep the copies in a place where they will be found, such as a desk or a file cabinet at home. They should not be placed in a safe or a safe deposit box that cannot be opened once the client dies.

G. Send a final bill.
Attachments:

1. Retainer letter language re waiver of conflict
2. Estate Planning Questionnaire
3. Bergen County Intestacy
4. Ethics Opinions
5. NJ Inheritance Tax Summary
6. Sample Will
7. Sample Power of Attorney
8. Sample Living Will
Notice and Waiver of Conflicts of Interest

When two or more clients are represented regarding the same subject matter, such as spouses doing tax planning, the law recognizes that a potential exists for conflicts of interests to arise with respect to the interests of each of you. By way of example, if one of you transfers property to the other, then he or she may dispose of the property as he or she determines. By way of further example, confidential information which is or becomes available to us from one of you or from another source may be disclosed to the other of you. These are only two common examples, and other conflicts may arise.

Please accept this letter as our notice of the conflict of interests, your opportunity to be represented by independent counsel, and your waiver of the same. Specifically, by signing and returning this retainer letter, each of you expressly consents to the representation by Cooper Levenson, of the other, each of you waives any objection to such representation, and each of you consent to the disclosure of any confidential information concerning your uncle’s estate to the other of you. Each of you also consents to the Firm’s continued representation of the other of you in the event that one of you terminates our representation.
ESTATE PLANNING QUESTIONNAIRE

TO: abc…

FROM: Joseph C. Mahon, Esq.

DATE: December …, 2019

Estate Planning is the process of identifying family, tax and inheritance issues for you and assisting you in resolving those issues in the manner that you determine to be most appropriate for you and your heirs. The process includes: (1) compiling and analyzing your assets; (2) determining who you wish to leave them to; and (3) preparing documents to pass the assets to your intended beneficiaries in the most practical manner. In addition to Wills, the documents may include beneficiary designations and trust agreements. To begin this process, we ask that you complete the following questionnaire, which will provide us with the basic information necessary to prepare drafts of wills, living wills and powers of attorney.

I. General Information

1. Please set forth your full name.

2. Please set forth your mailing address. If the municipality in which you live is different from your mailing address, please also set forth the municipality.

3. Please set forth your telephone numbers and e-mail addresses.

4. Please set forth your date of birth, citizenship, and social security number.
5. Please set forth your occupation(s). If you have an employment agreement with your employer, please provide us with a copy.

6. What is your marital status? If you are divorced, please provide us with copies of any divorce decrees or separation agreements. These documents are required to be reviewed in connection with your estate planning because they may impact the distribution of your property.

7. Do you have any significant health issues?

8. Family Information. Please list the full names, birth dates and social security numbers of your children. If you do not have children, please list your parents, brothers or sisters, or other closest relatives.

   a.) Are any of your children married (if so, please list spouse’s names)?

   b.) Do you have any grandchildren (if so, please list names and dates of birth)?

   c.) Do you have any beneficiaries with health issues or other special needs? If so, please note which beneficiary and their needs.
II. **Assets**

Please provide a summary of your assets, including the value of your home, the contents of your home, cash, securities, interests in businesses, employee benefits and life insurance. Do you own any of this property jointly with another person? If so, please provide the names of the joint owners or co-owners for each asset. Have you named a beneficiary for any of these assets, such as life insurance or retirement assets? The overall value of your property may raise the tax planning issues to be considered to maximize the use of your exemption from Federal and State Estate and Gift Taxes.

Please note whether you have interests in any of the following types of property:
- Farm or ranch?
- Closely held business?
- Stock in SubChapter S corporation?
- Medical, Dental or Veterinarian Practice?
- Valuable collections? (e.g., art, antiques, etc.)
- Oil and gas or other mineral interests?
- Commercial real estate?
- Safe deposit box

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<th>Homes and mortgages</th>
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<td>Cash and Securities (i.e., savings, checking, brokerage, investment accounts)</td>
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<td>Business Interests (i.e. LLCs, corporations, partnerships, etc.)</td>
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<tr>
<td>Retirement Accounts (i.e. Pension, Profit Sharing, 401(k), IRA, etc.)</td>
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To prepare appropriate beneficiary designations, and to address tax planning considerations, we ask that you also provide us with copies of the following documents:

- the most recent statements for each retirement account;
- statement for each policy of life insurance;
- any beneficiary designations for retirement accounts, life insurance or other assets;
- any shareholder, partnership or other business agreements; and
- deeds to your real estate.

Property that is jointly owned by you and another person with a right of survivorship will pass directly to the joint owner at your death, and will not pass under your Will to the heirs you set forth in your Will. You may, if you wish, designate bank and financial accounts as being jointly owned for convenience purposes only, i.e. so that the joint owner may assist you in managing your affairs and paying your bills. The law requires that you make this designation when the account is created, and it does not allow you to make the designation by Will. Do you wish to designate any jointly owned bank or financial accounts to pass under your Will?

_____ YES _____ NO

Are you the grantor, beneficiary or trustee of any trusts? Are you the custodian of any accounts created under the Uniform Transfers to Minors Act (UTMA) or the Uniform Gifts to Minors Act (UGMA)?

_____ YES _____ NO

If Yes, please provide details.
III. Will Information

1. Do you have an existing estate plan (i.e., Will, Living Will, Power of Attorney, Trust, etc.)? If so, please provide us with copies of all existing documents.

2. Do you wish to leave your estate in equal shares to your children? If “No,” please explain.
   
   _____ YES
   _____ NO

4. If a child pre-deceases you, do you wish to leave that child's share of his or her estate to his or her children in equal shares? If “No,” please explain.
   
   _____ YES
   _____ NO

5. Do you wish to make any provisions for grandchildren or other beneficiaries?

6. Do you wish to create any trusts for beneficiaries? Minors may not legally own property in their own name. If property passes to a minor outright, then it may be required to be held in a guardianship that is cumbersome and expensive. It is usually more practical to create a trust for a minor. Not only is a trust less expensive and more flexible than a guardianship, but it also may continue beyond age 18, protecting property from taxes and creditors, while providing the beneficiary with a vehicle for managing the assets. In the event any portion of your estate passes to a person whom you believe to be too young to receive such property outright, or to otherwise benefit from a trust, until what age would you wish to have a trust for that person continue?
7. Do you wish to make any bequests of specific property to anyone?

8. Do you wish to leave any property to charity?

9. In the remote event that none of your immediate family survived your death or the termination of any trust which you create, to whom do you wish to leave your estate?

10. Executors. The executor's role is to obtain the probate of the will, to collect your assets, to pay all bills and debts, to file any estate tax returns and pay any estate taxes, and to distribute your assets to your heirs. Who do you wish to name to act as executor and as successor executor? (We recommend that you name at least one successor executor). (Please provide names and complete addresses.)

11. Trustees. The role of the trustee is to receive from the executor the beneficiary's share of the estate, to invest it on behalf of the beneficiary, and to distribute it to the beneficiary in accordance with the terms of the will. Who would you like to name as a trustee for any trusts to be created? Who would you like to name as successor trustee? Please provide name and complete address.

12. Guardians. This section is only applicable if you have minor children who are unemancipated. The role of the guardian is to take primary responsibility for raising your minor children. Who would you like to name as guardians for your children? Who would you like to name as successor guardians? (Please provide name and complete address.)
IV. Other Information

1. Gift Information.

   a.) Are you the beneficiary, trustee or grantor of any trusts? If so, please describe each trust and provide a copy of it.

   b.) Have you ever filed any gift tax returns? Have you ever made any gifts in excess of $15,000.00? If so, please provide details.

2. Durable Powers of Attorney. By a durable power of attorney, you may designate an attorney-in-fact to conduct any and all transactions with respect to your property which you could perform for yourself. The power of attorney will continue to be effective in the event you became incapacitated. The primary purpose of the power of attorney is to avoid the necessity of a guardianship proceeding for the management of your affairs in the event you became unable to manage them for yourselves. Do you wish to execute a durable power of attorney to appoint an attorney-in-fact? Who do you wish to name as your attorney-in-fact? We recommend that you also name at least one successor. Please provide names and complete addresses and telephone numbers.
3. **Living Will.** By a living will, you may express your desires with respect to your health care in the event you were unable to provide instructions to your attending physicians at the time. By a living will, you may also designate a health care representative to make the appropriate health care decisions in the event you were unable to do so. Do you wish to execute a living will and to name a health care representative? Who do you wish to name as health care representative? We recommend that you also name at least one successor. Please provide names and complete addresses and telephone numbers.

4. **Burial Instructions.** Do you wish to include any specific burial instructions upon your death? If so, please provide details about your burial wishes.

5. **Other Information.** Please provide us with any additional information that you believe to be important to your estate planning (such as a provision for pets, etc.).

6. How would you like to receive drafts of your estate planning documents?

Date: ___________________________

abc…

CLAC 5152604.1
INTESTACY

It is estimated that almost one third of Bergen County residents who die this year, will die without a Will. While I encourage county residents to execute a Will – and strongly recommend a Will for every Bergen County adult – this article provides the estate procedure when a Bergen County resident dies without a Will. (Another pamphlet setting forth the procedure for "How to Probate a Will in Bergen County" can be obtained, without charge, by contacting the Bergen County Surrogate's Court at (201) 336-6700.

The estate of every Bergen County resident must be settled with the Bergen County Surrogate's Court unless the deceased owned no assets individually (in his or her name alone) in New Jersey. Except in that limited circumstance, an estate must be presented to the Bergen County Surrogate before transfer and disbursement of the deceased's assets can occur. This estate settlement requirement applies whether the person died with or without a Will.

The estate of a person who dies without a Will is called an "intestate" estate. Whoever is to take charge of the assets of an intestate estate must appear at the Bergen County Surrogate's Court to make application to be designated as the estate's "Administrator". Those who are first entitled to be appointed the administrator are the closest surviving next of kin. The Administrator's responsibilities include assembling the estate's assets, paying any outstanding debts of the deceased from those assets and disbursing those remaining assets according to law. The applicant is not required to hire an attorney; this is the individual choice of the applicant. In fact, most applicants complete the entire Surrogate's Court process without the need for an attorney. However, you may bring an attorney to the Surrogate's Court if you would feel more comfortable.

To apply to be the Administrator of an intestate estate, a person must bring the following to the Bergen County Surrogate's Court: (1) The original death certificate with a raised seal; (2) An estimate of the gross value (but not an item-by-item description) of the estate covering all real estate and non-real estate (personal) assets; (3) The complete names and addresses of the deceased's next of kin; (4) A blank New Jersey check or cash for fees--the average fees, excluding bonding costs, are $125-$150; and (5) If applicable, a formal written Renunciation of the right to serve as the estate's Administrator signed (in
the presence of a Notary Public) by every person, if any, who has prior or equal right to
the applicant to serve as the estate's Administrator.

You may telephone the Surrogate's Court at (201) 336-6700 in advance and we
will mail you the appropriate “Renunciation Forms,” without charge.

As a matter of law, the family members of the deceased have the first right to
serve as the Administrator, in the following order of preference: spouse, surviving partner
of a civil union, domestic partner, children, grandchildren, parents, brothers, sisters,
nieces, or nephews. Should no family member seek appointment, then a creditor or any
interested party may apply. A person who renounces the right to serve as Administrator
may do so without disclaiming the right to receive any of the deceased's assets. In
contrast, by having a Will, a person can choose the individual(s) (i.e., "Executor(s)") he
or she wishes to take charge and distribute his or her estate's assets.

Once the above described items have been received, the Surrogate will appoint
the applicant as the Administrator of the intestate estate. In most cases, the Administrator
must be bonded until the estate has been properly assembled and distributed. This
bonding fee is in addition to the $125-$150 in average fees paid by the person seeking to
be appointed as Administrator. Bonding is required to protect the creditors and
beneficiaries of the estate from the possibility that the Administrator will misuse his or
her authority to their financial detriment.

There are, however, exceptions to the bonding requirement for intestate estates.
These exceptions depend on when the death occurred, prior to February 27, 2005 or after
this date (see description of these exceptions in the applicable section “A” or “B”).

After the Administrator has been bonded and appointed, the Surrogate's Court
will then issue Surrogate's Certificates (also known as Letters of Administration) that are
used to assemble and transfer the intestate estate's assets. It is recommended that you
order several extra copies of these Certificates, especially if assets are held at several
banks, brokerage firms, with insurance companies and/or are pension plans. They will
also be needed to sell or transfer motor vehicles and all real estate assets. Along with the
Certificates, a General Information Brochure regarding the New Jersey Inheritance Tax
and Estate Tax is sent by the Surrogate's Court to the Administrator by mail within 5-7
business days of his or her appointment.

The laws of the State of New Jersey provide for the assets of the intestate estate, if
the deceased died on or after February 27, 2005, to be distributed to the next of kin by
"intestate succession", as follows:

Section A – IF DECEASED DIED ON OR AFTER FEBRUARY 27, 2005:

The intestate share of the surviving spouse, surviving partner of a civil union, or
domestic partner is:

** NO BOND REQUIRED FOR THE FOLLOWING CIRCUMSTANCES **
i.) The entire estate if:

a) No descendant or parent of the deceased survives him or her;

b) All of the deceased surviving descendants are also descendants of the surviving spouse, surviving partner of a civil union, or domestic partner and there is no other descendant of the surviving spouse, surviving partner of a civil union, or domestic partner who survives the deceased.

** BOND REQUIRED FOR THE FOLLOWING CIRCUMSTANCES **

ii.) The first 25% of the intestate estate, but not less than $50,000.00 nor more than $200,000.00, plus three-fourths of any balance of the intestate estate, if no descendant of the deceased survives the deceased, but a parent of the deceased survives the deceased.

iii.) The first 25% of the intestate estate, but not less than $50,000.00 nor more than $200,000.00, plus one-half of the balance of the intestate estate:

If all of the deceased’s surviving descendants are also descendants of the surviving spouse, surviving partner of a civil union, or domestic partner and the surviving spouse, surviving partner of a civil union, or domestic partner has one or more surviving descendants who are not descendants of the deceased;

If one or more of the deceased’s surviving descendants is not a descendant of the surviving spouse, surviving partner of a civil union, or domestic partner.

The intestate share of heirs other than surviving spouse, surviving partner of a civil union, or domestic partner is:

Any part of the intestate estate not passing to the deceased’s surviving spouse, surviving partner of a civil union, or domestic partner, or the entire intestate estate if there is no surviving spouse, surviving partner of a civil union, or domestic partner, pass in the following order to the individuals designated below who survived the deceased: To the deceased’s descendants by representation;

If there are no surviving descendants: to the deceased’s parents equally if both survive, or to the surviving parent;

If there are no surviving descendants or parent: to the descendants of the deceased’s parents or either of them by representation.

If there is no surviving descendant, parent or descendant of a parent, but the deceased is survived by one or more grandparents, half of the estate passes to the deceased’s paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the
descendants of the deceased’s paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the deceased’s maternal relatives in the same manner; but if there is no surviving grandparent, or descendant of a grandparent on the paternal or maternal side, the entire estate passes to the deceased’s relatives on the other side in the same manner as the half. If there is no surviving descendant, parent, descendant of a parent, or grandparent, but the deceased is survived by one or more descendants of grandparents, the descendants take equally if they are all of the same degree of kinship to the deceased, but if of unequal degree those of more remote degree take by representation.

If there are no surviving descendants of grandparents, then the deceased’s step-children or their descendants by representation.

Section B – IF DECEASED DIED PRIOR TO FEBRUARY 27, 2005

The laws of the State of New Jersey provide for the assets of the intestate estate to be distributed to the next of kin by "intestate succession", as follows:

I.) If you die leaving a spouse but no children, grandchildren or parents, the surviving spouse receives all.

II.) If you die leaving a spouse and children who are also the children of the spouse, the spouse receives the first $50,000 plus one-half of the balance of the estate. The children receive the other one-half of the balance divided equally amongst them. If one of your children dies leaving children then your grandchildren take their deceased parent's share. However, if all of your children have died before you then all of your grandchildren will share equally.

III.) If you die leaving a spouse and children who are not also the children of that spouse, the spouse receives one half, the children receive one-half divided equally and, if applicable, the grandchildren take their deceased parent's share unless all the children are deceased. Should that occur, all the grandchildren share equally.

IV.) If you die leaving children but no spouse, the children receive all divided equally among them. If there are grandchildren, they take their deceased parent's share, unless all the children are deceased. In that event, all the grandchildren share equally.

V.) If you die leaving a spouse but no children or grandchildren, and if your mother or father is still living, your spouse receives the first $50,000 of your estate plus one-half of the balance and your parents (or parent, if only one survives you) receive the remainder.

VI.) If you die leaving no spouse, no children, no grandchildren and one or both of your parents survive you, the surviving parent or parents take all divided equally. If no parent survives, then your surviving brothers and sisters receive all divided equally.
VII.) If you die leaving no surviving spouse, children, grandchildren, parents, brothers or sisters, then the estate will be divided equally among those people surviving you in the closest degree of kinship (starting with nieces and nephews) until an heir is found, if possible.

VIII.) If you die leaving no surviving next of kin without a Will, your estate assets escheat to the State of New Jersey.

Waiver of Administration
(Assets $50,000 or less for Surviving Spouse; $20,000 or less for Next of Kin)

There is a way for an intestate estate to avoid the General Administration process with its corresponding fees and bond premiums: an Application for a Waiver of Administration. If this Application is approved, then no Surrogate's Certificate (also known as Letters of Administration) is issued, no bond is required. In order to be eligible for this Waiver, the intestate estate must be valued at $50,000 or less (if the surviving spouse is making the application for Waiver) or $20,000 or less (if any other next of kin is making the application for Waiver). If the Waiver of Administration is granted, then, instead of a Surrogate's Certificate (or Letters of Administration), an Affidavit of Surviving Spouse (or Next of Kin, as the case may be) is issued. There is a small statutory charge of $5.00 per $100 of the intestate estate's value up to $1,000, then $50 flat fee.

In order to make an Application for a Waiver of Administration, a person must bring the following to the Bergen County Surrogate's Court: (1) The original death certificate with a raised seal; (2) An itemized list of each real estate and personal asset owned by the deceased individually, the asset's location and value; (3) The complete names and addresses of the deceased's next of kin; and (4) A formal, written Consent to the Waiver of Administration signed in the presence of a notary by every person, if any, who has an equal right to the applicant, unless the applicant is the surviving spouse, to serve as the estate's Administrator. (See the earlier part of this article). You may telephone the Surrogate's Court in advance and, upon request, the appropriate Consent forms will be mailed to you without charge. The Affidavit functions just like the Letters of Administration in permitting the holder to transfer the intestate estate's assets. Its effectiveness, however, is limited to the assets itemized in the Application for Waiver of Administration.
Attorney's Including Person Gain in Client's Will

108 N.J.L.J. 501
December 3, 1981

ADVISORY COMMITTEE ON PROFESSIONAL ETHICS

Appointed by the New Jersey Supreme Court

OPINION 487

Attorney's Including Person Gain in Client's Will

The inquirer requests us to provide the ethical considerations surrounding the preparation and execution of a client's last will and testament under the following circumstances:

1. Where the scrivener, absent a request from the testator, includes a direction that the executor retain the services of the scrivener or his firm as attorney for the estate.
2. Where the scrivener is specifically directed by the testator to include such a provision.
3. Where the testator directs the scrivener to appoint himself as executor or trustee under his last will and testament.
4. Where the testator directs the scrivener to include a provision for a legacy for himself.

Inquiry 1. The suggested practice would clearly violate DR 2-103(A). The thrust of DR 2-103(A) is that professional employment must be initiated by the client. The inclusion of such designations as a matter of form in the preparation of wills is violative of DR 2-103(A). In State v. Gulbankian, 54 Wis.2d. 605, 196 N.W.2d. 733 (Sup. Ct. 1972), 57 A.L.R.3d. 696 (1974), the Wisconsin Supreme Court in concluding the conduct to be unethical, cites former Canon 11, existing DR 2-103(A) and the "appearance" of solicitation that results from
such a systematic inclusion as the three reasons that such conduct should be frowned upon. Our Supreme Court in In re Honig, 10 N.J. 75-78 (1952), held:

The lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.

Clearly, this proposition is still a viable ethical standard notwithstanding the fact that it was bottomed on former Canon II, since replaced by the Disciplinary Rules. See also ABA Comm. on Professional Ethics, Opinion 602 (1963) We are of the opinion that such conduct is unethical.

Inquiry 2. The inclusion of a mandatory designation of the scrivener as attorney for the executor at the insistence of the testator provides a more vexing problem. In his treatise on legal ethics, Henry S. Drinker handles the question thus:

A question is sometimes raised as to the propriety of a lawyer's inserting in the will a legacy to himself, or a provision appointing him executor or trustee, or one directing his executors to employ him as counsel for the estate. This, of course, depends on the surrounding circumstances. If they are such that the lawyer might reasonably be accused of using undue influence, he will be wise to have the provision inserted in a codicil drawn by another lawyer. Where, however, a testator is entirely competent and the relation has been a long-standing one, and where the suggestion originates with testator, there is no necessity of having another lawyer in the case of a reasonable legacy, or of a provision appointing the draftsman executor, or of a direction that he be retained by the executors. In the case of the latter provision, it should be clearly explained to the testator that it will not be binding on the executor, who will be free to choose his own counsel, since a lawyer has no vested interest in representing the estate of one whose will he has drawn." Drinker, Legal Ethics 94 (1953) *** (footnote omitted)

This position of Drinker's may be followed provided the scrivener advises the executor or trustee upon the death of the testator that the mandatory nature of the appointment has no effect, and he is free to select counsel of his own choosing.

Inquiry 3. The appointment of the attorney (scrivener) as executor or trustee can be handled somewhat more simply where it is the true desire of the testator. Again, where the provision in the will results from the systematic inclusion by the attorney of the clause without a specific request of the testator DR 2-103(A) is violated. This Committee feels that the Drinker position heretofore outlined may be followed; that is to say, where the testator is entirely competent and the relation has been a long-standing one and where the suggestion originates with the testator, there is no necessity for having another lawyer prepare the provision appointing the draftsman executor or trustee. It is advisable, however, that a memorandum of these facts be prepared and maintained by the scrivener.
Inquiry 4. The legacy problem as outlined by Drinker, supra, depends upon the circumstances. However, lurking in the background of every legacy to the scrivener are the dangers of overreaching, abuse of the confidence reposed in him by his client, actual undue influence, and the presumption of undue influence created by the confidential relationship with the testator. At the very least, the "appearance" of these evils is present. The New Jersey Supreme Court in In re Davis, 14 N.J. 166, 171 (1953), stated as follows:

We wish to reiterate what has been said repeatedly by our courts as to the proprieties of a situation where the testatrix wishes to make her attorney or a member of his immediate family a beneficiary under a will. Ordinary prudence requires that such a will be drawn by some other lawyer of the testatrix' own choosing, so that any suspicion of undue influence is thereby avoided. Such steps are in conformance with the spirit of Canons 6, 11, of the Canons of Professional Ethics promulgated by this court.

Subsequently, the New Jersey Supreme Court presented the problem thus:

Our courts have on occasion said that where a testator wishes to name his attorney or a member of his attorney's family as a beneficiary, ordinary prudence requires that the will be drawn by some other lawyer of the testator's choosing, and thus to avoid the suspicion of an abuse of the confidential relationship. In re Nixon's Will, supra, Brogan, C.J.- In re Davis' Will, supra,- where

Mr. Justice Oliphant said: 'Such steps are in conformance with the spirit of Canons 6, 11 of the Canons of Professional Ethics promulgated by this court.' See also In re Putnam's Will, supra. Canon 11 declares that the lawyer should refrain from any action whereby for his personal benefit or gain he abuses or takes advantage of the confidence reposed in him by his client.' It would seem to be equally imperative that the lawyer also avoid the suspicion of benefit or gain. By the civil law a will written by a person in favor of himself was void. Bennett v. Bennett, 50 N.J. Eq. 439, 446 (Prerog. 1892). This by an ordinance under Claudius, that the writer of another's will should not mark down a legacy for himself. 28 L.R.A., N.S. 272.

Clearly these admonitions from our Supreme Court spanning 27 years dictate that the prudent practice under these circumstances is to have the legacy created by independent counsel in a codicil or having independent counsel prepare the entire will. See also State v. Horan, 21 Wis 2d. 66, 123 N.W. 2d. 488 (Sup. Ct. 1963), and State Bar Association v. Behnke, 276 N.W. 2d. 838 (Sup. Ct. Iowa 1979); In re
Gonyo, 73 Wis. 2d. 624, 245 N.W. 2d.. 893 (Sup. Ct. 1976), and cases collected in 98 ALR 2d. 1234 (1964).

* * *
LEGAL ETHICS OPINION 1515

ATTORNEY DRAFTING INSTRUMENT WHICH NAMES SELF EITHER AS PERSONAL REPRESENTATIVE OR TRUSTEE OR WHICH DIRECTS SUCH OTHER DESIGNEE TO EMPLOY ATTORNEY AS FIDUCIARY ADMINISTRATOR.

Inquiry: An attorney requests the Committee to opine as to the circumstances under which an attorney may draft an instrument in which the client names the attorney either as executor or trustee or which specifically directs that other persons whom the testator/grantor/client designates as executor or trustee consult the attorney/draftsman for legal services. Specifically, the attorney inquires:

(1) whether there must be a pre-existing attorney-client relationship in addition to the attorney-client relationship arising out of the preparation of the instrument in order for the attorney to be named as executor or trustee or for the document to designate that the executor or trustee engage the services of the attorney to provide legal services;

(2) what disclosure, if any, must be made to the client by the attorney with respect to fees that may be charged for the attorney's service as contemplated by the instrument and if disclosure is required, when must the disclosure be made;

(3) (a) whether an attorney/executor or trustee may retain his law firm as attorney for a trust or estate for which he is serving as fiduciary;

(b) if it is proper to retain the executor or trustee's own law firm, what limitations exist as to compensation for each;

(c) whether the matter must be disclosed to the testator/grantor/client in the course of the preparation of the instrument;

(4) whether the Code of Professional Responsibility imposes a minimum standard of competence upon attorneys serving as fiduciaries; and

(5) whether Virginia attorneys initiate the conversation with their clients as to who might be an appropriate fiduciary for the client's trust or estate or who might provide appropriate legal counsel to the estate, and whether the attorney may suggest his willingness to serve as such.

Opinion: 1. Draftsman as Fiduciary. Must there be a pre-existing attorney-client relationship in addition to the attorney-client relationship arising out of the preparation of the instrument in order for the attorney to be named as executor or trustee or for the document to designate that the executor or trustee engage the services of the attorney to
provide legal services and, if so, what must be the nature and quality of that attorney/client relationship?

Although the committee is of the opinion that a pre-existing attorney/client relationship is not required, it believes that a significant factor concerning the appropriateness of an attorney being named as executor or trustee in a document drafted by the attorney is whether the attorney draftsman took advantage of his role as draftsman to secure such a nomination for the attorney or another member of the attorney's firm. The naming of the executor or trustee must be an informed and fully volitional act of the client.

Although the issue of whether or not undue influence was exerted upon the testator/grantor by the attorney requires a factual determination, on a case-by-case basis, which is beyond the purview of the committee, the committee is of the opinion that the total lack of any pre-existing attorney/client relationship greatly enhances the potential for a finding of undue influence. The existence, duration, and nature of any earlier relationship would obviously mitigate such a finding because, clearly, an attorney with knowledge of the testator's/grantor's affairs, values, and estate would be in a position to best serve the client's needs. See DR:5-101(A); H. Drinker, Legal Ethics 94 (1979) (cited in ABA Comm. on Ethics and Professional Responsibility, Informal Dec. 602 (1963). See also Estate of Weinstock, 386 N.Y.S.2d 1 (1976) (when evidence also indicates overreaching, attorneys who named themselves as executors and who also were strangers to testator were removed as executors); Haynes v. First Nat'l State Bank of New Jersey, 432 A.2d 890 (N.J. 1981); Disciplinary Board v. Amundson, 297 N.W.2d 433 (N.D. 1980); and Discipline of Theodosen, 303 N.W.2d 104 (S.D. 1981).

Furthermore, while the Virginia Code of Professional Responsibility does not generally preclude in-person solicitation, DR:2-103(A) prohibits it under certain circumstances and requires that the attorney take into consideration the "physical, emotional or mental state of the person to whom the [solicitation] communication is directed and the circumstances in which the communication is made." Therefore, whether or not a pre-existing attorney/client relationship is involved, in order to minimize the appearance of undue influence, the attorney must consider carefully the testator's/grantor's state of mind and health before recommending himself or a member of his firm, for future employment as executor or trustee.

2. Disclosure of Fees. What disclosure, if any, must be made to the client by the attorney with respect to fees that may be charged for the attorney's service as contemplated by the instrument and, if disclosure is required, when must the disclosure be made?

The committee believes that the disciplinary rules applicable to your second question are DR:2-105(A), requiring, in pertinent part, that the attorney's fees be adequately explained to the client; DR:5-101(A) requiring a client's consent, after full and adequate disclosure, to the attorney's financial interest when that interest may affect the exercise
of the attorney's professional judgment on behalf of his client; and DR:6-101(C) which requires an attorney to keep a client reasonably informed about matters in which that attorney's services are being rendered.

It is the committee's opinion that full disclosure of the attorney/draftsman's potential fees as executor or trustee or legal counsel to the estate must be made to the client, as required by each of the pertinent disciplinary rules, prior to the execution of the instrument. See Estate of Weinstock, 386 N.Y.S.2d 1. The committee believes that the guidance articulated in EC:2-21 is particularly pertinent in these circumstances:

As soon as feasible after a lawyer has been employed, it is desirable that he reach a clear agreement with his client as to the basis of the fee charges to be made .... It is usually beneficial to reduce to writing the understanding of the parties regarding the fee ....

The committee is of the further opinion that it is advisable that the disclosure be made in written form, signed by the testator/grantor, either in the will or trust agreement itself or in a separate document.

Furthermore, when the attorney/draftsman or a member of his firm is being named executor or trustee, the committee also believes that the attorney has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services. Finally, the committee is of the opinion that an attorney/draftsman who contemplates charging separate fees for investment, tax or other services, over and above the fees for executor/trustee, must also fully disclose those separate fees.

3. Attorney/Fiduciary Retaining Own Law Firm as Attorney For Trust/Estate. May an attorney/executive or trustee retain his law firm as attorney for a trust or estate for which he is serving as fiduciary? If it is proper to retain the executor or trustee's own law firm, what limitations exist as to compensation for each? Should this matter be disclosed to the testator/grantor/client in the course of the preparation of the instrument?

The committee is of the opinion that the attorney named as executor or trustee must disclose and obtain the consent of the testator/grantor prior to the execution of the trust/will when the attorney intends to or is considering retaining his law firm as attorney for the trust or estate. The committee is of the further opinion that the disclosure must include the general compensation to be paid to the law firm. The role of the attorney who serves as fiduciary to a trust or estate and additionally engages his law firm as attorney for the same entity presents a personal conflict as described by DR:5-101(A). In such a situation, the attorney's own financial, business, or personal interest may potentially affect the exercise of his professional judgment on behalf of the trust or estate.

The committee has earlier opined that it is not per se improper for an executor or trustee to engage his own law firm to provide representation in legal matters relating to estate administration. LE Op. 1387.
The committee believes that LE Op. 1353 is also relevant to the question you raise.

That opinion found that it would not be improper for a lawyer who is employed both as Assistant General Counsel to a corporation and as "of counsel" to a law firm to retain the outside law firm to provide legal services to the same corporate client. The committee did opine, however, that full disclosure of the conflict must be made, consent from the corporate client must be received, the lawyer must not provide direct representation to the corporate client through the law firm, the lawyer must not share in any of the fees received by the firm from the corporate client, and communication between the outside law firm and the corporation must be maintained with other directors or employees of the corporation.

LE Op. 1353 dealt with a situation where the consent of the client could be readily obtained. Clearly, if at the time of the preparation of the document, the attorney/draftsman/executor/trustee makes a full and adequate disclosure of the possibility that the trustee/executor may retain his firm as legal counsel and of the general compensation that would be paid, and the testator/grantor/client consents, then the personal conflict is cured. However, if the trustee/executor did not obtain the consent of the now deceased testator/grantor/client, either because it was not disclosed at the time the document was drafted, or because the executor/trustee did not draft the document, then the committee is of the opinion that, after full and adequate disclosure, the conflict can be cured by the consent of all the residual beneficiaries of the estate or all of the income beneficiaries and vested remainder beneficiaries of the trust.

4. Fiduciary Competence. As a matter of ethical consideration, does the Code of Professional Responsibility impose a minimum standard of competence upon attorneys serving as fiduciaries?

Although the committee believes that standards for competence of Virginia attorneys serving as fiduciaries are governed by Virginia law and thus present a legal question beyond the purview of the committee, the committee does direct your attention to LE Op. 1325 which adopted the conclusions reached in ABA Formal Opinion 336 and found that when an attorney assumes the responsibility of acting as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be properly disciplined pursuant to the [Virginia] Code of Professional Responsibility.

Further, the committee directs your attention to DR:6-101(A) which in pertinent part mandates that a lawyer should undertake representation only in matters in which the lawyer can act with competence an demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters.

Finally, the committee cautions that DR:6-102(A) precludes a lawyer from limiting his liability to his client for his personal malpractice. See also LE Op. 1452 (an
attorney/client relationship arises between the attorney and the personal representative of an estate, albeit for the ultimate benefit of the estate).

5. Suggestions for Fiduciaries. May Virginia attorneys initiate the conversation with their clients as to who might be an appropriate fiduciary for the client's trust or estate or who might provide appropriate legal counsel to the estate, and, further, may the attorney suggest his willingness to serve as such? Are there limitations on an attorney's ability to solicit his designation as a fiduciary or future legal counsel to the estate?

The committee is of the belief that DR:2-103(A), regarding a lawyer's solicitation of professional employment, is applicable to the question you raise. In addition, Ethical Consideration 5-6 [ EC:5-6] provides further guidance in that it instructs that

[A] lawyer should not consciously influence a client to name him as executor, trustee, or lawyer in an instrument. In those cases where a client wishes to name his lawyer as such, care should be taken by the lawyer to avoid even the appearance of impropriety.

The committee is of the opinion that, although conversation with the testator/grantor as to the suitability of specific persons or entities to serve as fiduciaries or legal counsel to the estate, and recommendations that a professional fiduciary (e.g., a bank, attorney, or accountant) would be preferable to or in addition to a lay person in certain instances, is clearly in the nature of appropriate legal advice to a client, the attorney's suggestion of his own willingness to serve in those capacities would constitute solicitation for future employment. Although the Virginia Code of Professional Responsibility does not generally preclude in-person solicitation, DR:2-103(A) does, however, prohibit it if the communication has a substantial potential for or involves the use of overpersuasion or overreaching and requires that the attorney take into consideration the "sophistication regarding legal matters, [and] the physical, emotional or mental state of the person to whom the [solicitation] communication is directed and the circumstances in which the communication is made." Therefore, the attorney must consider carefully the testator's state of mind and health before soliciting future employment as executor, trustee or legal counsel to the estate, in order to minimize the appearance of undue influence.

The committee is of the view that the same considerations apply whether the document names the attorney as executor or trustee, on the one hand, or directs that the executor/trustee whom the client has designated engage the services of the attorney. In addition, the same considerations would also apply to the issue of waiving security on the executor's or trustee's bond where the attorney or a member of the attorney's firm is designated as executor or trustee. Advice about the suitability of specific persons or entities to serve as fiduciary should cover, in addition to competence and personal service, matters of financial stability both for the attorney and any agents with whom the attorney is expected to deal.

In addition, it is especially important to review with the client who wishes to avoid probate the availability of alternate fiduciary review procedures. Whether or not the client
elects to remain within the probate system, the attorney in all cases should carefully review with the client the potential consequences of an elective waiver of security on the bond of the fiduciary.

Summary: No previous attorney/client relationship is required before an attorney may be named as executor or trustee in an instrument drafted by the attorney or for the instrument to designate that the executor or trustee consult the attorney/draftsman or his firm to provide legal services in the administration of the estate. However, the total lack of a pre-existing attorney/client relationship may enhance the possibility of a finding of undue influence. The attorney/draftsman must consider the testator's/grantor's mental and physical health before soliciting or accepting future employment as executor or trustee.

Full disclosure of the attorney/draftsman's potential fees as executor or trustee or legal counsel to the estate must be made to the client prior to the execution of the instrument. It is advisable that the disclosure be made in written form, signed by the testator/grantor, either in the will or trust agreement itself or in a separate document. The attorney/draftsman has a duty to suggest that the client investigate potential fees of others who might otherwise provide such services. An attorney/draftsman who contemplates charging separate fees for investment, tax or other services, over and above the fees for executor/trustee, must also fully disclose those separate fees.

An attorney/fiduciary executor or trustee may retain his own law firm as attorney for the trust or estate; however, such employment creates a personal conflict under DR:5-101(A) which may be cured by the client's consent after full disclosure. If consent was not received at the time the document was drafted, the conflict can be cured by the consent of all the residual beneficiaries of the estate or all the income beneficiaries and vested remainder beneficiaries of the trust.

In the event that there are co-fiduciaries, consent must be obtained from all such co-fiduciaries prior to the firm's taking on representation of the estate.

Standards for competence of Virginia attorneys serving as fiduciaries are governed by Virginia law. However, when an attorney acts as a fiduciary and violates his or her duty in a manner that would justify disciplinary action had the relationship been that of attorney/client, the attorney may be disciplined under the Code of Professional Responsibility. LE Op. 1325. A lawyer should undertake representation only in matters in which the lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters. DR:6-101(A). A lawyer may not limit his liability to his client for his personal malpractice. DR:6-102(A).

An attorney's suggestion to a testator/grantor of the attorney's willingness to serve as fiduciary or legal counsel to the estate constitutes solicitation for future employment. The attorney must consider carefully the testator's state of mind and health before soliciting future employment as executor, trustee or legal counsel to the estate.
The same considerations apply to the issue of waiving security on the executor's or trustee's bond where the attorney or a member of the attorney's firm is designated as executor or trustee.

Advice as to the suitability of specific persons or entities to serve as fiduciary should cover competence, personal service, and matters of financial stability. The attorney should also review probate and the availability of alternate fiduciary review procedures, and the potential consequences of an elective waiver of security on the bond of the fiduciary.

Approved by Supreme Court
Effective February 1, 1994
GENERAL INFORMATION

Inheritance and Estate Tax

Inheritance and Estate Tax Branch
New Jersey Division of Taxation
50 Barrack Street, 3rd Floor
PO Box 249
Trenton, NJ 08695-0249

For additional information call:
(609) 292-5033
(8:30 AM–4:30 PM, M–F)
or go to:
www.njtaxation.org
"Inheritance & Estate Tax"

INTRODUCTION
Transfer Inheritance Tax is a "beneficiary" tax, and is based on who specifically receives a decedent's assets, and how much each beneficiary receives. The Estate Tax is based on the size of the entire estate, and does not break down the distribution of assets beyond exemptions for spouses and children. In New Jersey, the Inheritance Tax is a credit against the Estate Tax; an estate pays only the higher of the two.

New Jersey has had an Inheritance Tax since 1932 when a 5% tax was imposed on property transferred from a deceased parent ("descendent") to a beneficiary. Currently, the law imposes a graduated Inheritance Tax ranging from 11% to 16% on the transfer of real and personal property with an aggregate value of $500 or more to certain beneficiaries. New Jersey first enacted an Estate Tax in 1934. Its purpose was to ensure New Jersey receives the full amount of the Federal Estate Taxes allowed against the Federal Estate Tax.

WHAT'S NEW?
Pl. 2016, c. 37 signed into law on Oct. 14, 2016, provides that the New Jersey Estate Tax rate effective Jan 1, 2018 is $75,000.00 or 11% for the first $475,000.00 of the value of the Estates Taxable as of January 1, 2018. For estates transferred on or after Jan 1, 2018, the New Jersey Estate Tax is not longer subject to the provisions of the Federal Internal Revenue Code in effect on Dec. 31, 2016, and instead follows the current Federal Internal Revenue Code for determining the value of the estate which will be subject to New Jersey Estate Tax.

Additionally, New Jersey Estate Tax will be imposed on the estate of resident decedents dying on or after Jan. 1, 2018.

INHERITANCE TAX RETURNS ARE DUE
An Inheritance tax return must be filed and the tax paid on the transfer of real or tangible personal property within eight months after the date of death.

For a resident decedent a return must be filed for the transfer of real or tangible personal property located in New Jersey and all, inter vivos, personal property.

For a nonresident decedent a return must be filed for the transfer of real or tangible personal property located in New Jersey. To determine the size of the tax on intangible assets (e.g., bank accounts, stocks, etc.), all such assets are used in the calculation of the tax and must be reported on the return.

For either a resident or nonresident decedent a return must be filed whenever any tax is due or when property is passing to someone other than Class A beneficiaries. The tax is a lien on all New Jersey property for 15 years from the date of death unless the tax is paid before that time, or an acceptable bond is filed. Interest on unpaid tax will accrue at the rate of 12% per annum beginning eight months after a decedent's date of death. The return should be filed directly with the Inheritance and Estate Tax Branch in Trenton.

IMPORTANT REMINDERS
When filing the return:
• If the decedent died Testate with a will you must supply a legible copy of the WILL, plus any COGULLABLES (addendums to the will) and any SEPARATE WRITINGS which may affect the distribution of the estate.
• A copy of the decedent's last five years FEDERAL INCOME TAX RETURN is required.
• All returns, forms and corresponding must contain the required SOCIAL SECURITY NUMBERS.
• PAYMENTS ON ACCOUNT should be made to avoid the annual interest.
• All CHECKS should be made payable to NJ INHERITANCE AND ESTATE TAX.
• SEND responses, checks and documents to:

  New Jersey Division of Taxation
  Inheritance and Estate Tax
  PO Box 249
  Trenton, NJ 08695-0249
EXEMPTIONS
In addition to the exemptions listed under “Beneficiary Classes and Tax Rates,” no inheritance Tax is imposed on:

1. Transfers to a beneficiary having an aggregate value of less than $100.
2. Life insurance proceeds paid to a named beneficiary.
3. Payments from the New Jersey Public Employees Retirement System, the New Jersey Teachers’ Pension and Annuity Fund, and the New Jersey Police and Firemen’s Retirement System.
4. Federal Civil Service Retirement benefits payable to a beneficiary other than the estate or the executor or administrator of a decedent’s estate.
5. Annuities payable by the U.S. Government pursuant to the Federal Survivor’s Family Protection Plan or the Survivor’s Benefit Plan to a beneficiary other than the estate or the executor or administrator of a decedent’s estate.

ESTATE TAX
In addition to the inheritance Tax, the State of New Jersey imposes an Estate Tax on the estates of certain resident decedents. (There is no Estate Tax assessed against non-resident decedent’s estates.) Even estates that are partially or fully exempt from Inheritance Tax may be subject to the New Jersey Estate Tax. NOTE: A number of assets that are not reportable for Inheritance Tax are included in the gross estates for Estate Tax, most notably life insurance paid to a named beneficiary and non-fixed life estates.

For decedents dying after Dec. 31, 2001, but before Jan. 1, 2007:

The New Jersey Estate Tax is an income tax equal to the credit for State death taxes allowed under Federal Estate Tax law, less that portion of the credit which is attributable to property located outside New Jersey, and less any New Jersey Inheritance Tax.

The credit allowable is calculated in accordance with the provisions of the Internal Revenue Code in effect on Dec. 31, 2001. A 2001 Federal Form 706 must be completed in accordance with the provisions of the Internal Revenue Code in effect on Dec. 31, 2001.

Although the 2001 Internal Revenue Code did not permit a marital deduction for property passing to a surviving civil union partner, such a deduction is permitted for New Jersey Estate Tax purposes for decedents dying on or after Feb. 19, 2007. In these cases, the 2001 Form 706 should be completed as though the Internal Revenue Code created a surviving civil union partner and a surviving spouse in the same manner.

As an alternative to filing a completed 2001 Form 706, an estate may, in many cases, use the Simplified Method to compute the New Jersey Estate Tax. This method is based upon the net assets as determined for the New Jersey Inheritance Tax, with certain adjustments. The Simplified Method is not intended for use in all estates. It may not be used if an estate tax, or is required to file a, a Federal Estate Tax return (Form 706) with the IRS, or if the IRS does not produce a tax liability similar to that produced using the 2001 Federal Form 706. This method permits a marital deduction only for property passing outright to a surviving spouse or to a surviving civil union partner, or the estate, or the executor or administrator of a decedent’s estate.

For decedents dying on or after Jan. 1, 2007, but before Jan. 1, 2018:

The Estate Tax is calculated on the amount of the taxable estate pursuant to the current Internal Revenue Code, using a progressive rate schedule with rates ranging from 0% to 18%. Credit against the Estate Tax will include the portion of the tax attributable to property located outside New Jersey, any New Jersey Inheritance Tax, and a credit equal to the tax due on the $2 million exclusion amount ($199,600).

A completed current Federal Form 706 must be submitted along with the New Jersey Estate Tax Return whether or not the estate is subject to Federal Estate Tax.

For decedents dying on or after Jan. 1, 2018:

There is a New Jersey Estate Tax imposed on the estates of resident decedents dying on or after Jan. 1, 2018. This provision does not affect the New Jersey Inheritance Tax, which remains in force.

FEDERAL ESTATE TAX RETURN
The law requires that a copy of the Federal Estate Tax return be filed with the Division within 30 days after the filing of the original with the federal government. Also, a copy of any communication from the Federal Government making any final change in the return, or confirming, increasing, or reducing the tax shown to be due must be filed with the Division within 30 days of receipt.

INHERITANCE AND ESTATE TAX WAIVERS
Certain property in the name of an individual to a decedent cannot be transferred without the written consent of the Director, Division of Taxation. This consent, commonly known as a “waiver,” will not be granted until any tax due has been paid or provision made for payment.

A. PERSONAL PROPERTY - RESIDENT DECEDENTS
1. Waivers are not required for automobiles or other vehicles, household goods, personal effects, or mortgages, but these assets must be reported in the tax return(s) filed.

2. A membership certificate or interest in a cooperative housing association held in the name of a decedent and a surviving spouse, civil union partner or domestic partner as joint tenants with right of survivorship is exempt from the Inheritance Tax. However, a waiver is required to transfer ownership to the survivor.

3. Banks, savings and loan associations, and other financial institutions may receive 50% of all funds on deposit with them to the proper party prior to the issuance of a waiver. The full amount so deposited as of the date of death of decedent must be listed in the tax return(s) and will eventually require a waiver. This procedure is referred to as a BLANKET WAIVER and is not available for the transfer of stocks and bonds.

4. A SELF-EXECUTING WAIVER FORM I-A has been created for use in the estate of a RESIDENT decedent. This form may be used in most cases to transfer bank accounts, stocks, bonds and brokerage accounts, when the transfer is to a Class A beneficiary only. This form may NOT be used:
   a. For the transfer of real estate.
   b. For decedents dying after Dec. 31, 2001, but before Jan. 1, 2017, and the taxable estate has adjusted taxable gifts exceeds $557,000 for Federal Estate Tax purposes under the provisions of the Internal Revenue Code in effect on Dec. 31, 2001. (If the decedent died on or after Feb. 19, 2007, surviving by a civil union partner a marital deduction equal to that permitted a surviving spouse under the provisions of the Internal Revenue Code in effect on Dec. 31, 2001, may be used in determining the taxable estate.)
   c. For decedents dying on or after Jan. 1, 2017, but before Jan. 1, 2018, and the taxable estate exceeds $2 million for Federal Estate Tax purposes under the provisions of the current Internal Revenue Code.

The completed Form I-A should be filed with the financial institution or transfer agent who will then be authorized to release the subject asset, if warranted, without the need for receiving a waiver from the Division. NO FEE is filed with this form with the Division.

B. PERSONAL PROPERTY - NONRESIDENT DECEDENTS
In the estate of a NONRESIDENT decedent, no waivers are required for bank accounts, brokerage accounts or other intangible property, including stock and membership certificates or shares held in a co-op. However, all of these assets must be reported on the return. For full information on nonresident filing requirements, see the Division’s website or call Inheritance Tax information at 609-292-5033.

C. REAL PROPERTY - RESIDENTS AND NONRESIDENTS
Commonly called “real estate,” this refers to land and/or physical buildings that are permanent structures attached to land.

1. Unpaid Inheritance and Estate Taxes constitute a lien on New Jersey real property. Tax waivers are required to transfer the property. However, real property held by a husband and wife or civil union partners as “tenants by the entirety” in the estate of the spouse or civil union partner who dies first, need not be reported and may be transferred without a waiver.

2. A REQUEST FOR A REAL ESTATE PROPERTY TAX WAIVER, Forms M-1 (Resident Decedent) and M-1 N (Non-Resident Decedent) have been created for use by Class A beneficiaries. These forms may be used if the entire estate is unsaleable for inheritance tax purposes and passes to Class A beneficiaries, and the only reason to file is to obtain a tax waiver for real property.

Proper use of these forms may eliminate the need to file a formal tax return(s). Form M-1 may not be used if there is any New Jersey Estate Tax payable on.

a. For resident decedents dying after Dec. 31, 2001, but before Jan. 1, 2017, and the taxable estate plus adjusted taxable gifts exceeds $557,000 for Federal Estate Tax purposes under the provisions of the Internal Revenue Code in effect on Dec. 31, 2001. (If the decedent died on or after Feb. 19, 2007, surviving by a civil union partner a marital deduction equal to that permitted a surviving spouse under the provisions of the Internal Revenue Code in effect on Dec. 31, 2001, may be used in determining the taxable estate.)

b. For resident decedents dying on or after Jan. 1, 2017, but before Jan. 1, 2018, and the taxable estate exceeds $2 million for Federal Estate Tax purposes under the provisions of the current Internal Revenue Code.

These forms are to be filed with the Inheritance and Estate Tax Branch at Trenton. If the form is in order, the necessary waiver(s) will be promptly issued.

NEITHER THE M-1 NOT M-1 MAY BE USED WHEN IT IS CLAIMED THAT A RELATIONSHIP OF MUTUALLY ACKNOWLEDGED CHILD EXISTS.

SAFE DEPOSIT BOXES
Safe deposit boxes are no longer investigated by the New Jersey Division of Taxation. The Division has issued a blanket waiver in the form of a letter from the Division to all banking institutions, safe deposit companies, trust companies, and other institutions which serve as custodians of safe deposit boxes. The contents of the boxes may be reviewed without inspection by the Division.
New Jersey Tax Guide

A Guide to Being an Executor
What if you are an Executor or Administrator of an estate?
You are most likely looking to obtain waivers to release the decedent’s assets, such as NJ bank accounts, NJ stock, and NJ real estate. There are several steps to follow, and a few things you need to know before this can happen.

What are the different types of waivers?
A self-executing waiver (do-it-yourself) and the 0-1 waiver (issued by the Division of Taxation) are the different types of waivers. New Jersey banks are prohibited from closing a decedent’s bank accounts without one of these forms:

- **Form L-8 Self-Executing Waiver Affidavit** can only be used when there is **no Inheritance or Estate Taxes due (see below)**.
  - L-8s are to be filled out by you, as the estate representative. Then they can be sent or brought **directly to the bank**, transfer agent, or other financial institutions holding the funds.
  - Many banks have these forms on hand, but they can also be obtained on our [website](#).
  - **You do not file anything with the Inheritance and Estate Tax Branch if you qualify to use this form**.

- **Form 0-1** is a “waiver” that **can only be issued by the Division of Taxation**.
  - To get this form, you must file a return with the Division.
  - **Real Estate transfers always require Form 0-1**.
  - **Note**: 0-1 is **not** a form that you will be able to find on our website. This form can only be issued by the Division of Taxation.

Are there any Inheritance or Estate Taxes Due?
Your next job as Executor/Administrator is to figure out if any Inheritance or Estate taxes will be due. This will determine what forms or returns you will need to file.

*Besides the Federal estate tax, there are two separate State taxes related to a person’s death: the Inheritance Tax and the Estate Tax. You may owe one, but not the other. You will never pay more than the higher of the two taxes:*

- **Inheritance Tax** mainly depends on the relationship between the deceased person and the beneficiary. Estate proceeds payable to:
  - Surviving spouses, parents, children, grandchildren, etc. are exempt from Inheritance Tax.
    - These are Class A beneficiaries.
  - Brothers and sisters and children-in-law are subject to tax after built-in exemptions. These are Class C beneficiaries.
  - Nieces, nephews, aunts, uncles, friends, and non-relatives are subject to Inheritance Tax.
    - These are Class D beneficiaries.
  - Charitable institutions are exempt from Inheritance Tax. These are Class E beneficiaries.

If it turns out that Inheritance Tax may be due, the Inheritance Tax Resident Return ([Form IT-R](#)) needs to be filed. Any tax must be paid within eight months after the date of death or you will **incur a 10% annual interest charge** on unpaid tax.

Sometimes, a return needs to be filed even if there might not be any tax due. If there are any Class C, D, or E beneficiaries, you will need to file a full return.
• **Estate Tax** depends on the size of the decedent’s gross estate and the decedent’s date of death. You will have to file an Estate Tax return if the estate value is higher than the exemption level for that year:

<table>
<thead>
<tr>
<th>YEAR OF DEATH</th>
<th>EXEMPTION LEVEL</th>
<th>RETURN REQUIRED</th>
</tr>
</thead>
<tbody>
<tr>
<td>2016 or earlier</td>
<td>$675,000 including adjusted taxable gifts</td>
<td>IT-Estate</td>
</tr>
<tr>
<td>2017</td>
<td>$2 million</td>
<td>IT-Estate 2017</td>
</tr>
<tr>
<td>2018 or after</td>
<td>All exempt</td>
<td>No Estate Tax return</td>
</tr>
</tbody>
</table>

*If you determine that all of the beneficiaries and the estate are exempt from tax, you may use the following form to obtain a real estate waiver:*

• **Form L-9**: Resident Decedent Affidavit Requesting Real Property Tax Waiver. This Form needs to be filed with the Inheritance & Estate Tax Branch to receive a Form 0-1 Waiver for real estate.

**Non-Resident Decedents** (someone who died as a legal resident of another state or a foreign country): People who did not live in New Jersey, but owned certain types of property in New Jersey (usually real estate) may need to pay NJ Non-Resident Inheritance Tax. See New Jersey Non-Resident Inheritance Tax [Frequently Asked Questions](#) for more information. There is no Estate Tax on non-resident decedents.

**Other Important information for executors/administrators to know:**

- Banks and financial institutions may release up to 50% of the entire amount of funds on hand before a waiver is received. These funds may only go to the executor or administrator or joint owner of the account(s).
- Banks also must pay (without a waiver) any checks for Inheritance/Estate Taxes written to New Jersey Inheritance and Estate Tax from a decedent’s account (if there are sufficient funds in the account, of course.)
- When filing any return for Inheritance Tax, the fair market value of decedent’s assets should be reported as of the date of death, not as of the filing date.

**How long does processing take?**

Once you have filed a return with the Division, please plan for processing to take at least several months. If a return must be audited, it may take several months longer. About 40 to 50% of returns require additional attention in the form of an audit. Returns are processed and audited in the order they are received.

Inheritance and Estate Tax payments are usually posted within two weeks from the time they are received, but the processing of a return and issuing of waivers will take longer.

Full details regarding the above information are available on our website or by calling the Inheritance and Estate Tax Hotline at 609-292-5033 M-F 8:30 a.m.- 4:30 p.m. EST.

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*As executor, you may be required to file income tax returns on behalf of the decedent. For more information on New Jersey Gross Income Tax, please call 609-292-6400, or visit the [Division’s website](#)*.
WILL FORM 1 SIMPLE WITH TRUSTS
LAST WILL AND TESTAMENT

I, ABC..., now of ..., do hereby make, publish and declare this to be My Last Will and Testament, hereby revoking all Wills, Testaments and Codicils previously made by me.

FIRST: A. Tangibles. I give and bequeath such items of my tangible personal property to those persons whom I identify in a separate written statement as the person or persons whom I intend to have receive specific items of such property, which written statement is made by me latest in date prior to my death, and I give and bequeath the balance of my tangible personal property to my wife, xyz..., if she survives me, or if she does not survive me, to such of my children who survive me, in shares as nearly equal in value as practicable as they may agree or, if they do not agree or if any child is a minor, as my Executors shall determine.

The expense of packing, shipping, insuring and delivering my tangible personal property to any beneficiary shall be paid as an administration expense of my estate. Each bequest of property under this Article shall include all rights I may have under any insurance policies relating thereto.

Any tangible personal property distributable hereunder to a minor may be delivered to the person who is, in the sole and conclusive judgment of my Executor, in proper charge of such minor, whether with or without a court order.

B. Real Estate. I give, devise and bequeath any right, title and interest I may have in and to any real property, condominium or cooperative apartment (including any shares in the cooperative corporation and any proprietary lease appurtenant thereto), which shall be used by me for residential purposes, together with all rights I may have under any insurance policies relating thereto, to my wife, xyz..., if she survives me.

SECOND: Residue. All of the rest, residue and remainder of my estate, real and personal, wherever situated, including any lapsed bequests or devises not otherwise disposed of under this Will, (but excluding any property over which I may have a power of appointment, it being my intention not to exercise any such power), herein sometimes referred to as my "residuary estate", I dispose of as follows:

A. Marital Bequest. If my wife, xyz..., survives me, I give, devise and bequeath my residuary estate to my said wife.

B. Issue, Per Stirpes. If my wife, xyz..., does not survive me, my residuary estate shall be divided into shares per stirpes for my issue who survive me, and I give, devise and bequeath each share so set aside for any person who shall have then attained the age of ...(...) years to such person, and I give, devise and bequeath each share so set aside for any person who shall not have then attained the age of ...(...) years to my Trustees, to be disposed of for the benefit of such person as provided by Section C. of this Article.
C. Trust Until Age ...(...) Whenever property is directed to be disposed of as provided by this Section, I give, devise and bequeath such property to my Trustees, to hold IN TRUST, as a separate trust fund for the benefit of the person for whom it was set aside, to invest and reinvest the same and, until the beneficiary shall attain the age of twenty-one (21) years, to pay or apply such part or all or none of the net income of the trust at any time or from time to time to or for the benefit of the beneficiary as my Trustees, in their absolute discretion, may deem advisable. Any net income that is not paid or applied shall be added to the principal of the trust from time to time. Upon the beneficiary attaining the age of twenty-one (21) years, my Trustees shall pay or apply the net income of the trust at least quarter-annually to or for his or her benefit.

My Trustees may also pay or apply to or for the benefit of the beneficiary such part or all of the principal of the trust, even to the extent the trust is terminated thereby, as my Trustees, in their absolute discretion, may deem advisable for the health, education, maintenance, support or general welfare of the beneficiary.

My Trustees shall distribute to the beneficiary, upon the beneficiary attaining the age of twenty-five (25) years, one-third (1/3) of the then principal of the trust and, upon the beneficiary attaining the age of thirty (30) years, one-half (½) of the then principal of the trust and, upon the beneficiary attaining age thirty-five (35), the balance of the trust. If the beneficiary shall attain the age of twenty-five (25) years prior to property being disposed of for him or her under this Section, then my Trustees shall distribute to the beneficiary one-third (1/3) of such property outright. If the beneficiary shall attain the age of thirty (30) years prior to property being disposed of for him or her under this Section, then my Trustees shall distribute to the beneficiary two-thirds (2/3) of such property outright.

Upon the death of the beneficiary prior to the termination of his or her trust, my Trustees shall distribute the then remaining principal and any undistributed and accrued income of such trust to such one or more of persons, corporations or other entities (exclusive, however, of the beneficiary, his or her estate, his or her creditors or creditors of his or her estate, provided that, in the event a portion of the trust would pass in default of the within power of appointment to a person who is a "skip person" vis-a-vis the "transferor" of the trust as those terms are defined for purposes of the tax imposed pursuant to Section 2601 et seq. of the Internal Revenue Code, which portion of the trust shall have an inclusion ratio of ONE (1) for purposes of such tax, such beneficiary may exercise the within power of appointment over such portion of the trust in favor of his or her estate), in such shares, equal or unequal, in further trust or otherwise, as the beneficiary shall appoint by his or her Last Will and Testament duly established and therein expressly referring to this power of appointment. To the extent such property shall not be effectively appointed, the same shall be divided into shares per stirpes for the then living issue of the beneficiary, per stirpes, or, in default of such issue, for the then living issue, per stirpes, of the most immediate ancestor of the beneficiary who shall be me or my issue and who shall have issue then living, and each share so set aside for any person who shall have then attained the age of ...(....) years shall be distributed to such person outright, and each share so set aside for any person who shall not have then attained the age of ...(....) years shall be retained by my Trustees, to be disposed of for the benefit of such person as provided by this Section.
D. Remote Contingency. In the remote event that upon my death or the termination of any trust created under this Will, any part of my estate or such trust is not effectively disposed of as provided by this Will, then I give, devise and bequeath such property in the following shares to the following persons:

1. ONE-HALF (½) thereof (or the whole thereof if none of the parents of my said wife, xyz..., or their issue is then living) to the then living issue of my parents, per stirpes, or in default thereof, to such of my parents who are then living, in equal shares if both are then living, or all to the survivor of them if only one of them is then living; and

2. ONE-HALF (½) thereof (or the whole thereof if none of my parents or their issue is then living) to the then living issue of the parents of my wife, xyz..., per stirpes, or in default thereof, to such of the parents of my said wife who are then living, in equal shares if both are then living, or all to the survivor of them if only one of them is then living.

OR

1. ONE-HALF (½) thereof (or the whole thereof if none of the parents of my said wife, xyz..., or their issue is then living) to such of my parents who are then living, in equal shares if both are then living, or all to the survivor of them if only one of them is then living, and if neither of my parents are then living, to the then living issue of my parents, per stirpes: and

2. ONE-HALF (½) thereof (or the whole thereof if none of my parents or their issue is then living) to such of the parents of my said wife, xyz..., who are then living, in equal shares if both are then living, or all to the survivor of them if only one of them is then living, or if neither of the parents of my said wife are then living, to the then living issue of the parents of my wife, per stirpes.

OR

1. One-fourth (1/4) thereof to my ..., if she is then living, or if she is not then living to her issue then living, per stirpes;

2. One-fourth (1/4) thereof to my ..., if she is then living, or if she is not then living, to her issue who are then living, per stirpes;

3. One-fourth (1/4) thereof to my ..., if he is then living, or if he is not then living, to his issue then living, per stirpes; and

4. One-fourth (1/4) thereof to my ..., if she is then living, or if, she is not then living, to her issue then living, per stirpes;
provided that if any of the foregoing bequests shall lapse, such lapsed bequest shall accrue to each of the foregoing bequests which shall not have lapsed in the proportion which such non-lapsed bequest bears to the aggregate of non-lapsed bequests.

E. Perpetuities. Anything in this Will to the contrary notwithstanding, my intention is to permit any trusts created under this Will (by exercise of power of appointment or otherwise) to continue for the longest period of time permitted by law. Unless a statute or other rule of law allows the trusts created under this Will to continue for a longer period of time, then any trust hereunder which is still in existence on the twenty-first (21st) anniversary of the death of the last survivor of my wife, xyz..., and my issue living on the date of my death, shall then terminate and my Trustees shall distribute the then remaining principal and any accrued and accumulated income of such trust to the beneficiaries to whom the income of such trust may then be or is then required to be distributed, per stirpes, if more than one. If a statute or other rule of law allows any trust created under this Agreement to continue for a longer period of time, then, upon the expiration of that time period, each such trust shall then terminate and my Trustees shall distribute the then remaining principal and any accrued and accumulated income of such trust to the beneficiaries to whom the income of such trust may then be or is then required to be distributed, per stirpes, if more than one.

The foregoing notwithstanding, in no event may a power of appointment created hereunder be exercised to create another power of appointment which may be validly exercised to postpone the vesting of any interest in any property disposed of pursuant to this Will for a period greater than one thousand years after the date of my death or to suspend the power of alienation of such property for a period greater than twenty-one (21) years after the death of the last to survive of my wife, xyz..., and my issue living on the date of my death.

THIRD: Age 21 Catch Trust. Whenever under the provisions of this Will my Executors or Trustees would be required to distribute any property, either income or principal, to a person who has not then attained the age of twenty-one (21) years, my Executors or Trustees may, in their absolute discretion and notwithstanding any other provision of this Will, retain such property (or in the case of my Executors, transfer such property to my Trustees to retain). My Executors or Trustees, as the case may be, shall hold any property so retained IN TRUST, as a separate trust fund for the benefit of such person, shall invest and reinvest the same and, until the beneficiary shall attain the age of twenty-one (21) years, shall pay or apply such part or all or none of the net income of the trust at any time or from time to time to or for the benefit of the beneficiary, as my Executors or Trustees, as the case may be, in their absolute discretion, may deem advisable. Any net income that is not paid or applied shall be added to the principal of the trust from time to time. My Executors or Trustees also may pay or apply to or for the benefit of the beneficiary such part or all of the principal of the trust, even to the extent the same is terminated thereby, as they, in their absolute discretion, may deem advisable for the beneficiary's health, support, education or general welfare. Upon the earlier to occur of the beneficiary attaining of the age of twenty-one (21) years or the death of the beneficiary, my Executors or Trustees, as the case may be, shall distribute all of the remaining principal and any undistributed and accrued income of the trust to the beneficiary if the beneficiary shall then be living, or, if the beneficiary shall not then be living, to the legal representatives of the beneficiary's estate.
FOURTH: A. Estate Tax Allocation. My Executors shall pay any and all estate, inheritance and other death taxes and duties, including any interest and penalties thereon imposed by reason of my death by the United States of America, or any State or local entity thereof (but not any tax, interest and penalties imposed under Chapter 13 of Subtitle B of the Internal Revenue Code (the “generation skipping transfer tax”) or any similar state statute), in respect of property required to be included in my gross estate for the purposes of such taxes, whether passing under this Will or otherwise, other than i) any property which is subject to such taxes as a result of Section 2044 of the Internal Revenue Code or any similar state statute and which is not exempt from the Federal generation skipping transfer tax or similar state tax (my intention being to preserve exemption from any generation skipping transfer tax); ii) any property passing under any irrevocable trust created by me during my lifetime; iii) or any property over which I have a general power of appointment within the meaning of Section 2041 of the Internal Revenue Code created by a person other than me that I have not exercised. I authorize my Executors, in their absolute discretion, to pay or to decline to pay any such taxes, and interest and penalties thereon, imposed by any foreign government or subdivision thereof.

If my wife, xyz..., survives me, I direct that any such taxes and interest and penalties thereon so paid shall be apportioned to and paid out of my residuary estate.

If my said wife does not survive me, I direct that any such taxes and interest and penalties thereon, other than the New Jersey inheritance tax or any other similar death tax to the extent such inheritance taxes exceed the Federal credit allowed for state death taxes paid, so paid shall be paid without apportionment out of that part of my residuary estate which does not qualify for a charitable deduction or exemption with respect to each such tax, and I direct further that the New Jersey inheritance tax or any other similar death tax so paid, to the extent that such taxes exceed the Federal credit allowed for state death taxes paid, shall be apportioned to and paid from the property passing to each person or entity with respect to whom such tax is imposed.

B. Generation Skipping Transfer Tax. My Executors are authorized to allocate my generation-skipping transfer tax exemption under Section 2631(a) of the Internal Revenue Code, to and among any one or more dispositions of property with respect to which I am the transferor for purposes of such tax, whether such dispositions are contained in this Will or otherwise, in equal or unequal shares, to the exclusion of any one or more such dispositions, as they in their absolute discretion deem to be appropriate. Any allocation so made by my Executors shall be conclusive on all persons interested in any such disposition, and my Executors shall have no liability if, in light of or as the result of subsequent events, a different allocation would have caused a higher value of assets to be exempt from any generation-skipping transfer tax.

My Executors and Trustees are authorized at any time to divide any separate trust or separate trust share created under this Will (including any separate trust or separate trust share created pursuant to the application of this Article), into as many shares, equal or unequal, as they, in their absolute discretion deem appropriate, for purposes of allocating (whether as the result of my death or the death of any other individual) to any one or more of such shares any part or all of the exemption under Section 2631(a) of the Internal Revenue Code, or any successor statute thereto, and to combine such shares with each other, as they, in their absolute discretion, deem appropriate. I further authorize my Trustees, in their absolute discretion, to divide any property
received or held in any trust hereunder with an inclusion ratio, as defined in Section 2642(a)(1)
of the Internal Revenue Code, of neither one (1) nor zero into two separate trusts or trust shares
representing two fractional shares of the property being divided, one to have an inclusion ratio of
one (1) and the other to have an inclusion ratio of zero.

Any death taxes imposed by reason of my death or the death of any other individual and
chargeable against any trust created under this Will shall, if such trust shall theretofore have been
divided or shall then be divisible into separate trusts or separate trust shares, be allocated against
such separate trusts or trust shares (to the exhaustion of each such trust or share respectively) in
descending order of the inclusion ratios (as defined in Chapter 13 of the Internal Revenue Code)
applicable to such trusts or shares.

FIFTH: A. Executors and Trustees. I appoint my wife, xyz..., as Executor of this Will. If my
said wife fails to qualify or ceases to act as such Executor, I appoint ... and ... as successor
Executor of this Will, to take office in the order in which his and her name is set forth. Subject
to the foregoing, any Executor acting hereunder from time to time may by written instrument,
duly acknowledged, appoint any individual or bank or trust company as his, her or its successor
Executor of this Will.

[Or...] Any Executor acting hereunder from time to time may by written instrument, duly
acknowledged, appoint any individual or bank or trust company as his, her or its successor
Executor of this Will. If no such successor is appointed, then I appoint ... and ... as successor
Executor of this Will, to take office in the order in which his and her name is set forth.

A sole, surviving Executor at any time acting hereunder may by written instrument, duly
acknowledged, appoint any individual or bank or trust company as co-Executor of this Will
(provided that a co-Executor who has then ceased to act has not effectively appointed his, her or
its successor Executor).

I appoint ..., as Trustee under this Will. If ...he/she fails to qualify or ceases to act as
Trustee hereunder, then I appoint ... and ... as successor Trustee hereunder, to take office in the
order in which his and her name is set forth.

I appoint the beneficiary of any trust created under Section C. of Article SECOND ... (Residuary)
of this Will as a co-Trustee of such trust for his or her own benefit upon he or she
attaining the age of ...(...) years.

Subject to the foregoing, any Trustee acting hereunder from time to time may, by written
instrument, duly acknowledged, appoint any individual or bank or trust company as his, her or its
successor Trustee hereunder.

[Or...] Any Trustee acting hereunder from time to time may by written instrument, duly
acknowledged, appoint any individual or bank or trust company as his, her or its successor
Trustee under this Will. If no such successor is appointed, then I appoint ... and ... as successor
Trustee under this Will, to take office in the order in which his and her name is set forth.
A sole, surviving Trustee at any time acting hereunder may by written instrument, duly acknowledged, appoint any individual or bank or trust company as a co-Trustee hereunder (provided a co-Trustee who has ceased to act has not effectively appointed his, her or its successor Trustee hereunder).

In the event no Trustee shall be acting or appointed to act as provided herein, then a majority of the beneficiaries hereunder to whom the income of each separate trust hereunder may then be or is then required to be distributed and who are not then under a legal disability may by written instrument, duly acknowledged, appoint any individual or bank or trust company to act hereunder as Trustee.

…A majority of the then current beneficiaries of any trust created hereunder who are not under a disability shall have the right with respect to such trust, from time to time, by a written instrument duly acknowledged and delivered to each Trustee then acting, to remove any then acting bank or trust company as Trustee of such trust, provided that they appoint a bank or trust company in its place as a successor Trustee, which bank or trust company has at least one hundred million ($100,000,000) dollars of trust assets.

Any appointment of a fiduciary hereunder shall be effective at such time and upon such conditions as are set forth in the written instrument making such appointment. The foregoing power of appointment of successor fiduciaries or co-fiduciaries shall be a continuing power that may be exercised as often as required. In the event of a conflict in such appointments, the one latest in date shall control.

Each fiduciary appointed as herein provided shall have all of the powers and authority as if originally named herein, including the foregoing power of appointment of a successor fiduciary or a co-fiduciary.

B. Commissions. I direct that each Executor of my Will and Trustee hereunder shall be entitled to receive commissions for services as such fiduciary at the rates and in the manner provided for a sole Executor or testamentary Trustee, as the case may be, under the laws of the State of New Jersey in effect at the time or times such commissions shall be payable; provided, however, that in the case of any corporate fiduciary hereunder, the commissions of such corporate fiduciary shall be its regularly published fees for such services in effect at the time or times such commissions are payable.

C. Probate. I authorize my Executors to offer this Will for original or separate probate in the jurisdiction in which I am domiciled at my death or, if they deem it advisable or expedient to do so, in any other jurisdiction, and I request the appropriate court of each such jurisdiction to assume jurisdiction. If ancillary or separate administration of my estate is required in any jurisdiction where my Executors are unable or do not desire to qualify as ancillary or separate legal representatives, I appoint as such ancillary or separate legal representative such individual or corporation as my Executors shall designate in writing. Any balance of my property remaining after such ancillary or separate administration shall be delivered, to the extent permitted by law, to my Executors for disposition in accordance with the terms of this Will, or distributed directly without remission, as my Executors shall direct. I direct that all of the
powers and discretion granted to my Executors and Trustees hereunder shall also apply to any such ancillary or separate legal representative.

D. Guardians. If my wife, xyz..., is not living or is under a legal disability at my death, I appoint ..., as testamentary guardian of the person and property of any child of mine who shall not then have attained the age of majority. If ... shall fail or cease to qualify as such guardian, then I appoint ..., as such guardian in his/her place.

E. Bond. I direct that no Executor, Trustee, ancillary or separate legal representative or Guardian named in or appointed pursuant to this Will shall be required to give any bond or other security in any jurisdiction for the faithful performance of the duties of such office, for any reason whatsoever, including the advance payment of fiduciary commissions.

F. Trustee-Beneficiary. Notwithstanding anything contained elsewhere in this Will, no person who is both a Trustee and a beneficiary of any trust hereunder shall participate as Trustee in the exercise of any power to make discretionary allocations of receipts or disbursements as between income and principal or the exercise of any power to make discretionary distributions of principal or income to himself or herself as a beneficiary of such trust.

SIXTH: Powers. I give to my Executors and Trustees, in addition to the authority and power conferred upon them by law (including without limitation the powers set forth at ... N.J.S.A. 3B:14-23), express authority and power to be exercised by them as such fiduciaries, in their discretion, for any purpose, without application to, authorization from or confirmation by any court:

1. To determine what property is covered by general descriptions contained in this Will;

2. To pay my debts, funeral expenses and the expenses of my last illness (all of which I direct shall be paid out of my estate) as soon as the convenience of my estate will permit, and to pay or deliver any legacy without waiting the time prescribed by law;

3. To retain any property forming part of my estate or any trust hereunder in the same form in which it is received, whether or not the same be such as is permitted by law for the investment of trust funds or is deemed to be speculative or hazardous, and including the stock of any corporate fiduciary hereunder and the stock of any corporation in which my fiduciaries may have an interest by the ownership of stock or by being an officer or director thereof;

4. To invest and reinvest any funds of my estate or any trust hereunder in any property, wherever situated, real or personal, of any kind or nature, including without limitation, stocks, whether common, preferred or otherwise, options to buy or sell shares or other property, bonds, secured or unsecured obligations, mortgages, other securities, and interests in any of the foregoing, secured or unsecured, regardless of whether the same are permitted by law for the investment
of trust funds, it being my intention to give my Executors and Trustees the same power of investment and reinvestment which I possessed with respect to my own funds, including, but not limited to, powers to make loans (provided, however, that no loans shall be made to any person who is then acting as an Executor hereof or Trustee hereunder, unless such person is also a beneficiary hereunder) to make short sales, to purchase on margin, to acquire and invest in securities and interests of family-owned entities and in entities in which any Executor hereof or Trustee hereunder may have a personal or other interest;

5. To sell at public or private sale any property which I may own or which may become part of my estate, or any trust hereunder, for such price and upon such terms as they shall deem proper, and to grant options for the purchase thereof;

6. To purchase, exchange, mortgage, manage, partition, improve or otherwise alter any real estate comprising part of my estate, or of any trust hereunder or to lease the same for a term extending beyond the life of the trust without application to any court, upon such terms as they may deem proper, and to execute and deliver deeds, leases, mortgages or other instruments relating thereto;

7. To vote personally or by proxy, and to delegate power and discretion to any such proxy;

8. To exercise subscription, conversion and other rights and options, and to make payments in connection therewith;

9. To continue or renew any loans made by me which may be outstanding at the time of my death and to borrow money from any lender, including any corporate Executor or Trustee, for the purposes of paying taxes or administration expenses, or for any other purpose in the administration of my estate, to pay interest thereon, and to mortgage or pledge any property forming part of my estate or any trust hereunder as security for the repayment of the same;

10. To take any action, and to refrain from taking any action, with respect to any incorporation, reorganization, consolidation, merger, dissolution, recapitalization, refinancing, and any other plan or change affecting any property held by them, and in connection therewith to delegate their discretionary powers, and to pay any assessments, subscriptions and other charges;

11. To register any property in the name of a nominee or in street name or to hold the same unregistered or in such other form that title shall pass by delivery, but without thereby increasing or decreasing their liability as fiduciaries;

12. To apply to the use of any person any property, whether principal or income, vesting in or payable to such person, and in the case of a minor (a) to do so without regard either to the duty of any person to furnish support for such minor or the availability of other funds for such purpose, or (b) to pay or deliver the
same to such minor, or to a guardian or custodian under a gifts to minors act, including a custodian selected by any of them (who may select attaining twenty-one years for termination of the custodianship), or to a parent of such minor, or to a person with whom such minor resides, or to any person authorized by this Will to hold the same, or to the Trustees of any trust for the benefit of such person;

13. Without the consent of any beneficiary to make distributions of principal or income of my estate or any trust hereunder (including the satisfaction of any pecuniary bequest) in cash or in specific property, real or personal, or an undivided interest therein, or partly in cash and partly in such property, and to make distributions of different classes of income for income tax purposes to any one or more beneficiaries; and to do so without regard to the impact thereon to any beneficiary for income tax purposes or the income tax basis of specific property allocated to any beneficiary (including any trust) and without making pro rata distributions of specific assets; provided that in making distributions, property shall be valued as of the date of its distribution;

14. To pay out of my general estate in respect of any real or tangible personal property situated outside the state of the principal administration of my estate at the time of my death any administration expense payable under the laws of the state or country where such property is situated;

15. To renew, assign, alter, extend, compromise, release, with or without consideration, or submit to arbitration, obligations or claims, including claims in respect of taxes, in favor of or against my estate or any trust fund hereunder, and to accept any composition or security for any debt and to allow such time for payment thereof, either with or without security, as to them shall seem proper; and to abandon, in any way, property which they may determine not to be worth protecting;

16. To determine what portion, if any, of the income from wasting assets or stocks of corporations with wasting assets, or of the income from interest-bearing securities selling at a premium which I may leave at the time of my death, or which may subsequently be received or purchased by them, shall be set aside as a sinking fund to amortize such premiums or the depletion of such wasting assets, and upon the sale or collection of such securities or assets for more than their amortized cost to pay over to the then income beneficiary or beneficiaries any part or all of none of such sinking fund as they may, in their discretion, determine advisable;

17. To keep any or all of my estate assets and the assets of any trust hereunder at any place or places, whether in any jurisdiction inside the United States of America or abroad, or with a depository or a custodian at such place or places, to the extent permitted by law, as they may deem advisable; and at any time or from time to time as they deem advisable in their discretion for the benefit or security of my estate or any trust or fund or portion thereof, to remove (or decline to remove) all
or part of the assets or the situs of administration thereof from one jurisdiction to
another jurisdiction and elect that the law of such other jurisdiction shall
thereafter govern the same to such extent as may be necessary and appropriate,
and thereupon the courts of such other jurisdiction shall have the power to
effectuate the purposes of this Will to such extent as may be necessary and
appropriate; this power of removal shall be a continuing power which may be
exercised any number of times including for the purposes of further removal or
change of location of assets or situs of administration and the determination of my
Executors or Trustees, as the case may be, as to any such removal or change of
situs shall be conclusive and binding on all persons interested in my estate or in
any trust or fund hereunder;

18. To hold the principal of any trusts hereunder in one or more consolidated funds
without making a physical division of the investments therein, and to hold the
principal of any trust hereunder in two or more separate sub-trusts, as they may, in
their absolute discretion, deem advisable;

19. To keep the buildings and improvements on any real property in my estate or in
any trust hereunder in good repair and properly insured against loss by fire and
other casualty; and in case of loss or damage to any of the buildings or
improvements, to rebuild and repair the property so damaged and to pay for the
same out of insurance moneys received or out of other funds of my estate or any
trust hereunder;

20. To continue as a going concern, for as long as they may deem advisable, any
business in which I may be engaged at the date of my death, and to continue to
hold the stock, bonds, notes or other evidence of ownership or partial ownership
thereof, as trust investments, to make additional contributions of capital thereto or
to any new corporation, business or venture which to them may seem advisable,
specifically including new businesses or business ventures which ordinarily
would be regarded as speculative in nature, without liability on their part for
losses incurred in connection therewith;

21. To conduct and continue to conduct at the risk and with the assets of my estate or
any trust hereunder, any partnership, limited liability company, joint venture, tax
shelter investment or other business in which I may be engaged or in which I may
have an interest at the time of my death for such period or periods as they may
deeem advisable; to delegate to any partner, member, joint venturer, manager or
employee, or any other person such powers and authority as they may deem
advisable; in their discretion, without application to any court, to organize a
corporation to carry on such partnership, limited liability company, joint venture
or other business; and to take such action with reference thereto as they may deem
advisable;

22. To become or to continue to act as a partner of any partnership or a manager or
member of any limited liability company in which my estate or any trust
hereunder may have an interest and to serve as a director or officer of any corporation, or a manager of any limited liability company the obligations or the stock, bonds or other securities of which constitute a part of the principal of my estate or any trust hereunder; and to vote for themselves or any others as directors, managers or officers of any such corporation or limited liability company and to accept without accountability therefor, salaries or other compensation for services rendered by them as such partner, manager, director or officer, without diminution of or offset to any commissions payable to any fiduciary hereunder;

23. To claim proper deductions either from my gross estate for estate tax purposes or from my estate's gross income for income tax purposes, to have the federal estate tax on my estate fixed on date of death or alternate valuation date values, and to exercise or forbear to exercise any income, gift or estate tax option, without necessity for any adjustment between principal, income, or both, in the share of any beneficiary hereunder, as they may deem advisable;

24. To employ such agents, experts, accountants, tax preparers, custodians, bookkeepers and counsel, investment or legal (including, specifically any corporation, partnership or firm of which any fiduciary hereunder is an officer, employee, director, member, principal or affiliated with in any way), as they shall consider advisable, to delegate discretionary powers to and to rely on information or advice furnished by them, and to compensate them for their services out of principal or income without diminution of or offset to any commissions payable to any fiduciary hereunder, or prior authorization from any court or person interested in my estate or any trust created hereunder, as they may deem advisable; and

25. To pay themselves, individually, at such time or times and without prior approval of any court or person interested in my estate or any trust hereunder or payment of interest or the securing of any bond or rendering of any annual statement, account or computation thereof, such sum or sums on account of commissions to which they may eventually be entitled hereunder as they, in their discretion, may determine to be just and reasonable, to charge the same wholly against principal or wholly against income, or partially against principal and partially against income, as they may, in their discretion, determine advisable, and in the case of any Trustee to retain commissions which they may determine shall be payable out of income from income derived from any year preceding or succeeding the year with respect to which such commissions shall have been earned.

SEVENTH: A. No Annual Accounts. I direct that no Executor, Trustee, ancillary or separate legal representative or Guardian named in or appointed pursuant to this Will shall be required to file annual or other periodic accounts of proceedings in any court having jurisdiction over my estate or any trust created hereunder.

B. Settlement of Accounts. In order to avoid the expense and delay incident to the judicial settlement of accounts, any Executor or Trustee hereunder may from time to time during
administration of my estate or the term of any trust hereunder, in such his, her or its absolute
discretion, render an account, customer statement or other statement of such his her or its
proceedings as Executor or Trustee to the then living persons under no disability of age or
otherwise to whom the assets of the estate or the income of the trust is required to be or may then
be distributed and such persons who would then be presumptively entitled to the remainder of
such trust if it had then terminated. Any such competent adult beneficiaries or beneficiary, as the
case may be, shall have full power to settle finally any such account and on the basis of such
settlement to release such Executor or Trustee from all liability for such Trustee's acts or
omissions as Trustee for the period covered thereby. Such settlement and release shall be
binding upon all interested parties hereunder including those who may be under legal disability
or not yet in being and shall have the force and effect of a final decree, judgment or order of a
court of competent jurisdiction rendered in an action or proceeding for an accounting in which
jurisdiction was duly obtained over all necessary and proper parties. The foregoing provisions,
however, shall not preclude any Executor or Trustee from having such his, her or its accounts
judicially settled if such Executor or Trustee shall so desire.

C. Representation of Interests. I direct that in any judicial proceeding relating to my
estate or any trust created hereunder service upon any person under a disability shall not be
required when another person not under a disability is a party to the proceeding and has the same
interest as the person under the disability.

EIGHTH: Definitions. A. As used in this Will the terms "Executors" and "Trustees"
and pronouns relating thereto shall mean the Executor or Executors and Trustee or Trustees who
may be acting as such hereunder from time to time.

B. As used in this Will the terms "child", "children" or "issue" shall include only natural
issue, persons deriving their relationship to or through their parent or ancestor by legal adoption
prior to such adopted person's attainment of the age of eighteen (18) years, and persons deriving
their relationship to or through their parent or ancestor by legal adoption, and shall not
include persons deriving their relationship to or through their parent or ancestor by
acknowledgment of paternity unless a Court of competent jurisdiction determines such person to
be the natural issue of his or her alleged father on the basis of scientific evidence. I now have ...
children, whose names are ....

C. As used in this Will the phrase the "Internal Revenue Code" shall refer to the Internal
Revenue Code of 1986, as amended from time to time, or any successor statute thereto, together
with such regulations as may be validly promulgated thereunder.

D. Wherever the phrase "per stirpes" is used in this Will with reference to the issue of
any person, it shall mean that the stirpes begin with the children of such person and not at any
generational level junior to such children.

NINTH: A. Spendthrift. No interest of any beneficiary in the income or principal of any
trust created hereunder shall be subject to pledge, assignment, sale or transfer in any manner, nor
shall any beneficiary have the power in any manner to anticipate, charge or encumber his or her
said interest, nor shall said interest of any beneficiary be liable or subject in any manner while in
the possession of my Trustees, for the debts, contracts, liabilities, engagements or torts of such beneficiary.

B. **Survivorship.** If any descendant of mine fails to survive me or any prior beneficiary for a period of ninety (90) days, it shall conclusively be presumed for the purposes of this Will that I survived or that such prior beneficiary survived, as the case may be. If any other beneficiary under this Will and I, or any other prior beneficiary and any other subsequent beneficiary hereunder, shall die simultaneously or under such circumstances that there is not
sufficient evidence that we or they have died otherwise than simultaneously, it shall conclusively be presumed for the purposes of this Will that I survived or that such prior beneficiary survived, as the case may be.

IN WITNESS WHEREOF, I have hereunto set my hand this ___ day of __________, 2019.

______________________________ (L.S.)

ABC...

The foregoing instrument was signed, sealed, published and declared by ABC..., the Testator named therein, as and for his Last Will and Testament, in our joint presence, and we, at the same time, at his request, in his presence, and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses.

______________________________ residing at ______________________________

______________________________

______________________________ residing at ______________________________

______________________________

______________________________ residing at ______________________________

______________________________
STATE OF NEW JERSEY )
 ) ss.:
COUNTY OF 

ABC..., the Testator and witnesses, respectively, whose names are signed to the forgoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testator signed and executed this instrument as his Last Will and Testament, and that he signed it willingly, and that he executed it as his free and voluntary act for the purposes therein expressed, and that each witness states that he or she signed the Will as witness in the presence and hearing of the Testator and that to the best of his or her knowledge, the Testator was at that time eighteen or more years old, of sound mind, and under no constraint or undue influence.

______________________________
ABC..., Testator

______________________________
Witness

______________________________
Witness

______________________________
Witness

Subscribed, sworn to and acknowledged before me by ABC..., the Testator, and subscribed and sworn to before me by ________________, ________________ and ________________, the witnesses, this ___ day of ____________, 2019.

Notary Public
State of New Jersey
My Commission Expires
IN WITNESS WHEREOF, I have hereunto set my hand this ___ day of ____________, 2003.

_________________________________________ (L.S.)

XYZ...

The foregoing instrument was signed, sealed, published and declared by XYZ..., the Testatrix named therein, as and for her Last Will and Testament, in our joint presence, and we, at the same time, at her request, in her presence, and in the presence of each other, hereunto subscribe our names and residences as attesting witnesses.

_________________________________________ residing at __________________________________

_________________________________________

_________________________________________ residing at __________________________________

_________________________________________

_________________________________________ residing at __________________________________

_________________________________________
STATE OF NEW JERSEY       
)                
COUNTY OF               
) ss.:  

XYZ..., __________________________, __________________________ and __________________________, the Testatrix and witnesses, respectively, whose names are signed to the forgoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the Testatrix signed and executed this instrument as her Last Will and Testament, and that she signed it willingly, and that she executed it as her free and voluntary act for the purposes therein expressed, and that each witness states that he or she signed the Will as witness in the presence and hearing of the Testatrix and that to the best of his or her knowledge, the Testatrix was at that time eighteen or more years old, of sound mind, and under no constraint or undue influence.

XYZ..., Testatrix

Witness

Witness

Witness

Subscribed, sworn to and acknowledged before me by XYZ..., the Testatrix, and subscribed and sworn to before me by __________________________, __________________________, the witnesses, this _____ day of _______________ , 2003.

Notary Public
State of New Jersey
My Commission Expires
SIGNED, SEALED, PUBLISHED AND DECLARED by the above-named Testator, as and for his LAST WILL AND TESTAMENT, in the presence of us, who, at his request, in his presence, and in the presence of each other, have hereunto subscribed our names as attesting witnesses the day and year last above mentioned.

_________________________  residing at

_________________________  residing at

_________________________  residing at
Each of the undersigned, individually and severally, being duly sworn, deposes and says:

The within Will dated ________________, 20___, was subscribed in our presence and sight at the end thereof by ABC..., the within named Testator, at .

Said Testator, at the time of making such subscription, declared the instrument so subscribed to be his last Will.

Each of the undersigned thereupon signed his/her name as a witness at the end of said Will, at the request of said Testator and in his presence and sight and in the presence and sight of each other.

Said Testator was, at the time of so executing said Will, over the age of eighteen years, and, in the respective opinions of the undersigned, of sound mind, memory and understanding and not under any restraint or in any respect incompetent to make a will.

Said Testator, in the respective opinions of the undersigned, could read, write and converse in the English language and was suffering from no defect of sight, hearing or speech, or from any other physical or mental impairment which would affect his capacity to make a valid will. The Will was executed as a single, original instrument and was not executed in counterparts.

Each of the undersigned was acquainted with said Testator at such time, and makes this affidavit at his request.
The within original Will was shown to the undersigned at the time this affidavit was made, and was examined by each of them as to the signatures of said Testator and of the undersigned.

The foregoing instrument was executed by said Testator and witnessed by each of the undersigned affiants under the supervision of ____________________, an attorney-at-law.


Severally sworn to before me this

_____ day of ____________, 2003.

Notary Public
DURABLE POWER OF ATTORNEY

KNOW ALL MEN AND WOMEN BY THESE PRESENTS, that I, abc, residing at …., County of …., State of New Jersey, have made, constituted and appointed, and by these presents do make, constitute and appoint xyz, residing at …., County of …., State of New Jersey, my true and lawful attorney, severally and not jointly, to act in, manage, and conduct all my estate and all my affairs, and for that purpose for me and in my name, place and stead, and for my use and benefit, and as my act and deed, to do and execute, or to concur with the persons jointly interested with myself therein the doing or executing of, all or any of the following acts, deeds, and things, that is to say:

(1) To buy, receive, lease, accept, or otherwise acquire, to sell, convey, mortgage, hypothecate, pledge, quitclaim, or otherwise encumber or dispose of, or to contract or agree for the acquisition, sale, conveyance, disposal or encumbrance of, any property whatsoever and wheresoever situated, be it in my name or not, be it real, personal, or mixed, or any custody, possession, interest, or right therein or pertaining thereto, upon such terms as my attorney shall think proper, including but not limited to the right to transfer or otherwise convey that certain real property located at …., and designated as Block …., Lot …., in the … of …., County of …., State of New Jersey, and to execute any and all documents reasonably necessary or required to effectuate such transfer of title to said real estate, including but not limited to execution of a contract for sale, deed, affidavit of title, HUD-1 Settlement Statement (RESPA), mortgage documents, releases or other similar documents;

(2) To take, hold, possess, invest, lease, or let, or otherwise manage any or all of my real, personal, or mixed property, or any interest therein or pertaining thereto, to reject, remove or relieve tenants or other persons from, and recover possession of, such property by all lawful means, and to maintain, protect, preserve, insure, remove, store, transport, repair, rebuild, modify, or improve the same or any part thereof;

(3) To conduct banking transactions as set forth in Section 2 of P.L. 1991, C.95 (C. 46:2B-11) of the State of New Jersey;
(4) To make, do, and transact all and every kind of business of whatever kind or nature, including the receipt, recovery, collection, payment, compromise, settlement, and adjustment of all accounts, legacies, bequests, interests, annuities, rents, claims, demands, debts, taxes, and obligations, which may now or hereafter be due, owing or payable by me or to me;

(5) To make, endorse, accept, receive, sign, seal, execute, acknowledge, and deliver deeds, bills of sale, mortgages, assignments, agreements, contracts, certificates, hypothecations, checks, notes, bonds, vouchers, receipts, releases, documents relating to life or other insurance policies, settlement statements, affidavits, and such other instruments in writing of whatever kind and nature, as may be necessary or convenient;

(6) To make deposits or investments in, or withdrawals from, any account, holding, or interest which I may now or hereafter have, or be entitled to, in any bank, trust, or investment institution, including postal savings, depository offices, credit unions, savings and loan associations, and similar institutions, including a national chartered bank or a state chartered bank, to exercise any right, option or privilege pertaining thereto, to open or establish accounts, holdings, or interests of whatever kind or nature, with any such institution, and to endorse any funds received from the disposal, sale or other conveyance of any or all of any real, personal or mixed property and direct such funds to be applied towards the satisfaction or payment of any debt in my name or in my said attorney’s name, or in our names jointly, either with or without right of survivorship;

(7) To institute, prosecute, defend, compromise, arbitrate, and dispose of legal, equitable, or administrative hearings, actions, suits, attachments, arrests, distresses or other proceedings, or otherwise engage in litigation in which I may be involved or subject to;

(8) To act as my attorney or proxy in respect to any stocks, shares, bonds, or other investments, rights or interests, I may now or hereafter hold;

(9) To engage and dismiss agents, counsel, and employees, and to appoint and remove at pleasure any substitute for, or agent of, my said attorney, in respect to all or any of the matters or things herein mentioned, and upon such terms as my attorney shall think fit, including without limitation legal counsel to represent my attorney in fact or me in all matters relating to my affairs, including any guardianship proceeding brought by any person with respect to me, and to compensate such legal counsel independently from any Court rule or statute regarding the costs of such proceedings;

(10) To prepare, execute and file gift, income and other tax returns, claims for refund covering all or a portion of any taxes paid and other governmental reports, declarations, applications, requests and documents;

(11) To appear for me and represent me before the Treasury Department or any other governmental agencies, in connection with any matter involving federal gift, income or other taxes for any year to which I am party, giving my said attorney full power to do everything
whatsoever requisite and necessary to accomplish the foregoing, including without limitation, to receive confidential information, to receive refund checks, to execute waivers of the statute of limitations and to execute closing agreements as fully as the undersigned might do if personally present, giving my said attorney authority to appoint attorneys to represent my said attorney in connection therewith with full power of substitution and revocation at any time;

(12) To enter any safe deposit box or other place of safekeeping or deposit which I may now or hereafter occupy or possess;

(13) To make gifts of my property, in such amounts, outright or subject to such trusts, revocable or irrevocable, to any one or more persons or entities, in a manner consistent with my estate planning, to create, modify or revoke a trust for my benefit, to make additions to an existing trust for my benefit, to disclaim, renounce or release any interest in property, to renounce fiduciary positions, to withdraw and receive the income or corpus of a trust, to handle and engage in transactions regarding interests in estates and trusts, to add, delete or otherwise change the beneficiaries of any life insurance policies or other qualified or nonqualified benefit plans, to create, modify or terminate joint interests in property, including bank or securities accounts and toted trust accounts, and to and to pursue such estate, gift and income tax planning opportunities as may be available to me, as my said attorney in his or her absolute discretion may determine;

(14) To receive and endorse for deposit in any account any payments that I receive from any branch or department of the United States or other government, including without limitation, Social Security payments, Department of Veterans Affairs payments or grants, Medicare or Medicaid payments, and tax refunds;

(15) To receive and open my mail, change my mailing address, and otherwise represent me in any matter concerning the U.S. Postal Service;

(16) To apply for, fund, modify, withdraw from, or terminate a qualified tuition plan authorized under 26 USC §529, or its successor provisions, for any of my descendants, including the right to combine accounts, to transfer an account from one state to another, to redirect the investment of the account (to the extent permitted by law), or to change the designated beneficiary of the plan;

(17) To demand, obtain, review, and release to others medical records or other documents protected by the patient-physician privilege, attorney-client privilege, or any similar privilege, including all records subject to, and protected by, the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA") (I designate my attorney-in-fact as my personal representative under HIPAA);

(18) To file or process claims for any medical bills with all insurance companies through which I have coverage, including but not limited to Medicare and Medicaid, and to receive from Blue Cross/Blue Shield or any other insurer information obtained in the
adjudication of any claim in regard to services furnished to me under Title 18 of the Social Security Act;

(19) To create, fund, and maintain an Income Trust pursuant to 42 USC §1396(d)(4)(B) in order to qualify me for Medicaid or any other public assistance benefits;

(20) To maintain my present domicile or to adopt a new domicile for me appropriate to my living arrangements from time to time; and

(21) To delegate any one or more of the foregoing powers to such one or more persons or entities as my attorney in fact may, in his or her absolute discretion, determine to be necessary or appropriate, in the exercise of reasonable care, skill and caution.

Giving and granting unto my said attorney full power and authority to do and perform any and every act, deed, matter, and thing whatsoever in and about my estate, property, and affairs as fully and effectually to all intents and purposes as I might or could do in my own proper person if personally present, the above specially enumerated powers being in aid and exemplification of the fully, complete and general power herein granted, and not in limitation or definition thereof, and hereby ratifying all that my said attorney shall lawfully do or cause to be done by virtue of these presents.

In the event that my said attorney in fact is not available to act by reason of death of disability, or in the event my said attorney in fact chooses to delegate any or all of the foregoing powers as evidenced by a signed writing to the successor[s] named herein, then I by these presents do hereby make, constitute and appoint … residing at …, as successor as my true and lawful attorney, severally and not jointly, to act in, manage, and conduct all my estate and all my affairs, and for that purpose for me and in my name, place and stead, and for my use and benefit, and as my act and deed, to do and execute, or to concur with the persons jointly interested with myself therein the doing or executing of, all or any of the foregoing acts, deeds, and things.

In appointing an attorney in fact to act as my agent as provided herein, it is not my intention to impose on any person acting hereunder any liability for any loss in the value of my assets that does not arise either from the failure to use reasonable care in actions actually taken or from the breach of my agent’s fiduciary duties to act loyally for my benefit, to act within the scope of the authority granted herein, and to keep records of transactions in which my attorney in fact actually engages. I understand that any such person may nonetheless be subject to liability for actions taken outside of the scope of the relationship created by this instrument.

THIS POWER OF ATTORNEY IS EFFECTIVE NOW AND SHALL NOT BE AFFECTED BY THE DISABILITY OR INCAPACITY OF THE UNDERSIGNED PRINCIPAL, ABC, OR THE LAPSE OF TIME.

The undersigned principal shall be under a disability if the principal is unable to manage his or her property and affairs effectively for any reason whatsoever, including without
limitation, mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power or disappearance.

In all references herein to any parties, persons, entities or corporations, the use of any particular gender or the plural or singular number is intended to include the appropriate gender or number as the text of the within instrument may require.

Any third party to whom the within power of attorney is presented may retain and rely upon a photocopy of the original signed document, or may retain and rely upon a certified copy of the original.

IN WITNESS WHEREOF, I, ABC, have hereunto set my hand and seal this ________ day of ______________, 2019.

___________________________________

ABC

___________________________________

Social Security Number
BE IT REMEMBERED, that on this __________ day of __________ 2013, before me, Notary Public, personally appeared ABC, who, I am satisfied, is the grantor named in the within Power of Attorney; and I having made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as and for his voluntary act and deed, for the uses and purposes therein expressed.

___________________________________
Notary Public
State of New Jersey
My Commission Expires

BE IT REMEMBERED, that on this __________ day of __________ 2019, before me, Notary Public, personally appeared ABC, who, I am satisfied, is the grantor named in the within Power of Attorney; and I having made known to her the contents thereof, she did acknowledge that she signed, sealed and delivered the same as and for her voluntary act and deed, for the uses and purposes therein expressed.

___________________________________
Notary Public
State of New Jersey
My Commission Expires
ADVANCE DIRECTIVE FOR HEALTH CARE

(LIVING WILL)

This Advance Directive is one of many forms of advance directives which are available; others are equally valid. Completion of an advance directive is voluntary. Your medical care is not contingent upon your completion of an advance directive. Please consider whatever advance directive you may choose carefully. It is important that each person completing an advance directive be fully informed as to its meaning and implications.

To my Family, Doctors and others concerned with my care:

A. I, ABC..., being of sound mind, hereby declare and make known my instructions and wishes for future health care in the event that for reasons due to physical or mental incapacity, I am unable to participate in decisions regarding my care.

B. Please initial the statement or statements with which you agree: (select #1 or #2, but not both)

   1. ___ I direct that all medically appropriate measures be provided to sustain my life, regardless of my physical or mental condition.

   2. ___ If I experience extreme mental or physical deterioration such that there is no reasonable expectation of recovery or regaining a meaningful quality of life, then life-prolonging measures should not be initiated; or if they have been, they should be discontinued. Those life-sustaining procedures or treatments that may be withheld or withdrawn include but are not limited to cardiac resuscitation, respiratory support (ventilator) and artificially administered fluids and nutrition.

   3. ___ I direct that I be given appropriate medical care to alleviate pain and keep me comfortable.

C. Additional Comments or Instructions

_____________________________________________________________________

_____________________________________________________________________

_________________________
D. I authorize my attending physicians and any hospital or other health care professional or institution providing health care to me to provide and release to my Health Care Representatives designated herein and any member of my immediate family, or if no member of my immediate family is then living, my next of kin, my medical reports and any diagnoses, prognoses, medical records or other documents protected by the patient-physician privilege, attorney-client privilege, or any similar privilege, including all records subject to, and protected by, the Health Insurance Portability and Accountability Act of 1996, as amended ("HIPAA") (I designate my health care representative named below as my personal representative under HIPAA).

E. Designation of a Health Care Representative

I hereby designate:

Name: ___________________________ Relationship: ___________________________

Address: ___________________________

City: ___________ State: ___________ Telephone: ___________

as my Health Care Representative to make health care decisions about accepting, refusing or withdrawing treatment in accordance with my wishes as stated in this document. In the event my wishes are not clear, or a situation arises that I did not anticipate, my Health Care Representative is authorized to make health care decisions in my best interests, based upon what is known of my wishes.

F. Alternative Representative: If the person I have designated above is unable, unwilling or unavailable to act as my Health Care Representative, I hereby designate the following person(s) to do so, to act in the order in which his and/or her name is set forth:

1. Name: ___________________________ Relationship: ___________________________

Address: ___________________________

City: ___________ State: ___________ Telephone: ___________

2. Name: ___________________________ Relationship: ___________________________

Address: ___________________________

City: ___________ State: ___________ Telephone: ___________
I have discussed my wishes with these persons and trust their judgment on my behalf. I understand the purpose and effect of this document, and I sign it knowingly, voluntarily and after careful deliberation.

Signature __________________________ Date __________________________

G. Witnesses (cannot be Health Care Representative or Alternative Representative listed above in E or F)

I declare that the person who signed this document, or asked another to sign this document on her behalf, did so in my presence, that she is personally known to me, and that she appears to be of full age, sound mind and free of undue influence.

Witness __________________________ Date __________________________
Witness __________________________ Date __________________________

STATE OF NEW JERSEY )
) S.S.
COUNTY OF )

BE IT REMEMBERED, that on this _________ day of ____________, 2019, before me, a Notary Public for the State of New Jersey, personally appeared ABC..., who, I am satisfied, is the person named in the within instrument, and who did acknowledge that she executed the same as and for her voluntary act and deed, for the uses and purposes set forth therein.

__________________________________________
Notary Public
My Commission Expires:
State of New Jersey
With the rampant expansion of social media and online technologies over the past decade, it is no surprise that Facebook, MySpace, Twitter, Instagram, YouTube and blogs have made their way into the courtroom, pervaded the jury box, and even pierced the veil of judges' chambers. This expansion of social media technologies has raised many questions about the use of the information that can be obtained and the ways attorneys go about obtaining that information. This article addresses some of the ethical issues that can arise when an attorney turns to social media platforms or online technology during a trial.

Social media research has been described as the wild West by some legal commentators, and for this reason bar associations throughout the country have started establishing parameters for ethical online social media research at trial. About a year ago, during the summer of 2012, the New York State Bar Association Committee on Professional Ethics issued Formal Opinion No. 2012-2, titled “Jury Research and Social Media.” To date, the opinion appears to be the most comprehensive analysis of the subject.

Formal Opinion 2012-2 addresses the ethical restrictions that apply to an attorney's use of social media websites to research potential or sitting jurors. The starting point for this analysis was the New York Rules of Professional Conduct (RPCs) and in particular, RPC 3.5, which addresses the maintenance and partiality of tribunals and jurors. Among other things, RPC 3.5 states that “a lawyer shall not ... (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.”

This rule is similar to New Jersey RPC 3.5, titled “Impartiality and Decorum of the Tribunal.” Under New Jersey RPC 3.5(c) a lawyer shall not communicate ex parte with a juror or prospective juror except as permitted by law.

Social Media Research of Jurors During the Jury Selection Process

In light of the language in New Jersey's and New York's versions of RPC 3.5, one of the ethical issues that arises most often involves the use of social media research during the jury selection process. Formal Opinion 2012-2 analyzed this issue and found that “[i]f a juror were to (i) receive a 'friend' request (or similar invitation to share information on a social network site) as a result of an attorney's research, or (ii) otherwise to learn of the attorney's viewing or attempted viewing of the juror's pages, posts, or comments, that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification.”

Formal Opinion 2012-2 found that the same attempts to research a juror might constitute a prohibited communication even if inadvertent or unintended, because NY RPC 3.5 does not contain a mens rea requirement. The same appears to be true with
NJ RPC 3.5, which does not contain a *mens rea* requirement, and by its express terms prohibits all *ex parte* communications with jurors, even if inadvertent.

Thus, if an attorney does not know the functionality of a social media platform, he or she should proceed with caution in conducting research, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of the rules of professional conduct. Fortunately, most search engines for social media platforms do not permit registered members to learn who accessed their information. LinkedIn, however, allows its registered members to learn of individuals who viewed their profiles, *44* and attorneys should understand the functionality of the LinkedIn search engine and other similar search engines to minimize the risk of unintended communications with prospective jurors.

Although some attorneys may question if Internet research on jurors is even permissible during *voir dire*, the New Jersey Appellate Division found the practice acceptable. In *Carino v. Muenzen*, *3* a medical malpractice action, the plaintiff's counsel was using Google to conduct research on potential jurors in the *venire*. When this was brought to the attention of the trial judge, the court prohibited the research because: 1) the plaintiff's counsel did not provide advance notice to the court and opposing counsel, and 2) the judge wanted to create an “even playing field,” since the defendant's counsel was not conducting the same research. *4*

On appeal, the plaintiff's counsel argued that the trial court abused its discretion during jury selection by precluding him from accessing the Internet to obtain information on prospective jurors. The Appellate Division noted that no authority exists for the trial court's determination that counsel is required to notify an adversary and the court in advance of accessing the Internet during jury selection or any other part of a trial. The Appellate Division also criticized the trial court's effort to create an “even playing field,” noting that Internet access was open to both counsel. It thus concluded that the trial court acted unreasonably in preventing use of the Internet by the plaintiff's counsel, but nevertheless affirmed the judgment because the plaintiff's counsel had not demonstrated any prejudice resulting from the failure to use Internet research on potential jurors. *5*

Assuming access to the Internet is available, *Carino v. Muenzen* provides support for the principle that online research of potential jurors is permissible in New Jersey courts.

A federal court in the Eastern District of New York recently issued a similar ruling in *U.S. v. Watts*. *6* There, the defendant's counsel in a criminal matter filed a motion to permit a jury consulting firm to perform Internet research on potential jurors. The initial application to the court requested the name of jurors in the jury pool in advance of when the *venire* appeared, so research could be performed in advance. This portion of the application was denied. The court, however, allowed the parties to conduct Internet research on potential jurors during the *venire*, on the following three conditions: 1) the parties could not make unauthorized or improper direct contact with prospective or current jurors, including using social networking platforms that would leave a record with the account holder of having been searched; 2) the parties were barred from informing jurors that Internet searches were being conducted regarding them; and 3) if any party had reason to believe a juror may have neglected to disclose information bearing on his or her fitness to serve as a juror, that party was required to inform the court and opposing counsel immediately. *7* On this last restriction, the court noted that an “attorney's duty to inform the court about suspected juror misconduct trumps all other professional obligations, including those owed a client.” *8*

Not all courts, however, agree that Internet research on jurors is permissible or even beneficial. Recently, a judge in Montgomery County, Maryland, denied a request to allow a defense attorney in a child sex abuse case to use the Internet to research potential jurors during the jury selection process. *9* The judge believed Internet research on potential jurors was totally inappropriate and could have a chilling effect on jury service if individuals knew they were going to be “Googled” as soon as they walked into the courthouse. *10*
Social Media Research of Jurors During Trial

A second issue that arises with social media research is whether attorneys can continue to research and monitor the actions of sitting jurors during a trial. In this regard, the same ethical restrictions that apply to communications with potential jurors also apply to sitting jurors. These restrictions include the prohibition on an attorney communicating directly and indirectly with a sitting juror. Despite these restrictions, attorneys are well served to engage in unobtrusive monitoring of jurors during trial to ensure an unbiased, independent jury. Indeed, in a recent survey by the Federal Judicial Center, 79 percent of judges who responded said they had no way of knowing whether jurors had violated a social media ban. As such, social media monitoring is often left in the hands of counsel and, in some higher profile cases, the media. This was the case in the corruption trial of former Baltimore Mayor Sheila Dixon. There, a newspaper reported that certain members of the jury were communicating with each other about the case via Facebook. This report served as one of the bases for the mayor to seek a new trial. Before the court could rule on the application, however, a plea was entered. Nevertheless, the juror conduct and media attention underscore the need to monitor sitting jurors.

Another instance of jurors' use of social media and the need for monitoring occurred in *Sluss v. Commonwealth of Kentucky*. In *Sluss*, the defendant was convicted of murder and several other criminal counts arising from a motor vehicle death following a highly publicized trial. After the trial, it came to light that two of the jurors were Facebook friends with the victim's mother. The defendant appealed the conviction and argued, among other things, that the trial court erred in denying his motion for a new trial based on jury misconduct. The defendant contended that the jurors being Facebook friends with the victim's mother was evidence of misconduct.

On appeal, the Kentucky Supreme Court addressed the issue of who on Facebook is actually a friend, as opposed to a mere negligible connection who blindly accepts a friend request and has no real relationship. While opining that a juror who is a Facebook friend with a family member of a victim, standing alone, is probably not enough evidence to presume juror bias sufficient for a new trial, the Court remanded the matter for further inquiry to address “the extent of the interaction and the scope of the relationship” between the two jurors and the victim's mother, and whether juror misconduct occurred. In so concluding, the Court stated that “it is the closeness of the relationship and the information that a juror knows that frames whether that juror could reasonably be viewed as biased.”

Another example of a juror's misuse of social media was discussed in *U.S. v. Fumo*, which involved the highly publicized prosecution of Pennsylvania State Senator Vincent Fumo.

The portion of the appeal relevant to social media involved a juror posting various comments on Facebook. After it was reported by the media that a juror had been posting on Facebook about the trial, the juror deleted the comments from his Facebook page. The most discussed post involved the juror's comment that “This is it ... no looking back now!” As a result, the court reviewed the Facebook posts and held an in camera review in which it asked the juror about his activity and general media consumption. The juror claimed he had accidently seen the news report regarding his Facebook posts when a program he had been watching on television ended and the news began, but otherwise indicated he took his responsibilities and obligations as a juror seriously. Based on this review, the trial court concluded that most of the Facebook posts involved what the court deemed “ramblings” that were “so vague as to be virtually meaningless.” It thus concluded that the juror's Facebook posts were not substantially prejudicial.

On appeal, the Third Circuit affirmed, finding the trial court did not abuse its discretion in denying the defendants' motion for a new trial. It largely agreed that the juror's Facebook posts were “nothing more than harmless ramblings having no prejudicial effect,” and there was no evidence his extra-jury misconduct had any prejudicial effects on the defendants.
Nonetheless, the implications of jurors' improper use of social media during a trial are high. As noted by the Third Circuit in *Fumo*, “a juror who comments about a case on social media may engender responses that include extraneous information about the case or attempts by third-parties to exercise persuasion or influence.” When attorneys are aware of a juror's use of social media in a manner they believe is improper, they have an obligation to report the misconduct to the court and their adversary. And, once reported, a court has a number of remedies at its disposal.

In New Jersey, these remedies could include imprisonment and/or civil fine. These remedies were discussed in the recent decision issued by Assignment Judge Peter Doyne in *In re Daniel Kaminsky*. *Kaminsky* involved contempt proceedings against a juror for conducting Internet research during deliberations, in direct violation of the court's explicit instructions not to conduct such research. The situation came to light after two of the charged juror's fellow jury members reported they thought the research tainted the deliberations, which ultimately resulted in a hung jury. In a well-reasoned opinion outlining the implications of the ease of Internet research on modern juries, Judge Doyne held the juror in contempt and fined him $500. In so holding, Judge Doyne stated, “[a] clear message apparently need[s] be sent [that] the offense of contumely violating a court's instruction concerning internet use is serious, with consequential ramifications.”

Similarly, in *Juror Number One v. Sup. Ct. of Sacramento*, a California court, upon receiving a report that a juror posted items on his Facebook account concerning a criminal trial while it was in progress, ordered the juror to execute a consent form authorizing Facebook to release for *in camera* review all items he posted during the trial. The juror filed a petition for *writ* of prohibition that challenged the order on the basis that it was in violation of the Stored Communications Act, his Fourth and Fifth Amendment rights and his rights to privacy. The court made short work of the arguments and found a juror had no expectation of privacy in his or her Facebook posts and, in any event, privacy rights do not trump the litigants' rights to a fair trial free from juror misconduct.

Courts in Florida and Texas also have sent a clear message to jurors who engage in the improper use of social media during a trial. One Florida juror was held in contempt and sentenced to three days in jail when it came to light that he ‘friended’ a defendant in a personal injury case. Similarly, a Texas man was sentenced to two days of community service for friending a plaintiff.

**Social Media Research to Impeach a Witness During Trial**

A third issue that arises from social media research at trial involves whether counsel can use this technology to obtain information to impeach a witness. In analyzing this issue, it is important for an attorney to understand that *social media platforms are no different than direct or indirect communication with any individual. Accordingly, attorneys should re-familiarize themselves with NJ RPC 4.1, 4.2, 8.4(c) and 8.4(d) before conducting a social media search for impeachment evidence. These Rules of Professional Conduct provisions prevent, among other things, attorneys from doing the following:*

1. making materially false statements of fact or law to a third person, NJ RPC 4.1;
2. communicating with a person the lawyer knows or should know is represented by counsel, NJ RPC 4.2;
3. engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, NJ RPC 8.4(c); and
4. engaging in conduct that is prejudicial to the administration of justice, NJ RPC 8.4(d).

In light of these RPC provisions and other authorities, it is wholly permissible for an attorney to access and review the public social network pages of a witness at trial to search for impeachment material. A lawyer also can engage in truthful friending of an unrepresented party in a manner that does not involve trickery or deception to obtain information.
What an attorney cannot do is mislead a witness or potential witness in order to obtain information about them. Two defense attorneys recently were charged with ethics violations by the Office of Attorney Ethics of the Supreme Court of New Jersey for allegedly causing their paralegal to friend the plaintiff in a personal injury case in order to access information on the plaintiff's Facebook page that was not otherwise available to the public. The attorneys contended they never instructed the paralegal to friend the plaintiff, but simply instructed her to conduct online social media research on him.

In light of this story, if an attorney is going to conduct research on Facebook or another social media platform in order to obtain non-public information, it is important the attorney disclose his or her true identity and the truthful reason for the connection request.

Social Media Use by Attorneys

Finally, it goes without saying that attorneys, like everyone else, should be cognizant of their own use of social media. At least one judge in Galveston, Texas, utilized Facebook to catch an attorney who requested a continuance, allegedly because of the death of her father. The attorney, however, had recently posted a string of status updates on Facebook portraying a week of drinking and partying. In a separate incident, the same judge caught another attorney griping about having to handle a motion before her. Thus, just as attorneys are well advised to instruct their clients to maintain private Facebook pages, they too must be cognizant of their social media footprint and their obligation of candor toward a tribunal.

While some readers may seek to avoid the ethical issues discussed in this article entirely, by not using social media at all, this may not be the right answer. At least one court has held that an attorney may be under a limited obligation to use certain new technologies.

In Johnson v. McCullough, the Supreme Court of Missouri arguably created a limited duty for lawyers to research members of the venire. During voir dire, the plaintiff's counsel asked if any of the panelists had been involved in prior litigation. While many panelists responded, one member did not, and she eventually became a sitting juror. After the jury returned the verdict for the defendant, the plaintiff's counsel searched a litigation database and found the non-responsive juror had been a defendant in multiple debt collection cases and a personal injury case. The plaintiff filed a motion for a new trial, alleging jury non-disclosure based on the juror's failure to disclose her involvement in prior litigation. The trial court granted the motion, and the Supreme Court of Missouri affirmed.

The Missouri Supreme Court stated that “[w]ith the relative present day ease of procuring the venire member's prior litigation experiences, via Case.net, “[w]e encourage counsel to make such challenges before submission of a case whenever practicable.” The Court further noted that, “to preserve the issue of a juror's non-disclosure, a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial court any relevant information prior to trial.”

While most courts have not gone as far as the Missouri Supreme Court, a lawyer who fails to acquire at least a basic understanding of these new technologies does so at his or her--or perhaps more importantly, his or her client's--own peril.

Conclusion

In sum, social media has become a particularly effective arrow in the quiver of technologically savvy attorneys. While social media use in the litigation context continues to evolve, it is important that attorneys keep in mind the potential ethical implications of its use, for research or otherwise, and to avoid any action by them or their subordinates that could be construed as dishonest or deceitful.
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2 Id. at *6.


4 Id. at *9-10.

5 Id.


7 Id. at *103-104.

8 Id. at *104 (quoting United States v. Daugerdas, 867 F. Supp. 2d 445, 484 (S.D.N.Y. 2012)). While some attorneys may be skeptical of social media research on prospective jurors, the benefits of such research are potentially immense. For example, a trial consultant in Philadelphia stated that in a product liability case in which her client was representing the defendant, she discovered through online research that a juror had posted on Facebook that one of the juror's heroes was Erin Brokovich. This research helped the trial consultant's client decide to remove the juror from the panel. B. Grow, Internet v. Courts: Googling for the Perfect Juror, Reuters (Feb. 17, 2011). Likewise, in a case in the Circuit Court of Jackson, Mississippi, Khoury v. Conagra, social media research enabled attorneys for the defendant, Conagra, to have a juror dismissed for anti-corporate sentiments after it was discovered he maintained a corporate blog called “The Insane Citizen: Ramblings of a Political Madman,” which included statements such as “*F --- McDonald's.*” Id.; see also Khoury v. Conagra Foods, Inc., 368 S.W.3d 189 (Mo. Ct. App. 2012).


10 Id.

11 But see U.S. v. Kilpatrick, 2012 U.S. Dist. LEXIS 110165 (E.D. Mich. Aug. 7, 2012) (during the high-profile prosecution of Detroit's former mayor, the court impaneled an anonymous jury and held that parties were not permitted to monitor jurors' social media use, but the court would do so).

12 S. Eder, Jurors' Tweets Upend Trials, Wall Street Journal (March 5, 2012). Interestingly, as pointed out by Judge Peter E. Doyne in In re Daniel Kaminsky, 2012 N.J. Super. Unpub. LEXIS 539, *5-9 n.3 (March 9, 2012), which is discussed in greater detail infra, Judge Shira A. Scheindlin of the Southern District of New York attempts to prevent the problem of juror Internet research by requiring jurors to sign, under penalty of perjury, a pledge agreeing to obey the court's Internet use instructions in highly publicized criminal trials.


14 381 S.W.3d 215 (Ky. 2012).

15 Id. at 223.

16 Ibid.

17 655 F.3d 288 (3d Cir. 2011).

18 Id. at 299.
Id. at 306.

Id. at 305.

See Formal Opinion 2012-2, supra note 1; NJ RPC 3.3; U.S. v. Watts, 2013 U.S. Dist. LEXIS 42242, *104 (E.D.N.Y. March 22, 2013). Additionally, it appears to be a well-settled concept that a sitting juror commits misconduct by violating her oath, or by failing to follow the instructions and admonitions given by the trial court. As such, a juror may well have an obligation to report fellow juror misconduct either by accepting the oath or, perhaps more pointedly, if instructed by the court to do so.


Id. at *32.


See Eder, supra, note 10; see also R. Eckhart, Juror Jailed over Facebook Friend Request, Sarasota Herald-Tribune (Feb. 16, 2012).

See Eder supra, note 10.


An attorney cannot friend a party the attorney knows or should know is represented by counsel. NJ RPC 4.2.

Formal Opinion 2012-2, supra note 1.


In Sept. 2012, before the ethics hearings began, the two lawyers filed suit against the Office of Attorney Ethics in the Superior Court of New Jersey seeking declaratory and injunctive relief. See M. Gallagher, Facebook Case Tests Courts' Power To Review Ethics Tribunals' Actions, N.J. Law Journal (July 2, 2013). On Jan. 22, 2013, the lower court dismissed the case, Robertelli v. OAE, for lack of jurisdiction. Id. The case is pending in the Appellate Division. Id.


See M. McDonough, Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches, A.B.A. Chicago (July 31, 2009).

306 S.W.3d 551 (Mo. 2010).

Id. at 558.

Id. at 559.
SOCIAL MEDIA ETHICS GUIDELINES

OF THE

COMMERCIAL AND FEDERAL LITIGATION SECTION

OF THE

NEW YORK STATE BAR ASSOCIATION

UPDATED MAY 11, 2017

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Opinions expressed are those of the Section preparing these Guidelines and do not represent those of the New York State Bar Association unless and until the report has been adopted by the Association’s House of Delegates or Executive Committee.
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INTRODUCTION

Social media networks such as LinkedIn, Twitter and Facebook are becoming indispensable tools for legal professionals and the people with whom they communicate. As use of social media by lawyers and clients continues to grow and as social media networks proliferate and become more sophisticated, so too do the ethics issues facing lawyers. Accordingly, the Commercial and Federal Litigation Section of the New York State Bar Association is updating these social media guidelines – which were first issued in 20141 – to include new ethics opinions as well as additional guidelines where the Section believes ethical guidance is needed (the “Guidelines”). In particular, these Guidelines add new content on lawyers’ competence, the retention of social media by lawyers, client confidences, potential positional conflicts of interest associated with social media posts, the tracking of client social media use, communications by lawyers with judges, and lawyers’ use of social media platforms, such as LinkedIn, to communicate with selected audiences, or with the public in general.

These Guidelines should be read as guiding principles rather than as “best practices.” The world of social media is rapidly changing and “best practices” will continue to evolve to keep pace with such developments. Since there are multiple ethics codes that govern attorney conduct throughout the United States, these Guidelines do not attempt to define a universal set of “best practices” that will apply in every jurisdiction. In fact, even where different jurisdictions have enacted nearly-identical ethics rules, their individual ethics opinions on the same topic may differ due to different social mores, the priorities of different demographic populations, and the historical approaches to ethics rules and opinions in different localities.

In New York State, ethics opinions are issued by the New York State Bar Association and also by local bar associations located throughout the State.2 These Guidelines are predicated upon the New York Rules of Professional Conduct (“NYRPC”)3 and ethics opinions interpreting those rules that have been issued by New York bar associations. In addition, illustrative ethics opinions from other jurisdictions are referenced throughout where, for example, a New York ethics opinion has not addressed a certain situation or where another jurisdiction’s ethics opinion differs from the interpretation of the NYRPC by New York ethics authorities.

1. The Social Media Ethics Guidelines were most recently updated in June 2015.

2. A breach of an ethics rule is not enforced by bar associations, but by the appropriate disciplinary bodies. Ethics opinions are not binding in disciplinary proceedings, but they may be used as a defense in certain circumstances.

3. NY RULES OF PROF’L CONDUCT (NYRPC) (NY STATE UNIFIED CT. SYS., 2013). (These Rules of Professional Conduct were promulgated as Joint Rules of the Appellate Divisions of the Supreme Court In addition, the New York State Bar Association has promulgated comments regarding particular rules, but these comments, which are referenced in these Guidelines have not been adopted by the Appellate Divisions of the Supreme Court).
Social media communications that reach across multiple jurisdictions may implicate other states’ ethics rules. Those rules may differ from the NYRPC. Lawyers should consider the controlling ethical requirements the jurisdictions in which they practice.

The ethical issues discussed in the NYRPC frequently arise in the information gathering phase prior to, or during, litigation. One of the best ways for lawyers to investigate and obtain information about a party, witness, juror or another person, without having to engage in formal discovery, is to review that person’s social media account, profile, or posts. Lawyers must remember, however, that ethics rules and opinions govern whether and how a lawyer may view such social media. For example, when a lawyer conducts research, unintended social media communications or electronic notifications received by the user of a social media account revealing such lawyer’s research may have ethical consequences.

Further, because social media communications are often not just directed at a single person but at a large group of people, or even the entire Internet “community,” attorney advertising rules and other ethical rules must be considered when a lawyer uses social media. For example, it is not always readily apparent whether a lawyer’s social media communications constitute regulated “attorney advertising.” Similarly, privileged or confidential information can be unintentionally divulged beyond the intended recipient if a lawyer communicates to a group using social media. In addition, lawyers must be careful to avoid creating an unintended attorney-client relationship when communicating through social media. Finally, certain ethical obligations arise when a lawyer counsels a client about the client’s own social media posts and the removal or deletion of those posts, especially if such posts are subject to litigation or regulatory preservation obligations. These ethical obligations will also be discussed herein.

Throughout these Guidelines, the terms “website,” “account,” “profile,” and “post” are referenced in order to highlight sources of electronic data that might be viewed by a lawyer. The definition of these terms no doubt will change and new ones will be created as technology advances. However, for purposes of complying with these Guidelines, these terms are interchangeable, and a reference to one should be viewed as a reference to all for ethical considerations.

References to the applicable provisions of the NYRPC and references to relevant ethics opinions are noted after each Guideline, and definitions of important terms used in the Guidelines are set forth in the Appendix.
1. ATTORNEY COMPETENCE

Guideline No. 1.A: Attorneys’ Social Media Competence

A lawyer has a duty to understand the benefits, risks and ethical implications associated with social media, including its use for communication, advertising and research and investigation.

NYRPC 1.1(a) and (b).

Comment: NYRPC 1.1(a) provides: “[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

As Guideline No. 1 recognizes – and the Guidelines discuss throughout – a lawyer may choose to use social media for a multitude of reasons. Lawyers, however, need to be conversant with, at a minimum, the basics of each social media network that a lawyer uses in connection with the practice of law or that his or her client may use if it is relevant to the purpose or purposes for which the lawyer was retained.

Maintaining this level of understanding is a serious challenge that lawyers need to appreciate and cannot take lightly. As American Bar Association (“ABA”) Formal Opinion 466 (2014)\(^4\) states:

As indicated by [ABA Rule of Professional Conduct] Rule 1.1, Comment 8, it is important for a lawyer to be current with technology. While many people simply click their agreement to the terms and conditions for use of an [electronic social media] network, a lawyer who uses an [electronic social media] network in his practice should review the terms and conditions, including privacy features – which change frequently – prior to using such a network.\(^5\)

A lawyer must “understand the functionality and privacy settings of any [social media] service she wishes to utilize for research, and to be aware of any changes in the platforms’ settings or policies.”\(^6\) The ethics opinion also holds that


\(^5\) Id.

“[i]f an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site...”

Indeed, a lawyer cannot be competent absent a working knowledge of the benefits and risks associated with the lawyer’s use of social media. In fact, Comment 8 to Rule 1.1 of the Model Rules of Professional Conduct of the ABA was amended to provide:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Commentary to Rule 1.1 of the NYRPC, which is offered by the New York State Bar Association as informal guidance to practitioners, has also been amended to provide:

To maintain the requisite knowledge and skill, a lawyer should (i) keep abreast of changes in substantive and procedural law relevant to the lawyer’s practice, (ii) keep abreast of the benefits and risks associated with technology the lawyer uses to provide services to clients or to store or transmit confidential information, and (iii) engage in continuing study and education and comply with all applicable continuing legal education requirements under 22 N.Y.C.R.R. Part 1500.

Many other states have also adopted a duty of competence in technology in their ethical codes. Although a lawyer may not delegate his or her obligation to be competent, he or she may rely, as appropriate, on other lawyers or professionals in the field of electronic discovery and social media to assist in obtaining such competence. As NYRPC 1.1 (b) requires, “[a] lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.”

8. NYRPC 1.1 cmt. 8.
9. As of this writing, 27 states have included a duty of competence in technology in their ethical codes. See Robert Ambrogi, 27 States Have Adopted Ethical Duty of Technology Competence, LAWSITES (retrieved on April 30, 2017).
For a discussion of eDiscovery competence in general, see ethics opinions issued by the New York County Lawyers Association Professional Ethics Committee\(^\text{10}\) and the State Bar of California’s Committee on Professional Responsibility and Conduct.\(^\text{11}\)

\(^{10}\) New York County Lawyers Association Professional Ethics Committee, Formal Op. 749 (Feb. 21, 2017).

2. ATTORNEY ADVERTISING

Guideline No. 2.A: Applicability of Advertising Rules

A lawyer’s social media profile that is used only for personal purposes is not subject to attorney advertising and solicitation rules. However, a social media profile, posting or blog a lawyer primarily uses for the purpose of the retention of the lawyer or his law firm is subject to such rules. Hybrid accounts may need to comply with attorney advertising and solicitation rules if used for the primary purpose of the retention of the lawyer or his law firm.

NYRPC 1.0, 7.1, 7.3, 7.4, 7.5, 8.4(c)

Comment: It is clear that a social media profile that is used for work purposes is subject to attorney advertising and solicitation rules. In the case of a lawyer’s profile on a hybrid account that is used for business and personal purposes, given the differing views on whether the attorney advertising and solicitation rules would apply, it would be prudent for the lawyer to assume that they do.

The nature of the information posted on a lawyer’s LinkedIn profile may require that the profile be deemed “attorney advertising.” In general, a profile that contains basic biographical information, such as “only one’s education and a list of one’s current and past employment” does not constitute attorney advertising. According to NYCLA Formal Op. 748, a lawyer’s LinkedIn profile that “includes subjective statements regarding an attorney’s skills, areas of practice, endorsements, or testimonials from clients or colleagues, however, is likely to be considered advertising.”

The NYCLA ethics opinion states that if an attorney’s LinkedIn profile includes a detailed description of practice areas and types of work done in prior employment, the user should include the words “Attorney Advertising” on the lawyer’s LinkedIn profile. If an attorney also includes (1) statements that are reasonably likely to create an expectation about results the lawyer can achieve; (2)

12. NYRPC 1.0(a) defines “Advertisement” as “any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm’s services, the primary purpose of which is for the retention of the lawyer or law firm. It does not include communications to existing clients or other lawyers.”


statements that compare the lawyer’s services with the services of other lawyers; (3) testimonials or endorsements of clients; or (4) statements describing or characterizing the quality of the lawyer’s or law firm’s services, the attorney should also include the disclaimer “Prior results do not guarantee a similar outcome.”

The NYCLA opinion provides that attorneys who allow “Endorsements” from other users and “Recommendations” to appear on one’s profile fall within Rule 7.1(d), and therefore must include the disclaimer set forth in Rule 7.1(e).

Also, the NYCLA opinion noted that if an attorney claims to have certain skills, they must also include this disclaimer because a description of one’s skills – even where those skills are chosen from fields created by LinkedIn – constitutes a statement “characterizing the quality of the lawyer’s services” under Rule 7.1(d).

After NYCLA Formal Opinion 748 was issued, the New York City Bar Association issued Opinion 2015-7 addressing attorney advertising. The New York City Bar opinion addressed attorney advertising in a different manner and provides that an attorney’s LinkedIn profile may constitute attorney advertising only if it meets the following five criteria:

(a) it is a communication made by or on behalf of the lawyer; (b) the primary purpose of the LinkedIn content is to attract new clients to retain the lawyer for pecuniary gain; (c) the LinkedIn content relates to the legal services offered by the lawyer; (d) the LinkedIn content is intended to be viewed by potential new clients; and (e) the LinkedIn content does not fall within any recognized exception to the definition of attorney advertising.

The New York City Bar Association opinion notes that it should not be presumed that an attorney who posts information about herself on LinkedIn is doing so for the primary purpose of attracting paying clients. If someone merely includes a list of “Skills,” a description of one’s practice areas, or displays “Endorsements” or “Recommendations,” without more on their LinkedIn account, this does not, by itself, constitute attorney advertising.

16. Id.
17. NYRPC 7.1(e)(3) provides: “[p]rior results do not guarantee a similar outcome.”
20. Id.
21. Id.
New York City Bar Formal Op. 2015-7 also notes that if an attorney’s LinkedIn profile meets the five-pronged attorney advertising definition, he or she must comply with requirements of Article 7 of the NYRPC, which include, but are not limited to:

(1) labeling the LinkedIn content “Attorney Advertising”;  
(2) including the name, principal law office address and telephone number of the lawyer; (3) pre-approving any content posted on LinkedIn; (4) preserving a copy for at least one year; and  
(5) refraining from false, deceptive or misleading statements. These are only some of the requirements associated with attorney advertising.22

Attorneys practicing in New York should be aware of both opinions when complying with New York’s attorney advertising rules. An attorney’s ethical obligations apply to all forms of covered communications, including social media. If a post on Twitter (a “tweet”) is deemed attorney advertising, the rules require that a lawyer must include disclaimers similar to those described in NYCLA Formal Op. 748.23

Utilizing the disclaimer “Attorney Advertising” given the confines of Twitter’s 140 character limit (which in practice may be even less than 140 characters when including links, user handles or hashtags) may be impractical or not possible. Yet, such structural limitation does not provide a justification for not complying with the ethical rules governing attorney advertising. Thus, attorneys should consider only posting tweets that would not be categorized as attorney advertising to avoid having to comply with the attorney advertising rules within the Twitter environment.24

Rule 7.1(k) of the NYRPC provides that all advertisements “shall be pre-approved by the lawyer or law firm.” It requires that a copy of an advertisement “shall be retained for a period of not less than three years following its initial dissemination,” but specifies a one-year retention period for advertisements contained in a “computer-accessed communication” and yet another retention scheme for websites.25 Rule 1.0(c) of the NYRPC defines “computer-accessed communication” as any communication made by or on behalf of a lawyer or law


25. Id.
firm that is disseminated through “the use of a computer or related electronic
device, including, but not limited to, web sites, weblogs, search engines,
electronic mail, banner advertisements, pop-up and pop-under advertisements,
chat rooms, list servers, instant messaging, or other internet presences, and any
attachments or links related thereto.”26 Thus, social media posts that are deemed
“advertisements,” are “computer-accessed communications, and their retention is
required only for one year.”27

In accordance with NYSBA, Op. 1009, to the extent that a social media
post is found to be a “solicitation,” it is subject to filing requirements if directed to
recipients in New York. Social media posts, like tweets, may or may not be
prohibited “real-time or interactive” communications. This would depend on
whether they are broadly distributed and/or whether the communications are more
akin to asynchronous email or website postings or in functionality closer to
prohibited instant messaging or chat rooms involving “real-time” or “live”
responses. Practitioners are advised that both the social media platforms and
ethical guidance in this area are evolving and care should be used when using any
potentially “live” or real-time tools.

Guideline No. 2.B: Prohibited Use of Term “Specialists” on Social Media

Lawyers shall not advertise areas of practice under headings in social media
platforms that include the terms “specialist,” unless the lawyer is certified by the
appropriate accrediting body in the particular area.28

NYRPC 7.1, 7.4.

Comment: Although LinkedIn’s headings no longer include the term
“Specialties,” lawyers still need to be cognizant of the prohibition on claiming to
be a “specialist” when creating a social media profile.29 To avoid making
prohibited statements about a lawyer’s qualifications under a specific heading or
otherwise, a lawyer should use objective information and language to convey
information about the lawyer’s experience. Examples of such information include
the number of years in practice and the number of cases handled in a particular
field or area.30

26. Id.
27. Id.
29. One court has found that the prohibition on the words “expertise” and “specialty” in relation to
attorney advertising is unconstitutional; see Searcy v. Florida Bar, 140 F. Supp. 3d 1290 (N.D. Fla.
2015).
on Legal Ethics and Prof’l Responsibility, Formal Op. 85-170 (1985)).
A lawyer shall not list information under the ethically prohibited heading of “specialist” in any social media network unless appropriately certified as such. Skills or practice areas listed on a lawyer’s profile under the headings “Experience” or “Skills,” do not constitute a claim by a lawyer to be a specialist under NYRPC Rule 7.4. A lawyer may include information about the lawyer’s experience elsewhere, such as under another heading or in an untitled field that permits biographical information to be included. Certain states have issued ethics opinions prohibiting lawyers from listing their practice areas not only under “specialist,” but also under headings such as “expert.”

A limited exception to identification as a specialist may exist for lawyers who are certified “by a private organization approved for that purpose by the American Bar Association” or by an “authority having jurisdiction over specialization under the laws of another state or territory.” For example, identification of such traditional titles as “Patent Attorney” or “Proctor in Admiralty” are permitted for lawyers entitled to use them.

**Guideline No. 2.C: Lawyer’s Responsibility to Monitor or Remove Social Media Content by Others on a Lawyer’s Social Media Page**

A lawyer who maintains a social media profile must be mindful of the ethical restrictions relating to solicitation by her and the recommendations of her by others, especially when inviting others to view her social media account, blog or profile.

A lawyer is responsible for all content that the lawyer posts on her social media website or profile. A lawyer also has a duty to periodically monitor her social media profile(s) or blog(s) for comments, endorsements and recommendations to ensure that such third-party posts do not violate ethics rules. If a person who is not an agent of the lawyer unilaterally posts content to the lawyer’s social media, profile or blog that violates the ethics rules, the lawyer must remove or hide such content if such removal is within the lawyer’s control and, if not within the lawyer’s control, she may wish to ask that person to remove it.

NYRPC 7.1, 7.2, 7.3, 7.4.

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32. See NYRPC 7.4.
33. See Fl. Bar Standing Comm. on Advertising, Guidelines for Networking Sites (revised May 9, 2016); see also Peter Geraghty, Social Media Endorsements: Undue Flattery Will Get You Nowhere, YOURABA (July 2016).
Comment: While a lawyer is not responsible for a post made by a person who is not his agent, a lawyer’s obligation not to disseminate, use or participate in the dissemination or use of advertisements containing misleading, false or deceptive statements includes a duty to remove information from the lawyer’s social media profile where that information does not comply with applicable ethics rules. If a post cannot be removed, consideration must be given as to whether a curative post needs to be made. Although social media communications tend to be far less formal than traditional forms of communication to which the ethics rules apply, these rules apply with the same force and effect to social media postings.

Guideline No. 2.D: Attorney Endorsements

A lawyer must ensure the accuracy of third-party legal endorsements, recommendations, or online reviews posted to the lawyer’s social media profile. To that end, a lawyer must periodically monitor and review such posts for accuracy and must correct misleading or incorrect information posted by clients or other third-parties.

NYRPC 7.1, 7.2, 7.3, 7.4.

Comment: Although lawyers are not responsible for content that third-parties and non-agents of the lawyer post on social media, lawyers must monitor and verify that posts about them made to profiles they control are accurate. “Attorneys should periodically monitor their LinkedIn pages at reasonable intervals to ensure that others are not endorsing them as specialists,” as well as to confirm the accuracy of any endorsements or recommendations. A lawyer may not passively allow misleading endorsements as to her skills and expertise to remain on a profile that she controls, as that is tantamount to accepting the endorsement. Rather, a lawyer needs to remain conscientious in avoiding the publication of false or misleading statements about the lawyer and her services. Certain social media websites, such as LinkedIn, allow users to approve endorsements, thereby providing lawyers with a mechanism to promptly review, and then reject or approve, endorsements. A lawyer may also hide or delete endorsements, which, under those circumstances, may obviate the ethical obligation to periodically monitor and review such posts.

When an attorney provides information on social media related to successful results she has achieved for a client, she should be careful to avoid disclosing confidential information about her client and the matter. The risk of disclosure of confidential

35. Lawyers should also be cognizant of such websites as Yelp, Google and Avvo, where third parties may post public comments about lawyers.


information can also arise when a lawyer deems it necessary to correct adverse comments made by clients or former clients about the lawyer’s legal skills made on social media (known as “reverse advertising”). New York has not addressed the issue, but the Texas Center for Legal Ethics recently opined that in such a situation, a lawyer may post a “proportional and restrained response that does not reveal any confidential information or otherwise violate the Texas Disciplinary Rules of Professional Conduct.”

Guideline No. 2.E: Positional Conflicts in Attorney Advertising

When communicating and stating positions on issues and legal developments, via social media or traditional media, a lawyer should attempt to avoid situations where her communicated positions on issues and legal developments are inconsistent with those advanced on behalf of her clients and the clients of her firm.

NYRPC 1.7, 1.8

Comment: While commenting on issues and legal developments can certainly assist in advertising a lawyer’s particular knowledge and strengths, a position stated by a lawyer on a social media site in an attempt to market her legal services could inadvertently create a business conflict with a client. A lawyer needs to be cognizant of the fact that conflicts are imputed to the lawyer’s firm.

While no New York ethics opinion has addressed the issue, the D.C. Bar Legal Ethics Committee recently provided guidance on this subject stating, “Consideration must also be given to avoid the acquisition of uninvited information through social media sites that could create actual or perceived conflicts of interest for the lawyer or the lawyer’s firm. Caution should be exercised when stating positions on issues, as those stated positions could be adverse to an interest of a client, thus inadvertently creating a conflict. [D.C. Rule of Professional Conduct] 1.7(b)(4) states that an attorney shall not represent a client with respect to a matter if ‘the lawyer's professional judgment on behalf of the client will be or reasonably may be adversely affected by . . . the lawyer’s own financial, business, property or personal interests,’ unless the conflict is resolved in accordance with [D.C. Rule of Professional Conduct] 1.7(c). Content of social media posts made by attorneys may contain evidence of such conflicts.”

38. Tex. Ctr. Legal Ethics Op. 662 (Aug. 2016); see also Kurt Orzech, Texas Attys Can Use Rivals in Ad Keywords, Ethics Panel Says, LAW360 (Aug. 1, 2016) (discussing the Panel’s decision to allow use of competing attorneys or firms in a lawyer’s online advertising).

3. FURNISHING OF LEGAL ADVICE THROUGH SOCIAL MEDIA

Guideline No. 3.A: Provision of General Information

A lawyer may provide general answers to legal questions asked on social media. A lawyer, however, cannot provide specific legal advice on a social media network because a lawyer’s responsive communications may be found to have created an attorney-client relationship, and legal advice also may impermissibly disclose information protected by the attorney-client privilege.

NYRPC 1.0, 1.4, 1.6, 7.1, 7.3.

Comment: A client and lawyer must knowingly enter into an attorney-client relationship. Informal communications over social media may unintentionally result in a client believing that such a relationship exists. If an attorney-client relationship exists, then ethics rules concerning, among other things, the disclosure over social media of information protected by the attorney-client privilege to individuals other than to the client would apply.

Guideline No. 3.B: Public Solicitation is Prohibited through “Live” Communications

Due to the “live” nature of real-time or interactive computer-accessed communications, which includes, among other things, instant messaging and communications transmitted through a chat room, a lawyer may not “solicit” business from the public through such means.

40. “Computer-accessed communication” as defined by NYRPC 1.0(c) means “any communication made by or on behalf of a lawyer or law firm that is disseminated through the use of a computer or related electronic device, including, but not limited to, web sites, weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other internet presences, and any attachments or links related thereto.” Comment 9 to NYRPC 7.3 advises: “Ordinary email and web sites are not considered to be real-time or interactive communication. Similarly, automated pop-up advertisements on a website that are not a live response are not considered to be real-time or interactive communication. Instant messaging, chat rooms, and other similar types of conversational computer-accessed communication are considered to be real-time or interactive communication.”

41. “Solicitation” as defined by NYRPC 7.3(b) means “any advertisement initiated by or on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain. It does not include a proposal or other writing prepared and delivered in response to a specific request of a prospective client.”

If a potential client\textsuperscript{43} initiates a specific request seeking to retain a lawyer during real-time social media communications, a lawyer may respond to such request. However, such response must be sent through non-public means and must be kept confidential, whether the communication is electronic or in some other format.\textsuperscript{44} Emails and attorney communications via a website or over social media platforms, such as Twitter,\textsuperscript{45} may not be considered real-time or interactive communications. This Guideline does not apply if the recipient is a close friend, relative, former client, or existing client.\textsuperscript{46}

NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

\textit{Comment}: Answering general questions\textsuperscript{47} on the Internet is analogous to writing for any publication on a legal topic.\textsuperscript{48} “Standing alone, a legal question posted by a member of the public on real-time interactive Internet or social media sites...”

\begin{itemize}
\item The Philadelphia Bar Ass’n, however, has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, solicitation through a chat room is permissible, because it is more akin to targeted direct mail advertisements, which are allowed under Pennsylvania’s ethics rules. See \textit{Phila. Bar Ass’n Prof’l Guidance Comm., Op. 2010-6} (2010).
\item Individuals attempting to defraud a lawyer by posing as potential clients are not owed a duty of confidentiality. See \textit{NYCBA, Formal Op. 2015-3} (“An attorney who discovers that he is the target of an Internet-based trust account scam does not have a duty of confidentiality towards the individual attempting to defraud him, and is free to report the individual to law enforcement authorities, because that person does not qualify as a prospective or actual client of the attorney. However, before concluding that an individual is attempting to defraud the attorney and is not owed the duties normally owed to a prospective or actual client, the attorney must exercise reasonable diligence to investigate whether the person is engaged in fraud.”).
\item “If a lawyer subject to the D.C. Rules of Professional Conduct engages in chat room communications of sufficient particularity and specificity to give rise to an attorney-client relationship under the substantive law of a state with jurisdiction to regulate the communication, that lawyer must comply with the full array of D.C. Rules governing attorney-client relationships.” D.C. Ethics Op. 316.
\item Whether a Twitter or Reddit communication is a “real-time or interactive” computer-accessed communication is dependent on whether the communication becomes akin to a prohibited blog or chat room communication. See \textit{NYSBA, Op. 1009}.
\item NYRPC 7.3(a)(1).
\item Where “the inquiring attorney has ‘become aware of a potential case, and wants to find plaintiffs,’ and the message the attorney intends to post will be directed to, or intended to be of interest only to, individuals who have experienced the specified problem. If the post referred to a particular incident, it would constitute a solicitation under the Rules, and the attorney would be required to follow the Rules regarding attorney advertising and solicitation, see Rules 7.1 & 7.3. In addition, depending on the nature of the potential case, the inquirer’s post might be subject to the blackout period (i.e., cooling off period) on solicitations relating to ‘a specific incident involving potential claims for personal injury or wrongful death...’” \textit{NYSBA, Op. 1049} (2015).
\item See \textit{NYSBA, Op. 899}.
\end{itemize}
cannot be construed as a ‘specific request’ to retain the lawyer.”\textsuperscript{49} In responding to questions,\textsuperscript{50} a lawyer may not provide answers that appear applicable to all apparently similar individual problems because variations in underlying facts might result in a different answer.\textsuperscript{51}

Moreover, a lawyer should be careful in responding to an individual question on social media as it might establish an attorney-client relationship, probably one created without a conflict check, and, if the response over social media is viewed by others beyond the intended recipient, it may disclose privileged or confidential information.\textsuperscript{52}

A lawyer is permitted to accept employment that results from participating in “activities designed to educate the public to recognize legal problems.”\textsuperscript{53} As such, if a potential client initiates a specific request to retain the lawyer resulting from real-time Internet communication, the lawyer may respond to such request as noted above.\textsuperscript{54} However, such communications should be sent solely to that potential client. If, however, the requester does not provide his or her personal contact information when seeking to retain the lawyer or law firm, consideration should be given by the lawyer to respond in two steps: first, ask the requester to contact the lawyer directly, not through a real-time communication, but instead by

\begin{enumerate}
\item \textsuperscript{49} See id.
\item \textsuperscript{50} See NYSBA, Op. \textsuperscript{1049} (“We further conclude that a communication that merely discussed the client’s legal problem would not constitute advertising either. However, a communication by the lawyer that went on to describe the services of the lawyer or his or her law firm for the purposes of securing retention would constitute “advertising.” In that case, the lawyer would need to comply with Rule 7.1, including the requirements for labeling as “advertising” on the “first page” of the post or in the subject line, retention for one-year (in the case of a computer-accessed communication) and inclusion of the law office address and phone number. See Rule 7.1(f), (h), (k).”).
\item \textsuperscript{51} Id.
\item \textsuperscript{52} In addition, when “answering general questions on the Internet, specific answers or legal advice can lead to … the unauthorized practice of law in a forum where the lawyer is not licensed.” Paul Ragusa & Stephanie Diehl, Social Media and Legal Ethics—Practical Guidance for Prudent Use, BAKER BOTTS LLP (Nov. 1, 2016).
\item \textsuperscript{53} See NYRPC 7.1(f), (h), (k).
\item \textsuperscript{54} See NYSBA, Op. \textsuperscript{1049} (“When a potential client requests contact by a lawyer, either by contacting a particular lawyer or by broadcasting a more general request to unknown persons who may include lawyers, any ensuing communication by a lawyer that complies with the terms of the invitation was not initiated by the lawyer within the meaning of Rule 7.3(b). Thus, if the potential client invites contact by Twitter or email, the lawyer may respond by Twitter or email. But the lawyer could not respond by telephone, since such contact would not have been initiated by the potential client. See NYSBA, Op. \textsuperscript{1014} (2014). If the potential client invites contact by telephone or in person, the lawyer’s response in the manner invited by the potential client would not constitute ‘solicitation.’
\end{enumerate}
email, telephone, etc., and second, the lawyer’s actual response should not be made through a real-time communication.\textsuperscript{55}

**Guideline No. 3.C: Retention of Social Media Communications with Clients**

If an attorney utilizes social media to communicate with a client relating to legal representation, the attorney should retain records of those communications, just as she would if the communications were memorialized on paper.

NYRPC 1.1, 1.15.

*Comment:* A lawyer’s file relating to client representation includes both paper and electronic documents. The ABA Model Rules of Professional Conduct defines a “writing” as “a tangible or electronic record of a communication or representation...”\textsuperscript{56} NYRPC 1.0(x), the definition of “writing,” was expanded in late 2016 to specifically include a range of electronic communications.\textsuperscript{57}

The NYRPC “does not explicitly identify the full panoply of documents that a lawyer should retain relating to a representation.”\textsuperscript{58} The only NYRPC provision requiring maintenance of client documents is NYRPC 1.15(i). The NYRPC, however, implicitly imposes on lawyers an obligation to retain documents. For example, NYRPC 1.1 requires that “A lawyer should provide competent representation to a client.” NYRPC 1.1(a) requires “skill, thoroughness and preparation.”

The lawyer must take affirmative steps to preserve those emails and social media communications, which the lawyer believes need to be saved.\textsuperscript{59} However, due to the ephemeral nature of social media communications, “saving” such communications in electronic form may pose technical issues, especially where, under certain circumstances, the entire social media communication may not be saved, may be deleted automatically or after a period of time, or may be deleted

\textsuperscript{55} Id.

\textsuperscript{56} NYRPC 1.0(n), Terminology.

\textsuperscript{57} NYRPC 1.0(x): “Writing” or “written” denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photocopying, photography, audio or video recording, email or other electronic communication or any other form of recorded communication or recorded representation. A “signed” writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.


\textsuperscript{59} Id.
by the counterparty to the communication without the knowledge of the lawyer.60
Casual communications may be deleted without impacting ethical rules.61

NYCBA, Formal Op. 2008-1 sets out certain considerations for preserving electronic materials:

As is the case with paper documents, which e-mails and other electronic documents a lawyer has a duty to retain will depend on the facts and circumstances of each representation. Many e-mails generated during a representation are formal, carefully drafted communications intended to transmit information, or other electronic documents, necessary to effectively represent a client, or are otherwise documents that the client may reasonably expect the lawyer to preserve. These e-mails and other electronic documents should be retained. On the other hand, in many representations a lawyer will send or receive casual e-mails that fall well outside the guidelines in [ABCNY Formal Op. 1986-4]. No ethical rule prevents a lawyer from deleting those e-mails.

We also expect that many lawyers may retain e-mails and other electronic documents beyond those required to be retained under [ABCNY Formal Op. 1986-4]. For example, some lawyers and law firms may retain all paper and electronic documents, including e-mails, relating in any way to a representation, as a measure to protect against a malpractice claim. Such a broad approach to document retention may at times be prudent, but it is not required by the Code.62

A lawyer shall not deactivate a social media account, which contains communications with clients, unless those communications have been appropriately preserved.

60. Id.; see also Pennsylvania Bar Assn., Ethics Comm., Formal Op. 2014-300 (the Pennsylvania Bar Assn. has opined that, under the Pennsylvania Rules of Professional Conduct, which are different from the NYRPC, an attorney “should retain records of those communications containing legal advice.”)

61. Id.

62. NYCBA, Op. 623 opines that, “with respect to documents belonging to the lawyer, a lawyer may destroy all those documents without consultation or notice to the client, (i) except to the extent that the law may otherwise require, and (ii) in the absence of extraordinary circumstances manifesting a client’s clear and present need for such documents.”
4. REVIEW AND USE OF EVIDENCE FROM SOCIAL MEDIA

Guideline No. 4.A: Viewing a Public Portion of a Social Media Website

A lawyer may view the public portion of a person’s social media profile or public posts even if such person is represented by another lawyer.

NYRPC 4.1, 4.2, 4.3, 5.3, 8.4.

Comment: A lawyer is ethically permitted to view the public portion of a person’s social media website, profile or posts, whether represented or not, for the purpose of obtaining information about the person, including impeachment material for use in litigation.

This allowance is based, in part, on case law that holds that a person is said to have very little expectation of privacy with respect to their social media content, let alone those that are specifically designated as “public.”

Guideline No. 4.B: Contacting an Unrepresented Party and/or Requesting to View a Restricted Social Media Website

A lawyer may communicate with an unrepresented party and also request permission to view a restricted portion of the party’s social media website or profile. However, the lawyer must use her full name and an accurate profile, and may not create a different or false profile in order to mask her identity. If the unrepresented party asks for additional information from the lawyer in response to the communication or access request, the lawyer must accurately provide the information requested by the person or otherwise cease all further communications and withdraw the request if applicable.

NYRPC 4.1, 4.3, 8.4.

63. A lawyer should be aware that certain social media networks may send an automatic message to the person whose account is being viewed which identifies the person viewing the account as well as other information about such person.


65. Romano v. Steelcase Inc., 30 Misc.3d 426 (Sup. Ct. Suffolk Cty. 2010) (“She consented to the fact that her personal information would be shared with others, notwithstanding her privacy setting. Indeed that is the very nature and purpose of these social networking sites else they would cease to exist.”)

66. For example, this may include: (1) sending a “friend” request on Facebook, 2) requesting to be connected to someone on LinkedIn; or 3) following someone on Instagram.
Comment: It is permissible for a lawyer to join a social media network solely for the purpose of obtaining information concerning a witness.\textsuperscript{67} The New York City Bar Association has opined, however, that a lawyer shall not “friend” an unrepresented individual using any form of “deception.”\textsuperscript{68}

In New York, no “deception” occurs when a lawyer utilizes his or her “real name and profile” to contact an unrepresented person to send a “friend” request to obtain information from that person’s account.\textsuperscript{69} In New York, the lawyer is not required to initially disclose the reasons for the communication or “friend” request.\textsuperscript{70}

However, other states require that a lawyer’s initial “friend” request must contain additional information to fully apprise the witness of their true identity and intention. For example, the New Hampshire Bar Association, holds that an attorney must “inform the witness of the lawyer’s involvement in the disputed or litigated matter,” the disclosure of the “lawyer by name as a lawyer” and the identification of “the client and the matter in litigation.”\textsuperscript{71} The Massachusetts and San Diego Bar Associations simply require disclosure of the lawyer’s “affiliation and the purpose for the request.”\textsuperscript{72} The Philadelphia Bar Association notes that failure to disclose the attorney’s true intention constitutes an impermissible omission of a “highly material fact.”\textsuperscript{73}

In Oregon, there is an opinion that if the person being sought out on social media “asks for additional information to identify [the] lawyer, or if [the] lawyer has some other reason to believe that the person misunderstands her role, [the] lawyer must provide the additional information or withdraw the request.”\textsuperscript{74}

\begin{itemize}
\item \textsuperscript{67} See \textit{N.H. Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 (2012)}.
\item \textsuperscript{68} \textit{NYCBA, Formal Op. 2010-2 (2010)}.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} See id.
\item \textsuperscript{71} \textit{N.H Bar Ass’n Ethics Advisory Comm., Op. 2012-13/05 (2012)}.
\item \textsuperscript{72} \textit{Massachusetts Bar Ass’n Comm. On Prof Ethics Op. 2014-5 (2014); San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2 (2011); see also Tom Gantert, Facebook ‘Friending’ Can Have Ethical Implications, LEGALNEWS (Sept. 27, 2012)}.
\item \textsuperscript{74} \textit{Oregon State Bar Comm. on Legal Ethics, Formal Op. 2013-189 (2013)}.
\end{itemize}
Guideline No. 4.C:  **Contacting a Represented Party and/or Viewing Restricted Social Media Website**

A lawyer shall not contact a represented person or request access to review the restricted portion of the person’s social media profile unless express consent has been furnished by the person’s counsel.

NYRPC 4.1, 4.2.

*Comment:* It is significant to note that, unlike an unrepresented individual, the ethics rules are different when the person being contacted in order to obtain private social media content is “represented” by a lawyer, and such a communication is categorically prohibited.

The Oregon State Bar Committee has noted that “[a]bsent actual knowledge that the person is represented by counsel, a direct request for access to the person’s non-public personal information is permissible.”\(^{75}\)

Caution should be used by a lawyer before deciding to view a potentially private or restricted social media account or profile of a represented person that the lawyer has a “right” to view, such as a professional group where both the lawyer and represented person are members or as a result of being a “friend” of a “friend” of such represented person.

Note that there is an apparent gap in authority with respect to whether a represented party’s receipt of an automatic notification from a social media platform constitutes an impermissible communication with an attorney, as opposed to within the juror context, which has been covered by several jurisdictions.

Nevertheless, in New York, drawing upon those opinions addressing jurors, receipt of an automatic notification can be considered an improper communication with someone who is represented by counsel, particularly where “the attorney is aware that their actions would cause the juror to receive such message or notification.”\(^{76}\)

Conversely, **ABA, Formal Op. 466** opined that, at least within the juror context, an automatically generated notification does not constitute an impermissible communication since “the ESM service is communicating with the

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75. See *San Diego County Bar Ass’n Legal Ethics Comm., Op. 2011-2*.

juror based on a technical feature of the ESM,” and the lawyer is not involved.\textsuperscript{77} This view has also been adopted by the DC and Colorado Bar Associations.\textsuperscript{78}

Guideline No. 4.D: Lawyer’s Use of Agents to Contact a Represented Party

As it relates to viewing a person’s social media account, a lawyer shall not order or direct an agent to engage in specific conduct, or with knowledge of the specific conduct by such person, ratify it, where such conduct if engaged in by the lawyer would violate any ethics rules.

NYRPC 5.3, 8.4.

\textit{Comment:} This would include, \textit{inter alia}, a lawyer’s investigator, trial preparation staff, legal assistant, secretary, or agent\textsuperscript{79} and could, as well, apply to the lawyer’s client.\textsuperscript{80}


\textsuperscript{79} See N.Y. City Bar Ass’n Comm. on Prof’l Ethics, Formal Op. 2010-2 (2010).

5. COMMUNICATING WITH CLIENTS

Guideline No. 5.A: Removing Existing Social Media Information

A lawyer may advise a client as to what content may be maintained or made non-public on her social media account, including advising on changing her privacy and/or security settings. A lawyer may also advise a client as to what content may be “taken down” or removed, whether posted by the client or someone else. However, the lawyer must be cognizant of preservation obligations applicable to the client and/or matter, such as a statute, rule, regulation, or common law duty relating to the preservation of information, including legal hold obligations. Unless an appropriate record of the social media content is preserved, a party or nonparty may not delete information from a social media account that is subject to a duty to preserve.

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer must ensure that potentially relevant information is not destroyed “once a party reasonably anticipates litigation” or where preservation is required by common law, statute, rule, regulation or other requirement. Failure to do so may result in sanctions or other penalties. “[W]here litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding the destruction or spoliation of evidence, there is no ethical bar to ‘taking down’ such material from social media publications, or prohibiting a client’s lawyer from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user’s computer.” When litigation is not pending or “reasonably anticipated,” a lawyer may more freely advise a client on what to maintain or remove from her social media profile. Nor is there any ethical bar to advising a client to change her privacy or security settings to be more restrictive, whether before or after litigation has commenced,

81. “Content” may, as appropriate, include metadata.

82. Mark A. Berman, Counseling a Client to Change Her Privacy Settings on Her Social Media Account, NEW YORK LEGAL ETHICS REPORTER (Feb. 2015).


85. See Phil. Bar Ass’n, Prof'l Guidance Comm. Op. 2014-5 (noting that, a lawyer “must make reasonable efforts to obtain a photograph, link or other content about which the lawyer is aware if the lawyer knows or reasonably believes it has not been produced by the client.”).

as long as social media is appropriately preserved in the proper format and such is not a violation of law or a court order. 87

A lawyer should be aware that the act of deleting electronically stored information does not mean that such information cannot be recovered through the use of forensic technology or other means. Similarly, a post or other data shared with others may have been copied by another user or in other online accounts not controlled by the client.

Guideline No. 5.B: Adding New Social Media Content

A lawyer may advise a client with regard to posting new content on social media, as long as the proposed content is not known to be false by the lawyer. A lawyer also may not “direct or facilitate the client’s publishing of false or misleading information that may be relevant to a claim.” 88

NYRPC 3.1, 3.3, 3.4, 4.1, 4.2, 8.4.

Comment: A lawyer may review what a client plans to publish on social media in advance of posting89 and guide the client, including formulating a policy on social media usage. Subject to ethics rules, a lawyer may, for example, counsel the client to publish truthful information favorable to the client; discuss the significance and implications of social media posts (including their content and advisability); review how the posts may be perceived; and discuss how such posts might be used in a litigation, including cross-examination. A lawyer may advise a client that social media content or data that the client considers highly private or personal, even if not shared with other social media users, may be reviewed by opposing parties, judges and others due to court order, compulsory process, government searches, data breach, sharing by others or unethical conduct. A lawyer may advise a client to refrain from or limit social media posts, including during the course of a litigation or investigation.


89. A lawyer may consider periodically following or checking her client’s social media activities, especially in matters where posts may be relevant to her client’s claims or defenses. Monitoring a client’s social media posts could provide the lawyer with the opportunity, among other things, to advise on the impact of the client’s posts on existing or future litigation or on their implication(s) for other issues relating to the lawyer’s representation of the client. An attorney may wish to notify a client if he or she plans to closely monitor a client’s social media postings.

Pa. Bar Ass’n Ethics Comm., Formal Op. 2014-300 (2014) (noting that “tracking a client’s activity on social media may be appropriate for an attorney to remain informed about the developments bearing on the client’s legal dispute” and “an attorney can reasonably expect that opposing counsel will monitor a client’s social media account.”).
Guideline No. 5.C: False Social Media Statements

A lawyer is prohibited from proffering, supporting, or using false statements if she learns from a client’s social media posting that a client’s lawsuit involves the assertion of material false factual statements or evidence supporting such a conclusion and if proper inquiry of the client does not negate that conclusion.90

NYRPC 3.1, 3.3, 3.4, 4.1, 8.4.

Comment: A lawyer has an ethical obligation not to “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”91 Frivolous conduct includes the knowing assertion of “material factual statements that are false.”92

Guideline No. 5.D: A Lawyer’s Use of Client-Provided Social Media Information

A lawyer may review a represented person’s non-public social media information provided to the lawyer by her client, as long as the lawyer did not cause or assist the client to: (i) inappropriately obtain non-public information from the represented person; (ii) invite the represented person to take action without the advice of his or her lawyer; or (iii) otherwise overreach with respect to the represented person.

NYRPC 4.2.

Comment: One party may always seek to communicate with another party. Where a “client conceives the idea to communicate with a represented party,” a lawyer is not precluded “from advising the client concerning the substance of the communication” and the “lawyer may freely advise the client so long as the lawyer does not assist the client inappropriately to seek confidential information or invite the nonclient to take action without the advice of counsel or otherwise to overreach the nonclient.”93 New York interprets “overreaching” as prohibiting “the lawyer from converting a communication initiated or conceived by the client into a vehicle for the lawyer to communicate directly with the nonclient.”94

NYRPC Rule 4.2(b) provides that, notwithstanding the prohibition under Rule 4.2(a) that a lawyer shall not “cause another to communicate about the subject of the representation with a party the lawyer knows to be represented,”

91. NYRPC 3.1(a).
92. NYRPC 3.1(b)(3).
94. Id.
a lawyer may cause a client to communicate with a represented person... and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person’s counsel that such communications will be taking place.

Thus, lawyers need to use caution when communicating with a client about her connecting to or “friending” a represented person and obtaining private information from that represented person’s social media site.

A New Hampshire opinion states that a lawyer’s client may, for instance, send a friend request or request to follow a private Twitter feed of a person, and then provide the information to the lawyer, but the ethical propriety “depends on the extent to which the lawyer directs the client who is sending the [social media] request,” and whether the lawyer has complied with all other ethical obligations. In addition, the client’s profile needs to “reasonably reveal[] the client’s identity” to the other person.

The American Bar Association opines that a “lawyer may give substantial assistance to a client regarding a substantive communication with a represented adversary. That advice could include, for example, the subjects or topics to be addressed, issues to be raised and strategies to be used. Such advice may be given regardless of who – the lawyer or the client – conceives of the idea of having the communication . . . . [T]he lawyer may review, redraft and approve a letter or a set of talking points that the client has drafted and wishes to use in her communications with her represented adversary.”

**Guideline No. 5.E: Maintaining Client Confidences and Confidential Information**

Subject to the attorney-client privilege rules, a lawyer is prohibited from disclosing client confidences and confidential information relating to the legal representation of a client, unless the client has provided informed consent. Social media activities and a lawyer’s website or blog must comply with these limitations.

A lawyer should also be aware of potential risks created by social media services, tools or practices that seek to create new user connections by importing contacts or connecting platforms. A lawyer should understand how the service, tool or practice

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96. Id.
98. See NYRPC 1.6.
operates before using it and consider whether any activity places client information and confidences at risk.\textsuperscript{99}

Where a client has posted an online review of the lawyer or her services, the lawyer’s response, if any, shall not reveal confidential information relating to the representation of the client. Where a lawyer uses a social media account to communicate with a client or otherwise store client confidences, the lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure or use of, or unauthorized access to, such an account.\textsuperscript{100}

\textsuperscript{99} D.C. Bar Legal Ethics Comm., Op. 370 (2016) explains one risk of services that import email contacts to generate connections: “For attorneys, these connection services could potentially identify clients or divulge other information that a lawyer might not want an adversary or a member of the judiciary to see or information that the lawyer is obligated to protect from disclosure.”

Similarly, a lawyer’s request to connect to a person who is represented by opposing counsel may be embarrassing or raise questions regarding NYRPC 4.2 (Communication with Persons Represented by Counsel).

\textsuperscript{100} NYRPC 1.6(c). The New York Rules of Professional Conduct were amended on November 10, 2016 and Rule 1.6(c) was modified to address a lawyer’s use of technology. See Davis, Anthony, Changes to NY RPCs and an Ethics Opinion On Withdrawing for Non-Payment of Fees, NEW YORK LAW JOURNAL (January 9, 2017).

NYSBA Comment 16 to NYRPC 1.6 provides:

Paragraph (c) imposes three related obligations. It requires a lawyer to make reasonable efforts to safeguard confidential information against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are otherwise subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3. Confidential information includes not only information protected by Rule 1.6(a) with respect to current clients but also information protected by Rule 1.9(c) with respect to former clients and information protected by Rule 1.18(b) with respect to prospective clients. Unauthorized access to, or the inadvertent or unauthorized disclosure of, information protected by Rules 1.6, 1.9, or 1.18, does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the unauthorized access or disclosure. Factors to be considered in determining the reasonableness of the lawyer’s efforts include, but are not limited to: (i) the sensitivity of the information; (ii) the likelihood of disclosure if additional safeguards are not employed; (iii) the cost of employing additional safeguards; (iv) the difficulty of implementing the safeguards; and (v) the extent to which the safeguards adversely affect the lawyer’s ability to represent clients (e.g., by making a device or software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule, or may give informed consent to forgo security measures that would otherwise be required by this Rule. For a lawyer’s duties when sharing information with nonlawyers inside or outside the lawyer’s own firm, see Rule 5.3, Comment [2].
NYRPC 1.1, 1.6, 1.9(c), 1.18.

Comment: A lawyer is prohibited, absent a recognized exception, from disclosing client confidential information. Additionally, under NYRPC Rule 1.9(c), a lawyer is generally prohibited from using or revealing confidential information of a former client. There is, however, a “self-defense” exception to the duty of confidentiality set forth in Rule 1.6, which, as to former clients, is incorporated by Rule 1.9(c). Rule 1.6(b)(5)(i) provides that a lawyer “may reveal or use confidential information to the extent that the lawyer reasonably believes necessary … to defend the lawyer or the lawyer’s employees and associates against an accusation of wrongful conduct.”

NYSBA Ethics Opinion 1032 indicates that the self-defense exception applies to “claims” and “charges” in formal proceedings or a “material threat of a proceeding,” which “typically suggest the beginning of a lawsuit, criminal inquiry, disciplinary complaint, or other procedure that can result in a sanction” but not to a “negative web posting.” As such, a lawyer cannot disclose confidential information about a client when responding to a negative post concerning herself on platforms such as Avvo, Yelp or Facebook.

A lawyer is permitted to respond to online reviews, but such replies must be accurate and truthful and shall not contain confidential information or client confidences. Pennsylvania Bar Association Ethics Committee Opinion 2014-300

Comment 17 further provides:

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. Paragraph (c) does not ordinarily require that the lawyer use special security measures if the method of communication affords a reasonable expectation of confidentiality. However, a lawyer may be required to take specific steps to safeguard a client’s information to comply with a court order (such as a protective order) or to comply with other law (such as state and federal laws or court rules that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information). For example, a protective order may extend a high level of protection to documents marked “Confidential” or “Confidential – Attorneys’ Eyes Only”; the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) may require a lawyer to take specific precautions with respect to a client’s or adversary’s medical records; and court rules may require a lawyer to block out a client’s Social Security number or a minor’s name when electronically filing papers with the court. The specific requirements of court orders, court rules, and other laws are beyond the scope of these Rules.


(2014) opined that “[w]hile there are certain circumstances that would allow a lawyer to reveal confidential client information, a negative online client review is not a circumstance that invokes the self-defense exception.” Pennsylvania Bar Association Ethics Committee Opinion 2014-200 (2014) provides a suggested response for a lawyer replying to negative online reviews: “A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post represents a fair and accurate picture of events.”

If a lawyer chooses to respond to a former client’s online review, a lawyer should consult the relevant definition of “confidential information” as the definition may be quite broad. For instance, pursuant to NYRPC 1.6(a), “confidential information” includes, but is not limited to “information gained during or relating to the representation of a client, whatever its source, that is . . . likely to be embarrassing or detrimental to the client if disclosed.” Similarly, Texas Disciplinary Rule of Professional Conduct 1.05(a) defines “confidential information” as including “…all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client.” See also DC Bar Ethics Opinion 370 which states a “confidence” is “information protected by the attorney-client privilege” and a “secret” is “…other information gained in the professional relationship that the client has requested be held inviolate, or the disclosure of which would be embarrassing, or would be likely to be detrimental, to the client.”

Moreover, any response should be limited and tailored to the circumstances. Texas State Bar Ethics Opinion 662. See also DC Bar Ethics Opinion 370 (even self-defense exception for “specific” allegations by client against lawyer only allows disclosures no greater than the lawyer reasonably believes are necessary).


6. **RESEARCHING JURORS AND REPORTING JUROR MISCONDUCT**

Guideline No. 6.A: **Lawyers May Conduct Social Media Research**

A lawyer may research a prospective or sitting juror’s public social media profile, and posts.

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* “Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research. Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.”

At this juncture, it is “not only permissible for trial counsel to conduct Internet research on prospective jurors, but [] it may even be expected.”

The ABA issued [Formal Opinion 466](#) noting that “[u]nless limited by law or court order, a lawyer may review a juror’s or potential juror’s Internet presence, which may include postings by the juror or potential juror in advance of and during a trial.” There is a strong public interest in identifying jurors who might be tainted by improper bias or prejudice.” However, Opinion 466 does not address “whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors.”

107. See [SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).](#)
109. Id.
110. Id.
Guideline No. 6.B: A Juror’s Social Media Profile May Be Viewed as Long as There Is No Communication with the Juror

A lawyer may view the social media profile of a prospective juror or sitting juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.\textsuperscript{111}

NYRPC 3.5, 4.1, 5.3, 8.4.

Comment: Lawyers need “always use caution when conducting [jury] research” to ensure that no communication with the prospective or sitting jury takes place.\textsuperscript{112}

“Without express authorization from the court, any form of communication with a prospective or sitting juror during the course of a legal proceeding would be an improper communication.”\textsuperscript{113} For example, ABA, Formal Op. 466 opines that it would be a prohibited \textit{ex parte} communication for a lawyer, or the lawyer’s agent, to send an “access request” to view the private portion of a juror’s or potential juror’s Internet presence.\textsuperscript{114} This type of communication would be “akin to driving down the juror’s street, stopping the car, getting out, and asking the juror for permission to look inside the juror’s house because the lawyer cannot see enough when just driving past.”\textsuperscript{115}

NYCLA, Formal Op. 743 and NYCBA, Formal Op. 2012-2 have opined that even inadvertent contact with a prospective juror or sitting juror caused by an automatic notice generated by a social media network may be considered a technical ethical violation. New York ethics opinions also draw a distinction between public and private juror information.\textsuperscript{116} They opine that viewing the public portion of a social media profile is ethical as long as there is no automatic

\begin{footnotes}
\item[115] Id.
\item[116] Id.
\end{footnotes}
message sent to the account owner of such viewing (assuming other ethics rules are not implicated by such viewing). 117

In contrast to the above New York opinions, ABA, Formal Op. 466 opined that “[t]he fact that a juror or a potential juror may become aware that a lawyer is reviewing his Internet presence when a network setting notifies the juror of such does not constitute a communication from the lawyer in violation” of the Rules of Professional Conduct (emphasis added). 118 The ABA held that, as a general rule, an automatic notification represents a communication between the juror and a given ESM platform, as opposed to an impermissible communication between the lawyer and the attorney. The Colorado Bar Association and DC Bar have since adopted the ABA's position, i.e., “such notification does not constitute a communication between the lawyer or prospective juror” as opposed to a “friend” request. 119

According to ABA, Formal Op. 466, this type of notice is “akin to a neighbor’s recognizing a lawyer’s car driving down the juror’s street and telling the juror that the lawyer had been seen driving down the street.” 120 Yet, this view has been criticized on the basis of the possible impact such communication might have on a juror’s state of mind and has been deemed more analogous to the improper communication where, for instance, “[a] lawyer purposefully drives down a juror’s street, observes the juror’s property (and perhaps the juror herself), and has a sign that says he is a lawyer and is engaged in researching the juror for the pending trial knowing that a neighbor will advise the juror of this drive-by and the signage.” 121

Under ABA, Formal Op. 466, a lawyer must: (1) “be aware of these automatic, subscriber-notification procedures” and (2) make sure “that their review is purposeful and not crafted to embarrass, delay, or burden the juror or the

117. If a lawyer logs into LinkedIn and clicks on a link to a LinkedIn profile of a juror, an automatic message may be sent by LinkedIn to the juror whose profile was viewed advising of the identity of the LinkedIn subscriber who viewed the juror’s profile. In order for that reviewer’s profile not to be identified through LinkedIn, that person must change his or her settings so that he or she is anonymous or, alternatively, be fully logged out of his or her LinkedIn account.


120. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014); see also Pa. Bar Ass’n Ethics Comm., Formal Op. 2014-300 (2014) (“[t]here is no ex parte communications if the social networking website independently notifies users when the page has been viewed.”).

proceeding.” Moreover, ABA, Formal Op. 466 suggests that “judges should consider advising jurors during the orientation process that their backgrounds will be of interest to the litigants and that the lawyers in the case may investigate their backgrounds,” including a juror’s or potential juror’s social media presence.\footnote{122}{Id.}

New York guidance similarly holds that when reviewing social media to perform juror research, a lawyer needs to perform such research in a way that does not leave any “footprint” or notify the juror that the lawyer or her agent has been viewing the juror’s social media profile.\footnote{123}{Id.}

The New York opinions cited above draw a distinction between public and private juror information.\footnote{124}{See N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012); N.Y. Cty. Lawyers Ass'n, Formal Op. 743 (2011); SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).} They opine that viewing the public portion of a social media profile is ethical as long as there is no notice sent to the account holder indicating that a lawyer or her law firm viewed the juror’s profile and assuming other ethics rules are not implicated. However, such opinions have not taken a definitive position that such unintended automatic contact is subject to discipline.

The American Bar Association and New York opinions, however, have not directly addressed whether a lawyer may non-deceptively view a social media account that from a prospective or sitting juror’s view is putatively private, which the lawyer has a right to view, such as an alumni social network where both the lawyer and juror are members or whether access can be obtained, for instance, by being a “friend” of a “friend” of a juror on Facebook.

**Guideline No. 6.C: Deceit Shall Not Be Used to View a Juror’s Social Media**

A lawyer may not make misrepresentations or engage in deceit in order to be able to view the social media profile of a prospective juror or sitting juror, nor may a lawyer direct others to do so.

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* An “attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable.”\footnote{125}{Id.}

\footnote{126}{See N.Y. City Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012).}
“Subordinate lawyers and non-lawyers performing services for the lawyer must be instructed that they are prohibited from using deception to gain access” to portions of social media accounts not otherwise accessible to the lawyer.\(^{127}\)

**Guideline No. 6.D: Juror Contact During Trial**

After a juror has been sworn in and throughout the trial, a lawyer may view or monitor the social media profile and posts of a juror provided that there is no communication (whether initiated by the lawyer, her agent or automatically generated by the social media network) with the juror.

NYRPC 3.5, 4.1, 5.3, 8.4.

*Comment:* The concerns and issues identified in the comments to Guideline No. 6.B are also applicable during the evidentiary and deliberative phases of a trial.

Yet, these later litigation phases present additional issues, such as a lawyer wishing to monitor juror social media profiles or posts in order to determine whether a juror is failing to follow court instructions or engaging in other improper behavior. However, the risks posed at this stage of litigation are greater than during the jury selection process and could result in a mistrial.\(^{128}\)

While an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial. The Committee therefore re-emphasizes that it is the attorney’s duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.\(^{129}\)

**ABA, Formal Op. 466** permits passive review of juror social media postings, in which an automated response is sent to the juror, of a reviewer’s Internet “presence,” even during trial absent court instructions prohibiting such conduct.\(^{130}\)

In one New York case, the review by a lawyer of a juror’s LinkedIn profile during a trial almost led to a mistrial. During the trial, a juror became aware that an attorney from a firm representing one of the parties had looked at the juror’s LinkedIn profile. The juror brought this to the attention of the court stating “the defense was checking on me on social media” and also asserted, “I feel intimidated and don’t feel I can be


\(^{128}\) Rather than risk inadvertent contact with a juror, a lawyer wanting to monitor juror social media behavior might consider seeking a court order clarifying what social media may be accessed.


This case demonstrates that a lawyer must take caution in conducting social media research of a juror because even inadvertent communications with a juror presents risks.\footnote{See Richard Vanderford, \textit{LinkedIn Search Nearly Upends BofA Mortgage Fraud Trial}, LAW360 (Sept. 27, 2013).}

It might be appropriate for counsel to ask the court to advise both prospective and sitting jurors that their social media activity may be researched by attorneys representing the parties. Such instruction might include a statement that it is not inappropriate for an attorney to view jurors’ public social media. As noted in \textit{ABA, Formal Op. 466}, “[d]iscretion by the trial judge of the likely practice of trial lawyers reviewing juror ESM during the jury orientation process will dispel any juror misperception that a lawyer is acting improperly merely by viewing what the juror has revealed to all others on the same network.”\footnote{ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).}

\textbf{Guideline No. 6.E: Juror Misconduct}

\textit{In the event that a lawyer learns of possible juror misconduct, whether as a result of reviewing a sitting juror’s social media profile or posts, or otherwise, she must promptly bring it to the court’s attention.}\footnote{See N.Y. Cty. Lawyers Ass’n, Formal Op. 743 (2011); N.Y. City Bar Ass’n Comm. on Prof'l Ethics, Formal Op. 2012-2 (2012); SOCIAL MEDIA JURY INSTRUCTIONS REPORT, NYSBA COMMERCIAL AND FEDERAL LITIGATION SECTION (2015).}

NYRPC 3.5, 8.4.

\textit{Comments:} An attorney faced with potential juror misconduct is advised to review the ethics opinions issued by her controlling jurisdiction, as the extent of the duty to report juror misconduct varies among jurisdictions. For example, \textit{ABA, Formal Op. 466} pertains only to criminal or fraudulent conduct by a juror, rather than the broader concept of improper conduct. Opinion 466 requires a lawyer to take remedial steps, “including, if necessary, informing the tribunal when the lawyer discovers that a juror has engaged in criminal or fraudulent conduct related to the proceeding.”\footnote{ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 14-466 (2014).}

New York, however, provides that “a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer
has knowledge.”136 If a lawyer learns of “juror misconduct” due to social media research, he or she “must” promptly notify the court.137 “Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror’s improper conduct benefits the attorney.”138

The DC Bar opines that the determination of “[w]hether and how such misconduct must or should be disclosed is beyond the scope” of precise ethical guidance, except in instances “clearly establishing that a fraud has been perpetrated upon the tribunal.”139

136. NYRPC 3.5(d).
7. **USING SOCIAL MEDIA TO COMMUNICATE WITH A JUDICIAL OFFICER**

A lawyer shall not communicate with a judicial officer over social media if the lawyer intends to influence the judicial officer in the performance of his or her official duties.

NYRPC 3.5, 8.2 and 8.4.

*Comment:* There are few New York ethical opinions addressing lawyers’ communication with judicial officers over social media, and ethical bodies throughout the country are not consistent when opining on this issue. However, lawyers should consider that any such communication can be problematic because the “intent” of such communication by a lawyer will be judged under a subjective standard, including whether reposting a judge’s posts would be improper.

A lawyer may connect or communicate with a judicial officer on “social media websites provided the purpose is not to influence the judge, and reasonable efforts are taken to ensure that there is no ex parte or other prohibited communication,”\(^{140}\) which is consistent with **NYRPC 3.5(a)(1)** which forbids a lawyer from “seek[ing] to or caus[ing] another person to influence a judge, official or employee of a tribunal.”\(^{141}\)

It should be noted that **New York Advisory Opinion 08-176 (Jan. 29, 2009)** provides that a judge who otherwise complies with the Rules Governing Judicial Conduct “may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules.”\(^{142}\) **New York Advisory Committee on Judicial Ethics Opinion 08-176** further opines that:

[A] judge also should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge’s court through a social network. In some ways, this is no different from adding the person’s contact information into the judge’s Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e., other users can normally see the judge’s friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger


\(^{141}\) **NYRPC 3.5(A)(1).**

bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a “close social relationship” requiring disclosure and/or recusal.

See New York Advisory Committee on Judicial Ethics Opinion 13-39 (May 28, 2013) (“the mere status of being a ‘Facebook friend,’ without more, is an insufficient basis to require recusal. Nor does the committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3[E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously ‘friended’ certain individuals who are now involved in some manner in a pending action.”).
APPENDIX – Social Media Definitions

This appendix contains a collection of popular social technologies and terminology, both general and platform-specific, and is designed for attorneys seeking a basic understanding of the social media landscape.

A. Social Technologies

**Facebook**: an all-purpose platform that connects users with friends, family, and businesses from all over the world and enables them to post, share, and engage with a variety of content such as photos and status updates. Founded in 2004, the site now has in excess of 1.5 billion active monthly users.

**Instagram**: a visually-focused platform that allows users to post photos and videos. Created in 2010, and later purchased by Facebook, it has approximately 500 million active monthly users.

**LinkedIn**: an employment-based networking platform which focuses on engagement with individuals in their respective professional capacities. Launched in 2002, it now boasts roughly 100 million active monthly users.

**Periscope**: a video-streaming mobile application that allows users to broadcast live video. Created in 2014, and purchased by Twitter shortly thereafter, it has in excess of 10 million active monthly users.

**Pinterest**: a platform that essentially functions as a social scrapbook, allowing users to save and collect links to share with other users. Started in 2010, it has in excess of 100 million active monthly users, majority of whom are female.

**Reddit**: a social news and entertainment website where all content is user-submitted and the popularity of each post is voted upon by the user base itself. Created in 2005, it has more than 240 million active monthly visitors.
Snapchat: an image messaging application that allows users to send and receive photos and videos known as "snaps," which are hidden from the recipients once the time limit expires. Officially released in September 2011, it has in excess of 200 million active monthly users.

Tumblr: a microblogging platform that allows users to post text, images, video, audio, links, and quotes to their blogs. It was created in 2007 and has more than 500 million active monthly users.

Twitter: a real-time social network that allows users to share updates that are limited to 140 characters. Founded in 2006, it has more than 315 million active monthly users.

Venmo: a peer-to-peer payment system where users send money from their bank or credit/debit card to another member. Introduced in 2009, and acquired by PayPal in 2013, it handles approximately 10 billion dollars of social transactions per year.

Waze: a social-based GPS platform that is based upon crowd sourcing of events such as accidents and traffic jams from its user base. Founded in 2008, and purchased by Google in 2013, it has 50 million active users.

WhatsApp: a cross-platform instant messaging service that allows users to exchange text, images, video, and audio messages for free. Launched in January 2010, and acquired by Facebook in 2014, it now has more than 1 billion users.

B. Social Terminologies

Add: process on Snapchat of subscribing to another user’s account in order to receive access to their content. This is a “unilateral connection” that does not provide dual-access to both users’ content or require the second user to expressly approve or deny the first user’s access.
**Automatic Notification**: an automatic message sent by the social media platform to the person whose account is being viewed by another. This message may indicate the identity of the person viewing the account as well as other information about such person.

**Bilateral Connection**: a two-way connection between users. That is, for one user to connect with a second, the second user must expressly accept or deny the first user’s access.

**Block**: refers to a user’s option to restrict another’s ability to interact with the user and/or the user’s content on a given platform.

**Connections**: term used on LinkedIn to describe the relationship between two users, indicated by varying degrees.

  - **1st Degree Connection**: those who have bilaterally agreed to share and receive exclusive content from one another beyond those available to the LinkedIn community at large.
  - **2nd Degree Connection**: those who share a mutual 1st degree connection but are not themselves directly connected.
  - **3rd Degree Connection**: those who share a mutual 2nd degree connection but are not themselves directly connected.

**Cover Photo**: a large, horizontal image at the top of a user’s Facebook profile. Similar to a profile photo, a cover photo is public.

**Direct Message**: private conversations that occur on Twitter. Both parties must be following one another in order to send or receive messages.

**Facebook Live**: a feature on Facebook that allows users to stream live video and interact with viewers in real-time.

**Fan**: a user who follows and receives updates from a particular Facebook page. The user must “like” the page in order to become a fan of it.

**Favorite**: an indication that someone “likes” a user’s post on Twitter, given by clicking the star icon.

**Filter**: an aesthetic overlay that can be applied to a photo or video.

**Follow**: process of subscribing to another user in order to receive access to their content. This is a unilateral connection as it does not provide access to one’s own content.

**Follower**: refers to a user who subscribes to another user’s account and thereby receives access to the latter’s content.

**Following**: refers to those accounts that a particular user has subscribed to in order to view and/or receive updates about the content of those accounts.
**Friend**: refers to those users on Facebook who bilaterally agreed to provide access to each other’s account beyond those privileges afforded to the Facebook community at large. “Friend” may also create a publicly viewable identification of the relationship between the two users. “Friending” is the term used by Facebook, but other social media networks use analogous concepts such as “Follower” on Twitter or “Connections” on LinkedIn.

**Friending**: The process through which the member of a social media network designates another person as a “friend” in response to a request to access Restricted Information. “Friending” may enable a member’s “friends” to view the member’s restricted content.

**Geofilter**: a type of Snapchat filter that is specific to a certain location or event and is only available to users within a certain proximity to said location or event.

**Handle**: a unique name used to refer to a user’s account on a given platform.

**Hashtag**: mechanism used to group posts under the same topic by using a specific word preceded by the # symbol.

**Home Page**: section of Instagram users' accounts where they can see all the latest updates from those who they are following.

**Lenses**: used on Snapchat to allow users to add animated masks to their postings and stories.

**Like**: an understood expression of support for content. The amount of likes received is generally tied to the popularity of a given post.

**News Feed**: section of Facebook users’ accounts where they can see all the latest updates from those accounts which they are subscribed to, e.g., their friends.

**Notification**: a message sent by a given platform to a user to indicate the presence of new social media activity.

**Pinboard**: the term used on Pinterest for a collection of “pins” that can be organized by any theme of a user’s choosing.

**Posting or Post**: Uploading content to a social media network. A post contains information provided by the person, and specific social media networks may use their own term equivalent to a post (e.g., “Tweets” on Twitter).

**Privacy Settings**: allow a user to determine what content other users are able to view and who is able to contact them.

**Private**: state of a social media account (or a particular post) that, because of heightened privacy settings, is hidden from the general public.

**Profile**: Accessible information about a specific social media member. Some social media networks restrict access to members while other networks permit a member to restrict, in varying degrees, a person’s ability to view specified aspects of a member’s account or profile. A profile
contains, among other things, biographical and personal information about the member. Depending on the social media network, a profile may include information provided by the member, other members of the social media network, the social media network, or third-party databases.

**Public:** Information available to anyone viewing a social media network without the need for permission from the person whose account is being viewed. Public information includes content available to all members of a social media network and content that is accessible to non-members.

**Repin:** on Pinterest, where a user saves another’s pin to their own board. Similar to a “retweet” on Twitter.

**Restricted (“private”):** Information that is not available to a person viewing a social media account because an existing on-line relationship between the account holder and the person seeking to view it is lacking (whether directly, e.g., a direct Facebook “friend,” or indirectly, e.g., a Facebook “friend of a friend”). Note that content intended to be “restricted” may be “public” through user error in seeking to protect such content, through re-posting by another member of that social media network, or as a result of how the content is made available by the social media network or due to technological change.

**Retweet:** a Twitter user sharing another’s “tweet” with their own followers.

**Snap:** the term used to describe an image posted to the Snapchat platform.

**Social Media (also called a social network):** An Internet-based service allowing people to share content and respond to postings by others. Social media may be viewed via websites, mobile or desktop applications, text messaging or other electronic means.

**Social Network:** online space consisting of those who personally know one another or otherwise have agreed to provide them with access to their content.

**Social Profile:** a personal page within a social network that generally displays posts from that person as well as the person’s interests, education, and employment, and identifies those accounts that have access to their content.

**Status:** the term for a user posting to the user’s own page which is simultaneously published on the home page of a particular site, e.g., Facebook’s News Feed.

**Story:** the term used on Snapchat and Instagram for a designated string of images or videos that only are accessible for a period of 24 hours.

**Subreddit:** a smaller sub-category within Reddit that is dedicated to a specific topic or theme. These are defined by the symbol “/r/”.

**Tag:** a keyword added to a social media post with the original purpose of categorizing related content. A tag can also refer to the act of tagging someone in a post, which creates a link to that person’s social media profile and associates the person with the content.
**Timeline**: section of Twitter users' accounts where they can see all the latest updates from those whom they are following.

**Tweet**: the term for a user’s post on Twitter that can contain up to 140 characters of text, as well as photos, videos, and links.

**Unfollow**: the action of unsubscribing from receiving updates from another user.

**Unfriending**: the action of terminating access privileges as and between two users.

**Unilateral connection**: a one-way connection between users. That is, a user may connect with a second without the second user connecting with the first or requiring the second to expressly approve or deny the first’s request.

**Verified**: this refers to a social media account that a platform has confirmed to be authentic. This is indicated by a blue checkmark and is generally reserved for brands and public figures as a way of preventing fraud and protecting the integrity of the person or company behind the account.

**Views**: this simply refers to the amount of people who have watched a certain video or story.

**Wall**: the space on a Facebook profile or fan page where users can share posts, photos and links.
Formal Opinion 2012-2:  
JURY RESEARCH AND SOCIAL MEDIA

TOPIC: Jury Research and Social Media

DIGEST: Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror’s website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror’s social media activities, the lawyer must reveal the improper conduct to the court.

RULES: 3.5(a)(4); 3.5(a)(5); 3.5(d); 8.4

QUESTION: What ethical restrictions, if any, apply to an attorney’s use of social media websites to research potential or sitting jurors?

OPINION

I. Introduction

Ex parte attorney communication with prospective jurors and members of a sitting jury has long been prohibited by state rules of professional conduct (see American Bar Association Formal Opinion 319 (“ABA 319’’)), and attorneys have long sought ways to gather information about potential jurors during voir dire (and perhaps during trial) within these proscribed bounds. However, as the internet and social media have changed the ways in which we all communicate, conducting juror research while complying with the rule prohibiting juror communication has become more complicated.

In addition, the internet appears to have increased the opportunity for juror misconduct, and attorneys are responding by researching not only members of the venire but sitting jurors as well. Juror misconduct over the internet is problematic and has even led to mistrials. Jurors have begun to use social media services as a platform to communicate about a trial, during the trial (see WSJ Law Blog (March 12, 2012), http://blogs.wsj.com/law/2012/03/12/jury-files-the-temptation-of-twitter/), and jurors also turn to the internet to conduct their own out of court research. For example, the Vermont Supreme Court recently overturned a child sexual assault conviction because a juror conducted his own research on the cultural significance of the alleged crime in Somali Bantu culture. State v. Abdi, No. 2012-255, 2012 WL 231555 (Vt. Jan. 26, 2012). In a case in Arkansas, a murder conviction was overturned because a juror tweeted during the trial, and in a Maryland corruption trial in 2009, jurors used Facebook
to discuss their views of the case before deliberations.  (Juror’s Tweets Uprock Trials, Wall Street Journal, March 2, 2012.)  Courts have responded in various ways to this problem.  Some judges have held jurors in contempt or declared mistrials (see id.) and other courts now include jury instructions on juror use of the internet.  (See New York Pattern Jury Instructions, Section III, infra.)  However, 79% of judges who responded to a Federal Judicial Center survey admitted that “they had no way of knowing whether jurors had violated a social-media ban.” (Juror’s Tweets, supra.)  In this context, attorneys have also taken it upon themselves to monitor jurors throughout a trial.

Just as the internet and social media appear to facilitate juror misconduct, the same tools have expanded an attorney’s ability to conduct research on potential and sitting jurors, and clients now often expect that attorneys will conduct such research.  Indeed, standards of competence and diligence may require doing everything reasonably possible to learn about the jurors who will sit in judgment on a case.  However, social media services and websites can blur the line between independent, private research and interactive, interpersonal “communication.”  Currently, there are no clear rules for conscientious attorneys to follow in order to both diligently represent their clients and to abide by applicable ethical obligations.  This opinion applies the New York Rules of Professional Conduct (the “Rules”), specifically Rule 3.5, to juror research in the internet context, and particularly to research using social networking services and websites.¹

The Committee believes that the principal interpretive issue is what constitutes a “communication” under Rule 3.5.  We conclude that if a juror were to (i) receive a “friend” request (or similar invitation to share information on a social network site) as a result of an attorney’s research, or (ii) otherwise to learn of the attorney’s viewing or attempted viewing of the juror’s pages, posts, or comments, that would constitute a prohibited communication if the attorney was aware that her actions would cause the juror to receive such message or notification.  We further conclude that the same attempts to research the juror might constitute a prohibited communication even if inadvertent or unintended.  In addition, the attorney must not use deception—such as pretending to be someone else—to gain access to information about a juror that would otherwise be unavailable.  Third parties working for the benefit of or on behalf of an attorney must comport with these same restrictions (as it is always unethical pursuant to Rule 8.4 for an attorney to attempt to avoid the Rule by having a non-lawyer do what she cannot).  Finally, if a lawyer learns of juror misconduct through a juror’s social media activities, the lawyer must promptly reveal the improper conduct to the court.

¹ Rule 3.5(a)(4) states: “a lawyer shall not . . . (4) communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.”
II. Analysis Of Ethical Issues Relevant To Juror Research

A. Prior Authority Regarding An Attorney’s Ability To Conduct Juror Research Over Social Networking Websites

Prior ethics and judicial opinions provide some guidance as to what is permitted and prohibited in social media juror research. First, it should be noted that lawyers have long tried to learn as much as possible about potential jurors using various methods of information gathering permitted by courts, including checking and verifying voir dire answers. Lawyers have even been chastised for not conducting such research on potential jurors. For example, in a recent Missouri case, a juror failed to disclose her prior litigation history in response to a voir dire question. After a verdict was rendered, plaintiff’s counsel investigated the juror’s civil litigation history using Missouri’s automated case record service and found that the juror had failed to disclose that she was previously a defendant in several debt collection cases and a personal injury action. Although the court upheld plaintiff’s request for a new trial based on juror nondisclosure, the court noted that “in light of advances in technology allowing greater access to information that can inform a trial court about the past litigation history of venire members, it is appropriate to place a greater burden on the parties to bring such matters to the court’s attention at an earlier stage.” Johnson v. McCullough, 306 S.W.3d 551, 558-59 (Mo. 2010). The court also stated that “litigants should endeavor to prevent retrials by completing an early investigation.” Id. at 559.

Similarly, the Superior Court of New Jersey recently held that a trial judge “acted unreasonably” by preventing plaintiff’s counsel from using the internet to research potential jurors during voir dire. During jury selection in a medical malpractice case, plaintiff’s counsel began using a laptop computer to obtain information on prospective jurors. Defense counsel objected, and the trial judge held that plaintiff’s attorney could not use her laptop during jury selection because she gave no notice of her intent to conduct internet research during selection. Although the Superior Court found that the trial court’s ruling was not prejudicial, the Superior Court stated that “there was no suggestion that counsel’s use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of „fairness” or maintaining „a level playing field.” The „playing field” was, in fact, already „level” because internet access was open to both counsel.” Carino v. Muenzen, A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *27 (N.J. Sup. Ct. App. Div. Aug. 30, 2010).

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2 Missouri Rule of Professional Conduct 3.5 states: “A lawyer shall not: (a) seek to influence a judge, juror, prospective juror, or other official by means prohibited by law; (b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.”

3 The Committee also notes that the United States Attorney for the District of Maryland recently requested that a court prohibit attorneys for all parties in a criminal case from conducting juror research using social media, arguing that “if the parties were permitted to conduct additional research on the prospective jurors by using social media or any other outside sources prior to the
Other recent ethics opinions have also generally discussed attorney research in the social media context. For example, San Diego County Bar Legal Ethics Opinion 2011-2 (“SDCBA 2011-2”) examined whether an attorney can send a “friend request” to a represented party. SDCBA 2011-2 found that because an attorney must make a decision to “friend” a party, even if the “friend request [is] nominally generated by Facebook and not the attorney, [the request] is at least an indirect communication” and is therefore prohibited by the rule against ex parte communications with represented parties. In addition, the New York State Bar Association (“NYSBA”) found that obtaining information from an adverse party’s social networking personal webpage, which is accessible to all website users, “is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription research service as Niexi or Factiva and that is plainly permitted.” (NYSBA Opinion 843 at 2) (emphasis added).

And most recently, the New York County Lawyers’ Association (“NYCLA”) published a formal opinion on the ethics of conducting juror research using social media. NYCLA Formal Opinion 743 (“NYCLA 743”) examined whether a lawyer may conduct juror research during voir dire and trial using Twitter, Facebook and other similar social networking sites. NYCLA 743 found that it is “proper and ethical under Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror’s social networking site, provided there is no contact or communication with the prospective juror and the lawyer does not seek to „friend” jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror but must not „friend” the juror, email, send tweets or otherwise communicate in any way with the juror or act in any way by which the juror becomes aware of the monitoring.” (NYCLA 743 at 4.) The opinion further noted the importance of reporting to the court any juror misconduct uncovered by such research and found that an attorney must notify the court of any impropriety “before taking any further significant action in the case.” Id. NYCLA concluded that attorneys cannot use knowledge of juror misconduct to their advantage but rather must notify the court.

As set forth below, we largely agree with our colleagues at NYCLA. However, despite the guidance of the opinions discussed above, the question at the core of applying Rule 3.5 to social media—what constitutes a communication—has not been specifically addressed, and the Committee therefore analyzes this question below.

in court voir dire, the Court’s supervisory control over the jury selection process would, as a practical matter, be obliterated.” (Aug. 30, 2011 letter from R. Rosenstein to Hon. Richard Bennet.) The Committee is unable to determine the court’s ruling from the public file.

California Rule of Profession Conduct 2-100 states, in part: “(A) While representing a client, a member shall not communicate directly or indirectly about the subject of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.”
B. An Attorney May Conduct Juror Research Using Social Media Services And Websites But Cannot Engage In Communication With A Juror

1. Discussion of Features of Various Potential Research Websites

Given the popularity and widespread usage of social media services, other websites and general search engines, it has become common for lawyers to use the internet as a tool to research members of the jury venire in preparation for jury selection as well as to monitor jurors throughout the trial. Whether research conducted through a particular service will constitute a prohibited communication under the Rules may depend in part on, among other things, the technology, privacy settings and mechanics of each service.

The use of search engines for research is already ubiquitous. As social media services have grown in popularity, they have become additional sources to research potential jurors. As we discuss below, the central question an attorney must answer before engaging in jury research on a particular site or using a particular service is whether her actions will cause the juror to learn of the research. However, the functionality, policies and features of social media services change often, and any description of a particular website may well become obsolete quickly. Rather than attempt to catalog all existing social media services and their ever-changing offerings, policies and limitations, the Committee adopts a functional definition.\(^5\)

We understand “social media” to be services or websites people join voluntarily in order to interact, communicate, or stay in touch with a group of users, sometimes called a “network.” Most such services allow users to create personal profiles, and some allow users to post pictures and messages about their daily lives. Professional networking sites have also become popular. The amount of information that users can view about each other depends on the particular service and also each user’s chosen privacy settings. The information the service communicates or makes available to visitors as well as members also varies. Indeed, some services may automatically notify a user when her profile has been viewed, while others provide notification only if another user initiates an interaction. Because of the differences from service to service and the high rate of change, the Committee believes that it is an attorney’s duty to research and understand the properties of the service or website she wishes to use for jury research in order to avoid inadvertent communications.

2. What Constitutes a “Communication”?

Any research conducted by an attorney into a juror or member of the venire’s background or behavior is governed in part by Rule 3.5(a)(4), which states: “a lawyer shall not . . . (4)

\(^5\) As of the date of this writing, May 2012, three of the most common social media services are Facebook, LinkedIn and Twitter.
communicate or cause another to communicate with a member of the jury venire from which the jury will be selected for the trial of a case or, during the trial of a case, with any member of the jury unless authorized to do so by law or court order.” The Rule does not contain a mens rea requirement; by its literal terms, it prohibits all communication, even if inadvertent. Because of this, the application of Rule 3.5(a)(4) to juror research conducted over the internet via social media services is potentially more complicated than traditional juror communication issues. Even though the attorney’s purpose may not be to communicate with a juror, but simply to gather information, social media services are often designed for the very purpose of communication, and automatic features or user settings may cause a “communication” to occur even if the attorney does intend not for one to happen or know that one may happen. This raises several ethical questions: is every visit to a juror’s social media website considered a communication? Should the intent to research, not to communicate, be the controlling factor? What are the consequences of an inadvertent or unintended communications? The Committee begins its analysis by considering the meaning of “communicate” and “communication,” which are not defined either in the Rule or the American Bar Association Model Rules.  

Black’s Law Dictionary (9th Ed.) defines “communication” as: “1. The expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception.  2. The information so expressed or exchanged.” The Oxford English Dictionary defines “communicate” as: “To impart (information, knowledge, or the like) (to a person; also formerly with); to impart the knowledge or idea of (something), to inform a person of; to convey, express; to give an impression of, put across.” Similarly, Local Rule 26.3 of the United States District Courts for the Southern and Eastern Districts of New York defines “communication” (for the purposes of discovery requests) as: “the transmittal of information (in the form of facts, ideas, inquiries or otherwise).”  

Under the above definitions, whether the communicator intends to “impart” a message or knowledge is seemingly irrelevant; the focus is on the effect on the receiver. It is the “transmission of;” “exchange of” or “process of bringing” information or ideas from one person to another that defines a communication. In the realm of social media, this focus on the transmission of information or knowledge is critical. A request or notification transmitted through a social media service may constitute a communication even if it is technically generated by the service rather than the attorney, is not accepted, is ignored, or consists of nothing more than an automated message of which the “sender” was unaware. In each case, at a minimum, the researcher imparted to the person being researched the knowledge that he or she is being investigated.

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6 Although the New York City Bar Association Formal Opinion 2010-2 (“NYCBA 2010-2”) and SDCBA 2011-2 (both addressing social media “communication” in the context of the “No Contact” rule) were helpful precedent for the Committee’s analysis, the Committee is unaware of any opinion setting forth a definition of “communicate” as that term is used in Rule 4.2 or any other ethics rule.
3. An Attorney May Research A Juror Through Social Media Websites As Long As No Communication Occurs

The Committee concludes that attorneys may use search engines and social media services to research potential and sitting jurors without violating the Rules, as long as no communication with the juror occurs. The Committee notes that Rule 3.5(a)(4) does not impose a requirement that a communication be willful or made with knowledge to be prohibited. In the social media context, due to the nature of the services, unintentional communications with a member of the jury venire or the jury pose a particular risk. For example, if an attorney views a juror’s social media page and the juror receives an automated message from the social media service that a potential contact has viewed her profile—even if the attorney has not requested the sending of that message or is entirely unaware of it—the attorney has arguably “communicated” with the juror. The transmission of the information that the attorney viewed the juror’s page is a communication that may be attributable to the lawyer, and even such minimal contact raises the specter of the improper influence and/or intimidation that the Rules are intended to prevent. Furthermore, attorneys cannot evade the ethics rules and avoid improper influence simply by having a non-attorney with a name unrecognizable to the juror initiate communication, as such action will run afoul of Rule 8.4 as discussed in Section II(C), infra.

Although the text of Rule 3.5(a)(4) would appear to make any “communication”—even one made inadvertently or unknowingly—a violation, the Committee takes no position on whether such an inadvertent communication would in fact be a violation of the Rules. Rather, the Committee believes it is incumbent upon the attorney to understand the functionality of any social media service she intends to use for juror research. If an attorney cannot ascertain the functionality of a website, the attorney must proceed with great caution in conducting research on that particular site, and should keep in mind the possibility that even an accidental, automated notice to the juror could be considered a violation of Rule 3.5.

More specifically, and based on the Committee’s current understanding of relevant services, search engine websites may be used freely for juror research because there are no interactive functions that could allow jurors to learn of the attorney’s research or actions. However, other services may be more difficult to navigate depending on their functionality and each user’s particular privacy settings. Therefore, attorneys may be able to do some research on certain sites but cannot use all aspects of the sites’ social functionality. An attorney may not, for example, send a chat, message or “friend request” to a member of the jury or venire, or take any other action that will transmit information to the juror because, if the potential juror learns that the attorney seeks access to her personal information then she has received a communication. Similarly, an attorney may read any publicly-available postings of the juror but must not sign up to receive new postings as they are generated. Finally, research using services that may, even unbeknownst to the attorney, generate a message or allow a person to determine that
their webpage has been visited may pose an ethical risk even if the attorney did not intend or know that such a “communication” would be generated by the website.

The Committee also emphasizes that the above applications of Rule 3.5 are meant as examples only. The technology, usage and privacy settings of various services will likely change, potentially dramatically, over time. The settings and policies may also be partially under the control of the person being researched, and may not be apparent, or even capable of being ascertained. In order to comply with the Rules, an attorney must therefore be aware of how the relevant social media service works, and of the limitations of her knowledge. It is the duty of the attorney to understand the functionality and privacy settings of any service she wishes to utilize for research, and to be aware of any changes in the platforms’ settings or policies to ensure that no communication is received by a juror or venire member.

C. An Attorney May Not Engage in Deception or Misrepresentation In Researching Jurors On Social Media Websites

Rule 8.4(c), which governs all attorney conduct, prohibits deception and misrepresentation. In the jury research context, this rule prohibits attorneys from, for instance, misrepresenting their identity during online communications in order to access otherwise unavailable information, including misrepresenting the attorney’s associations or membership in a network or group in order to access a juror’s information. Thus, for example, an attorney may not claim to be an alumnus of a school that she did not attend in order to view a juror’s personal webpage that is accessible only to members of a certain alumni network.

Furthermore, an attorney may not use a third party to do what she could not otherwise do. Rule 8.4(a) prohibits an attorney from violating any Rule “through the acts of another.” Using a third party to communicate with a juror is deception and violates Rule 8.4(c), as well as Rule 8.4(a), even if the third party provides the potential juror only with truthful information. The attorney violates both rules whether she instructs the third party to communicate via a social network or whether the third party takes it upon herself to communicate with a member of the jury or venire for the attorney’s benefit. On this issue, the Philadelphia Bar Association Professional Guidance Committee Opinion 2009-02 (“PBA 2009-02”) concluded that if an attorney uses a third party to “friend” a witness in order to access information, she is guilty of deception because “[this action] omits a highly material fact, namely, that the third party who asks to be allowed access to the witness” pages is doing so only because she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit.” (PBA 2009-02 at 3.) New York City Bar Association Formal Opinion 2010-2 similarly held that a lawyer may not gain access to a social networking website under false pretenses, either directly or through an agent.

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7 Rule 8.4 prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation,” and also states “a lawyer or law firm shall not: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts or another.” (Rule 8.4(c),(a).)
and NYCLA 743 also noted that Rule 8.4 governs juror research and an attorney therefore cannot use deception to gain access to a network or direct anyone else to “friend” an adverse party.  (NYCLA 743 at 2.)  We agree with these conclusions; attorneys may not shift their conduct or assignments to non-attorneys in order to evade the Rules.

D. The Impact On Jury Service Of Attorney Use Of Social Media Websites For Research

Although the Committee concludes that attorneys may conduct jury research using social media websites as long as no “communication” occurs, the Committee notes the potential impact of jury research on potential jurors’ perception of jury service.  It is conceivable that even jurors who understand that many of their social networking posts and pages are public may be discouraged from jury service by the knowledge that attorneys and judges can and will conduct active research on them or learn of their online—albeit public—social lives.  The policy considerations implicit in this possibility should inform our understanding of the applicable Rules.

In general, attorneys should only view information that potential jurors intend to be—and make—public.  Viewing a public posting, for example, is similar to searching newspapers for letters or columns written by potential jurors because in both cases the author intends the writing to be for public consumption.  The potential juror is aware that her information and images are available for public consumption.  The Committee notes that some potential jurors may be unsophisticated in terms of setting their privacy modes or other website functionality, or may otherwise misunderstand when information they post is publicly available.  However, in the Committee’s view, neither Rule 3.5 nor Rule 8.4(c) prohibit attorneys from viewing public information that a juror might be unaware is publicly available, except in the rare instance where it is clear that the juror intended the information to be private.  Just as the attorney must monitor technological updates and understand websites that she uses for research, the Committee believes that jurors have a responsibility to take adequate precautions to protect any information they intend to be private.

E. Conducting On-Going Research During Trial

Rule 3.5 applies equally with respect to a jury venire and empanelled juries.  Research permitted as to potential jurors is permitted as to sitting jurors.  Although there is, in light of the discussion in Section III, infra, great benefit that can be derived from detecting instances when jurors are not following a court’s instructions for behavior while empanelled, researching jurors mid-trial is not without risk.  For instance, while an inadvertent communication with a venire member may result in an embarrassing revelation to a court and a disqualified panelist, a communication with a juror during trial can cause a mistrial.  The Committee therefore re-emphasizes that it is the attorney’s duty to understand the functionality of any social media service she chooses to utilize and to act with the utmost caution.
III. An Attorney Must Reveal Improper Juror Conduct to the Court

Rule 3.5(d) provides: “a lawyer shall reveal promptly to the court improper conduct by a member of the venire or a juror, or by another toward a member of the venire or a juror or a member of her family of which the lawyer has knowledge.” Although the Committee concludes that an attorney may conduct jury research on social media websites as long as “communication” is avoided, if an attorney learns of juror misconduct through such research, she must promptly notify the court. Attorneys must use their best judgment and good faith in determining whether a juror has acted improperly; the attorney cannot consider whether the juror’s improper conduct benefits the attorney.

On this issue, the Committee notes that New York Pattern Jury Instructions (“PJI”) now include suggested jury charges that expressly prohibit juror use of the internet to discuss or research the case. PJI 1:11 Discussion with Others - Independent Research states: “please do not discuss this case either among yourselves or with anyone else during the course of the trial. . . . It is important to remember that you may not use any internet service, such as Google, Facebook, Twitter or any others to individually or collectively research topics concerning the trial. . . . For now, be careful to remember these rules whenever you use a computer or other personal electronic device during the time you are serving as juror but you are not in the courtroom.” Moreover, PJI 1:10 states, in part, “in addition, please do not attempt to view the scene by using computer programs such as Goggle Earth. Viewing the scene either in person or through a computer program would be unfair to the parties . . . .” New York criminal courts also instruct jurors that they may not converse among themselves or with anyone else upon any subject connected with the trial. NY Crim. Pro. §270.40 (McKinney’s 2002).

The law requires jurors to comply with the judge’s charge and courts are increasingly called upon to determine whether jurors’ social media postings require a new trial. See, e.g., Smead v. CL Financial Corp., No. 06CC11633, 2010 WL 6562541 (Cal. Super. Ct. Sept. 15, 2010) (holding that juror’s posts regarding length of trial were not prejudicial and denying motion for new trial). However, determining whether a juror’s conduct is misconduct may be difficult in the realm of social media. Although a post or tweet on the subject of the trial, even if unanswered, can be considered a “conversation,” it may

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8 New York City Bar Association Formal Opinion 2012-1 defined “promptly” to mean “as soon as reasonably possible.”

9 Although the Committee is not opining on the obligations of jurors (which is beyond the Committee’s purview), the Committee does note that if a juror contacts an attorney, the attorney must promptly notify the court under Rule 3.5(d).

10 People v. Clarke, 168 A.D.2d 686 (2d Dep’t 1990) (holding that jurors must comply with the jury charge).
not always be obvious whether a particular post is “connected with” the trial. Moreover, a juror may be permitted to post a comment “about the fact [of] service on jury duty.”

IV. Post-Trial

In contrast to Rule 3.4(a)(4), Rule 3.5(a)(5) allows attorneys to communicate with a juror after discharge of the jury. After the jury is discharged, attorneys may contact jurors and communicate, including through social media, unless “(i) the communication is prohibited by law or court order; (ii) the juror has made known to the lawyer a desire not to communicate; (iii) the communication involves misrepresentation, coercion, duress or harassment; or (iv) the communication is an attempt to influence the juror's actions in future jury service.” Rule 3.5(a)(5). For instance, NYSBA Opinion 246 found that “lawyers may communicate with jurors concerning the verdict and case.” (NYSBA 246 (interpreting former EC 7-28; DR 7-108(D).) The Committee concludes that this rule should also permit communication via social media services after the jury is discharged, but the attorney must, of course, comply with all ethical obligations in any communication with a juror after the discharge of the jury. However, the Committee notes that “it [is] unethical for a lawyer to harass, entice, or induce or exert influence on a juror” to obtain information or her testimony to support a motion for a new trial. (ABA 319.)

V. Conclusion

The Committee concludes that an attorney may research potential or sitting jurors using social media services or websites, provided that a communication with the juror does not occur. “Communication,” in this context, should be understood broadly, and includes not only sending a specific message, but also any notification to the person being researched that they have been the subject of an attorney’s research efforts. Even if the attorney does not intend for or know that a communication will occur, the resulting inadvertent communication may still violate the Rule. In order to apply this rule to social media websites, attorneys must be mindful of the fact that a communication is the process of bringing an idea, information or knowledge to another’s perception—including the fact that they have been researched. In the context of researching jurors using social media services, an attorney must understand and analyze the relevant technology, privacy settings and policies of each social media service used for jury research. The attorney must also avoid engaging in deception or misrepresentation in

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11 US v. Fumo, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009) aff'd, 655 F.3d 288 (3d Cir. 2011) (“[The juror’s] comments on Twitter, Facebook, and her personal web page were innocuous, providing no indication about the trial of which he was a part, much less her thoughts on that trial. Her statements about the fact of her service on jury duty were not prohibited. Moreover, as this Court noted, her Twitter and Facebook postings were nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless. [Juror] raised no specific facts dealing with the trial, and nothing in these comments indicated any disposition toward anyone involved in the suit.”) (internal citations omitted).
conducting such research, and may not use third parties to do that which the lawyer cannot. Finally, although attorneys may communicate with jurors after discharge of the jury in the circumstances outlined in the Rules, the attorney must be sure to comply with all other ethical rules in making any such communication.
ADVISING A CLIENT REGARDING POSTS ON SOCIAL MEDIA SITES

TOPIC: What advice is appropriate to give a client with respect to existing or proposed postings on social media sites.

DIGEST: It is the Committee’s opinion that New York attorneys may advise clients as to (1) what they should/should not post on social media, (2) what existing postings they may or may not remove, and (3) the particular implications of social media posts, subject to the same rules, concerns, and principles that apply to giving a client legal advice in other areas including RPC 3.1, 3.3 and 3.4.1

RPC: 4.1, 4.2, 3.1, 3.3, 3.4, 8.4.

OPINION:

This opinion provides guidance about how attorneys may advise clients concerning what may be posted or removed from social media websites. It has been estimated that Americans spend 20 percent of their free time on social media (Facebook, Twitter, Friendster, Flickr, LinkedIn, and the like). It is commonplace to post travel logs, photographs, streams of consciousness, rants, and all manner of things on websites so that family, friends, or even the public-at-large can peer into one’s life. Social media enable users to publish information regionally, nationally, and even globally.

The personal nature of social media posts implicates considerable privacy concerns. Although all of the major social media outlets have password protections and various levels of privacy settings, many users are oblivious or indifferent to them, providing an opportunity for persons with adverse interests to learn even the most intimate information about them. For example, teenagers and college students commonly post photographs of themselves partying, binge drinking, indulging in illegal drugs or sexual poses, and the like. The posters may not be aware, or may not care, that these posts may find their way into the hands of family, potential employers, school admission officers, romantic contacts, and others. The content of a removed social media posting may continue to exist, on the poster’s computer, or in cyberspace.

1 This opinion is limited to conduct of attorneys in connection with civil matters. Attorneys involved in criminal cases may have different ethical responsibilities.
That information posted on social media may undermine a litigant’s position has not been lost on attorneys. Rather than hire investigators to follow claimants with video cameras, personal injury defendants may seek to locate YouTube videos or Facebook photos that depict a “disabled” plaintiff engaging in activities that are inconsistent with the claimed injuries. It is now common for attorneys and their investigators to seek to scour litigants’ social media pages for information and photographs. Demands for authorizations for access to password-protected portions of an opposing litigant’s social media sites are becoming routine.

Recent ethics opinions have concluded that accessing a social media page open to all members of a public network is ethically permissible. New York State Bar Association Eth. Op. 843 (2010); Oregon State Bar Legal Ethics Comm., Op. 2005-164 (finding that accessing an opposing party’s public website does not violate the ethics rules limiting communications with adverse parties). The reasoning behind these opinions is that accessing a public site is conceptually no different from reading a magazine article or purchasing a book written by that adverse party. Oregon Op. 2005-164 at 453.

But an attorney’s ability to access social media information is not unlimited. Attorneys may not make misrepresentations to obtain information that would otherwise not be obtainable. In contact with victims, witnesses, or others involved in opposing counsel’s case, attorneys should avoid misrepresentations, and, in the case of a represented party, obtain the prior consent of the party’s counsel. New York Rules of Professional Conduct (RPC 4.2). See, NYCBA Eth. Op., 2010-2 (2012); NYSBA Eth. Op. 843. Using false or misleading representations to obtain evidence from a social network website is prohibited. RPC 4.1, 8.4(c).

Social media users may have some expectation of privacy in their posts, depending on the privacy settings available to them, and their use of those settings. All major social media allow members to set varying levels of security and “privacy” on their social media pages. There is no ethical constraint on advising a client to use the highest level of privacy/security settings that is available. Such settings will prevent adverse counsel from having direct access to the contents of the client’s social media pages, requiring adverse counsel to request access through formal discovery channels.

A number of recent cases have considered the extent to which courts may direct litigants to authorize adverse counsel to access the “private” portions of their social media postings. While a comprehensive review of this evolving body of law is beyond the scope of this opinion, the premise behind such cases is that social media websites may contain materials inconsistent with a party’s litigation posture, and thus may be used for impeachment. The newest cases turn on whether the party seeking such disclosure has laid a sufficient foundation that such impeachment material likely exists or whether the party is engaging in a “fishing expedition” and an invasion of privacy in the hopes of stumbling onto something that may be useful.2

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2 In Tapp v. N.Y.S. Urban Dev. Corp., 102 A.D.3d 620, 958 N.Y.S. 2d 392 (1st Dep’t 2013), the First Department held that a defendant’s contention that Facebook activities “may reveal daily activities that contradict or conflict with
Given the growing volume of litigation regarding social media discovery, the question arises whether an attorney may instruct a client who does not have a social media site not to create one: May an attorney pre-screen what a client posts on a social media site? May an attorney properly instruct a client to “take down” certain materials from an existing social media site?

Preliminarily, we note that an attorney’s obligation to represent clients competently (RPC 1.1) could, in some circumstances, give rise to an obligation to advise clients, within legal and ethical requirements, concerning what steps to take to mitigate any adverse effects on the clients’ position emanating from the clients’ use of social media. Thus, an attorney may properly review a client’s social media pages, and advise the client that certain materials posted on a social media page may be used against the client for impeachment or similar purposes. In advising a client, attorneys should be mindful of their ethical responsibilities under RPC 3.4. That rule provides that a lawyer shall not “(a)(1) suppress any evidence that the lawyer or the client has a legal obligation to reveal or produce... [nor] (3) conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.”

Attorneys’ duties not to suppress or conceal evidence involve questions of substantive law and are therefore outside the purview of an ethics opinion. We do note, however, that applicable state or federal law may make it an offense to destroy material for the purpose of defeating its availability in a pending or reasonably foreseeable proceeding, even if no specific request to reveal or produce evidence has been made. Under principles of substantive law, there may be a duty to preserve “potential evidence” in advance of any request for its discovery. VOOM HD Holdings LLC v. EchoStar Satellite L.L.C., 93 A.D.3d 33, 939 N.Y.S. 2d 331 (1st Dep’t 2012) (“Once a party reasonably anticipates litigation, it must, at a minimum, institute an appropriate litigation hold to prevent the routine destruction of electronic data.”); QK Healthcare, Inc., v. Forest Laboratories, Inc., 2013 N.Y. Misc. LEXIS 2008; 2013 N.Y. Slip Op. 31028(U) (Sup. Ct. N.Y. Co., May 8, 2013); RPC 3.4, Comment [2]. Under some circumstances, where litigation is anticipated, a duty to preserve evidence may arise under substantive law. But provided that such removal does not violate the substantive law regarding destruction or spoliation of evidence, there is no ethical bar to “taking down” such material from social media publications, or prohibiting a client’s attorney from advising the client to do so, particularly inasmuch as the substance of the posting is generally preserved in cyberspace or on the user’s computer.

An attorney also has an ethical obligation not to “bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”

plaintiff’s” claim isn’t enough. “Mere possession and utilization of a Facebook account is an insufficient basis to compel plaintiff to provide access to the account or to have the court conduct an in camera inspection of the account’s usage. To warrant discovery, defendants must establish a factual predicate for their request by identifying relevant information in plaintiff’s Facebook account — that is, information that ‘contradicts or conflicts with plaintiff’s alleged restrictions, disabilities, and losses, and other claims.’” Also, see, Kregg v. Maldonado, 98 A.D.3d 1289, 951 N.Y.S. 2d 301 (4th Dep’t 2012); Patterson v. Turner Constr. Co., 88 A.D.3d 617, 931 N.Y.S. 2d 311 (1st Dep’t 2011); McCann v. Harleysville Ins. Co. of N.Y., 78 A.D.3d 1524, 910 N.Y.S. 2d 614 (4th Dep’t 2010).
RPC 3.1(a). Frivolous conduct includes the knowing assertion of “material factual statements that are false.” RPC 3.1(b)(3). Therefore, if a client’s social media posting reveals to an attorney that the client’s lawsuit involves the assertion of material false factual statements, and if proper inquiry of the client does not negate that conclusion, the attorney is ethically prohibited from proffering, supporting or using those false statements. See also, RPC 3.3; 4.1 (“In the course of representing a client, a lawyer shall not knowingly make a false statement of fact or law to a third person.”)

Clients are required to testify truthfully at a hearing, deposition, trial, or the like, and a lawyer may not fail to correct a false statement of material fact or offer or use evidence the lawyer knows to be false. RPC 3.3(a)(1); 3.4(a)(4). Thus, a client must answer truthfully (subject to the rules of privilege or other evidentiary objections) if asked whether changes were ever made to a social media site, and the client’s lawyer must take prompt remedial action in the case of any known material false testimony on this subject. RPC 3.3 (a)(3).

We further conclude that it is permissible for an attorney to review what a client plans to publish on a social media page in advance of publication, to guide the client appropriately, including formulating a corporate policy on social media usage. Again, the above ethical rules and principles apply: An attorney may not direct or facilitate the client’s publishing of false or misleading information that may be relevant to a claim; an attorney may not participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false. RPC 3.4(a)(4). However, a lawyer may counsel the witness to publish truthful information favorable to the lawyer’s client; discuss the significance and implications of social media posts (including their content and advisability); advise the client how social media posts may be received and/or presented by the client’s legal adversaries and advise the client to consider the posts in that light; discuss the possibility that the legal adversary may obtain access to “private” social media pages through court orders or compulsory process; review how the factual context of the posts may affect their perception; review the posts that may be published and those that have already been published; and discuss possible lines of cross-examination.

CONCLUSION:

Lawyers should comply with their ethical duties in dealing with clients’ social media posts. The ethical rules and concepts of fairness to opposing counsel and the court, under RPC 3.3 and 3.4, all apply. An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on “private” social media pages, and what may be “taken down” or removed.

3 We do not suggest that all information on Facebook pages would constitute admissible evidence; such determinations must be made as a matter of substantive law on a case by case basis.

172 F.Supp.3d 1100
United States District Court, N.D. California.

Oracle America, Inc., Plaintiff,
v.
Google Inc., Defendant.

No. C 10–03561 WHA
Signed March 25, 2016

Synopsis
Background: Copyright owner brought action against alleged infringer for violation of owner's copyright in programming platform that alleged infringer used to compose operating system for mobile devices.

[ Holding ] The District Court, William Alsup, J., held that if both parties were unable to consent to complete ban on internet and social research on venire or empaneled jury, parties would follow procedures regarding use and disclosure of such research to venire and jury.

Ordered accordingly.

West Headnotes (1)

[1] Jury
  Examination by court
  Rights and privileges of jurors

Court would order, in absence of complete agreement by both parties on ban against internet and social media research on venire members, that certain procedures would be followed at jury instruction to inform venire members about specific extent to which each party would use internet and social media searches to investigate and monitor jurors both during and after trial, so that venire members could adjust their privacy settings from mobile devices if they wished, and as trial progressed, each party would immediately report any apparent misconduct by a juror to the court and preserve an exact record of every search and all information viewed so that court and parties could see when objecting side of motion alleging juror misconduct first learned of a problem, and further, no personal appeals to particular jurors were allowed at any time during trial.

Cases that cite this headnote

Attorneys and Law Firms

ORDER RE INTERNET AND SOCIAL MEDIA SEARCHES OF JURORS

WILLIAM ALSUP, UNITED STATES DISTRICT JUDGE

Trial judges have such respect for juries—reverential respect would not be too strong to say—that it must pain them to contemplate that, in addition to the sacrifice jurors make for our country, they must suffer trial lawyers and jury consultants scouring over their Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.

In this high-profile copyright action, both sides requested that the Court require the venire to complete a two-page jury questionnaire. One side then wanted a full extra day to digest the answers, and the other side wanted two full extra days, all before beginning voir dire. Wondering about the delay allocated to reviewing two pages, the judge eventually realized that counsel wanted the names and residences from the questionnaire so that, during the delay, their teams could scrub Facebook and other profiles to dissect their politics, religion, relationships, preferences, friends, photographs, and other personal information.

An ordinary Google search on the venire would fetch hits, including links to many Facebook profiles, which, in turn, would at least display profile information classified as “public.” Counsel could uncover even more personal information by logging onto their own Facebook accounts and researching the specific venire persons. In this way, counsel could mine not only the “public” data but the details classified as “for friends only” or “friends of friends,” depending on the fortuity of friend listings. The same is true, more or less, for other social media sites.

The Court, of course, realizes that social media and Internet searches on the venire would turn up information useful to the lawyers in exercising their three peremptory challenges, and, might even, in a very rare case, turn up information concealed during voir dire that could lead to a for-cause removal. While the trial is underway, ongoing searches might conceivably reveal commentary about the case to or from a juror.

Nevertheless, in this case there are good reasons to restrict, if not forbid, such searches by counsel, their jury consultants, investigators, and clients.

The first reason is anchored in the danger that upon learning of counsel's own searches directed at them, our jurors would stray from the Court's admonition to refrain from conducting Internet searches on the lawyers and the case. This is a high-profile lawsuit, as stated, and dates back to 2010. Nearly one million hits (including tens of thousands of news results) appear in a Google search for Oracle v. Google. These include strong opinions on both sides and at least the usual amount of inaccurate information. In this very case, we earlier learned that both sides hired online commentators who have promoted their respective litigation viewpoints on blogs and other web sites. Numerous of the top results for searches on counsel for either party (or for the undersigned judge) include discussions of this controversy and its national policy implications. As a result, we have an unusually strong need to prevent any member of our jury from yielding to the impulse to conduct Internet searches on our lawyers or our case or its history.

Our jury will, of course, be admonished to refrain from any Internet research about the lawsuit, the parties, the lawyers, or the judge—an admonition that will be regularly repeated. See Judicial Conference Committee on Court Administration and Case Management, Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate about a Case (June 2012). Indeed, the entire venire will be told to refrain from any such research soon after it reaches the courtroom and well before the final jury is even selected.
Google is willing to accept an outright ban on Internet research about the venire and our jury, provided the ban applies equally to both sides. Oracle, however, will not. Oracle initially took a broad position on the scope of Internet research it intended to conduct, but it has since purported to scale back its plan. On numerous occasions, Oracle has supplied confusing answers to the Court's inquiries about its plan, and its responses make little sense in light of how the Court understands the most prominent social media sites to operate. For purposes of this order, it is unnecessary to pin Oracle down in its intentions, but it will be necessary for Oracle to pin down its specific search intentions by the time jury selection begins, as outlined below.

To return to the first concern, the apparent unfairness in allowing the lawyers to do to the venire what the venire cannot do to the lawyers will likely have a corrosive effect on fidelity to the no-research admonition. Once our venire learns of the lawyers' Internet searches (as the venire would via the instruction Oracle requests), a very serious risk will be presented that they will feel justified in doing to the lawyers (and to the case itself) what the lawyers are doing to them, namely, conducting Internet searches—despite the no-research admonition. The one-sidedness of Oracle's approach will be hard to accept and therein lies the danger. Given the massive volume of Internet commentary on the lawyers and the case, this presents a significant risk.

A second danger posed by allowing counsel to conduct research about the venire *1103 and the jury is that it will facilitate improper personal appeals to particular jurors via jury arguments and witness examinations patterned after preferences of jurors found through such Internet searches. For example, if a search found that a juror's favorite book is *To Kill A Mockingbird,* it wouldn't be hard for counsel to construct a copyright jury argument (or a line of expert questions) based on an analogy to that work and to play upon the recent death of Harper Lee, all in an effort to ingratiate himself or herself into the heartstrings of that juror. The same could be done with a favorite quote or with any number of other juror attitudes on free trade, innovation, politics, or history. Jury arguments may, of course, employ analogies and quotations, but it would be out of bounds to play up to a juror through such a calculated personal appeal, all the moreso since the judge, having no access to the dossiers, couldn't see what was really in play. See *United States v. Nobari,* 574 F.3d 1065, 1077 (9th Cir.2009).

A third reason is to protect the privacy of the venire. They are not celebrities or public figures. The jury is not a fantasy team composed by consultants, but good citizens commuting from all over our district, willing to serve our country, and willing to bear the burden of deciding a commercial dispute the parties themselves cannot resolve. Their privacy matters. Their privacy should yield only as necessary to reveal bias or a reluctance to follow the Court's instructions. It is a weak answer that venire persons, through their social media privacy settings, have chosen to expose their profiles to scrutiny, for navigating privacy settings and fully understanding default settings is more a matter of blind faith than conscious choice. (Otherwise, there would be no need for websites explaining the intricacies of privacy settings.)

For all these reasons, the Court has considered exercising its discretion to impose an outright ban preventing counsel and the parties from conducting social media and Internet searches on venire persons as well as on the final empaneled jury. Such a ban would be within the sound exercise of discretion to protect the integrity of our process and to curb unnecessary intrusions into juror privacy. A main problem in doing so, however, is that the lawyers would then be precluded from learning information readily available to the press and every member of the public in the gallery. That is, with an outright ban, everyone in the gallery could have more information about the venire persons and the empaneled jurors than the lawyers themselves. Of course, the Court cannot control those in the gallery, but it can control the trial teams. And, lawyer surveillance is what leads to the problems above, so such a ban on the trial teams would be logical. Still, the Court respects the excellent trial lawyers in this case and their burden in this trial and is reluctant to order them. Rather, the Court calls upon them to voluntarily consent to a ban against Internet research on the venire or our jury until the trial is over. If they will so agree, we will so advise the venire at the start of jury selection and this will surely have a positive effect on fidelity to the no-research admonition. If all counsel so agree, counsel will be given an enlargement of time to conduct extra voir dire themselves.

In the absence of complete agreement on a ban, the following procedure will be used. At the outset of jury
selection, each side shall inform the venire of the specific extent to which it (including jury consultants, clients, and other agents) will use Internet searches to investigate and to monitor jurors, including specifically searches on Facebook, LinkedIn, Twitter, and so on, including the extent to which they will log onto their own social media accounts to conduct searches and the extent to which they will perform ongoing searches while the trial is underway. Counsel shall not explain away their searches on the ground that the other side will do it, so they have to do it too. Nor may counsel intimate to the venire that the Court has allowed such searches and thereby leave the false impression that the judge approves of the intrusion. Counsel may simply explain that they feel obliged to their clients to consider all information available to the public about candidates to serve as jurors. Otherwise, counsel must stick to disclosing the full extent to which they will conduct searches on jurors. By this disclosure, the venire will be informed that the trial teams will soon learn their names and places of residence and will soon discover and review their social media profiles and postings, depending on the social media privacy settings in place. The venire persons will then be given a few minutes to use their mobile devices to adjust their privacy settings, if they wish. The venire persons will also be given the normal admonition that they cannot do any research about the case, the parties, or the lawyers and that they cannot speak to anyone about the case, including by making any social media postings about it. Only the names and places of residence of those called forward to the box shall be provided to counsel (so the identities of venire persons still in the gallery will remain private).

In this case, there is a further special point that both sides may wish to address with the venire. The very name of the defendant—Google—brings to mind Internet searches. On their own, prospective jurors are likely to wonder whether Google will be mining the histories of Internet searches by the venire persons to determine their interests in politics, careers, hobbies, dating, shopping, travel, or other intimate facts. Although Google has assured the Court that it has no intention to review such search histories, our venire will not know this (unless told) and may speculate. It would, therefore, be prudent to explain to our venire that neither party will resort to examining search histories on any search engine.

Thereafter, until the trial is over, each side will be permitted to view online whatever it told the venire it would review—but nothing more. If, as we proceed forward, either side detects any apparent misconduct by a juror, counsel must immediately report it to the Court and the other side regardless of whether the juror appears favorable to their side or not. Each side must preserve an exact record of every search and all information viewed so that if a motion is later made alleging misconduct by a juror, we will all be able to see when the objecting side first learned of the problem.

During voir dire, each prospective juror that has been called forward will be asked if he or she can still follow the usual prohibitions on research and public statements about the case despite the one-sidedness (that is, despite the fact that one or both trial teams will be trying to monitor each juror’s social media postings). If the prospective juror cannot do so, he or she will be excused on that basis.

With regard to the problem of personal appeals, this order rules now that no personal appeals to any juror may be made. This prohibition bars witness examinations or jury arguments (or opening statements) exploiting information learned about a juror via searches, such as, without limitation, favorite books, texts, verses, songs, or analogies to likes or dislikes expressed on the Internet. This prohibition, of course, applies whether or not the name of the particular juror is called out.

In addition to the Court’s own thorough voir dire, each side shall have twenty minutes of venire examination directed to bias or other for-cause challenges, subject to enlargement for good cause (but this may not be used for “conditioning the jury” or “extracting promises” or drawing out argumentative material from jurors to argue the case).

The Court would much prefer to fully protect the privacy of all venire persons from Internet searches and only reluctantly allows the foregoing.

* * *

This is an emerging and developing concern. To that end, this order will now step back and offer a snapshot of how some of today’s prominent social media sites protect (or don't protect) personal information, which information
may be useful for other judges, lawyers, and academics in working through this concern:

• With regard to Facebook, typical profiles contain the following information: lists of personal connections (i.e., “friends”), pictures, videos, check-ins at real-world locations, scheduled events, posts dating back to the creation of the user’s profile (including commentary on news stories and discussions with other “friends”), relationship status, work experience, educational background, current city, home town, contact information, and certain personal interests such as favorite quotes, membership in certain groups, hobbies, political preferences, religious views, sexual orientation, and preferred media. Access to segments of this information can be regulated by the account holder according to various privacy settings. The highest level of privacy keeps information accessible only to the user. This is rarely used, inasmuch as a key purpose of Facebook is to share information with other people using the platform. The next level of privacy allows a user to reveal information only to his or her “friends” (or to a more limited list). The next level allows access to “friends of friends,” which includes not only the user's friends but all of the friends of the user's friends, which can vastly multiply access. (For example, if someone has three hundred friends and each of them has three hundred friends, access would expand to 90,000 viewers.) The most expansive setting is “public,” meaning at least everyone with a Facebook account. Certain “public” information, including a user's primary picture, list of likes, hometown, current city, education and work history, and favorite quote, is even available to Internet users without Facebook accounts or who have not logged onto their accounts. Generally, a Facebook user's post history (i.e., the stream of text, articles, discussions, pictures, and videos the user shares) is not available to searchers without a Facebook account. By default today, most information is accessible only to friends, although a default setting of “friends of friends” has been employed by Facebook in the past. This means that someone may log onto Facebook and automatically access all Facebook information (including post history) on a juror classified as “public,” as “friends of friends” (if there is a “friend” in common) or as “friends only” (if the investigator happens to be a Facebook “friend” of the juror). “Public” information (excluding post history) is accessible as well via ordinary Google searches without ever logging onto Facebook. Finally, Facebook does not notify its users when their profiles have been visited.

• With regard to Twitter, a typical user's profile includes that user's "tweet" history, which includes all posts made since the user created the account, the list of other Twitter accounts that user “follows” and the list of other users that “follow” that user's account. When one Twitter user “follows” another Twitter user, the latter's posts appear in the former's default real-time feed of tweets. Access to this information is regulated by a choice between two privacy settings. The default privacy setting keeps all of a user's tweets public, in which case anyone may view those tweets, even without ever logging onto a Twitter account. Additionally, anyone who is logged onto Twitter can view the list of a user’s "followers" and the accounts that user “follows” if the user's tweets are made public. Alternatively, a user may elect to keep tweets “protected,” in which case the above information is available only to other Twitter users whom the user has affirmatively approved to view that information. Twitter does not notify its users when their profiles have been visited.

• With regard to LinkedIn, a typical user's profile includes a picture, the user's employment and education history, contact information, a list of skills, publications, awards and interests, among other line items that might appear on a résumé. The profile also includes information such as a list of the “connections” the user has established on the site. (Two users “connect” once one user sends a request to connect and the other accepts the request, which opens up additional personal data and avenues of communication.) A user's profile also displays a list of groups established on the site that the user has joined. Users can post content, such as links to news articles or original writing. For each item on a user's profile (except for the list of “connections”), the user may elect to publish the item to his or her “public profile,” making it visible to everyone, including individuals who are not even logged onto LinkedIn, or to make it visible only to the user's “connections.” A user may further select whether to reveal his list of personal connections to other users. Unlike Facebook and Twitter, LinkedIn's default setting is to display a notification informing a user
each time his or her profile is visited by another LinkedIn user and identifying that visitor by name. A visitor may change that setting so that a visitee receives no notification, or so the notification only displays the visitor's place of employment without any further identifying information.

With regard to the case law, most of it discusses the problems of jurors using of social media and conducting Internet searches, thereby exposing jurors to commentary about the case. E.g., *United States v. Feng Li*, 630 Fed.Appx. 29, 33–34, 2015 WL 7005595, at *3 (2d Cir.2015); *United States v. Fumo*, 655 F.3d 288 (3d. Cir.2011); *Dimas-Martinez v. State*, 2011 Ark. 515, 385 S.W.3d 238 (2011). Several other decisions address whether a party waives arguments seeking to set aside a verdict based on a juror's apparent bias if that apparent bias could have been discovered through an Internet search of that juror before the verdict (where counsel were allowed and able to conduct such searches).


There are precious few decisions addressing our immediate problem, namely, whether counsel should be allowed to conduct *1107 Internet and social media research about prospective and empaneled jurors.

The American Bar Association issued an opinion that, within limits, it is ethical for counsel to conduct Internet searches on prospective jurors. Specifically, in Formal Opinion No. 466, the ABA considered the extent to which an attorney may conduct Internet searches of jurors and prospective jurors without running afoul of ABA Model Rule 3.5(b), which prohibits ex parte communication with jurors. That opinion determined that “passive review” of a juror's website or social media that is available without making an “access request” and of which the juror is unaware is permissible within ABA Model Rule 3.5(b). The ABA likened such review to “driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions.” Access requests, such as friend requests on Facebook, “following” users on Twitter, or seeking to “connect” on LinkedIn, whether on one's own or through a jury consultant or other agent, constitute forbidden ex parte communications within the rule. That such searches are not unethical does not translate into an inalienable right to conduct them.

Although the ABA determined that a range of activities is *permitted* without violating a professional duty, it cautioned that judges may limit the scope of the searches that counsel could perform regarding the juror's social media “[i]f a judge believes it to be necessary, under the circumstances of a particular matter....”

California has not promulgated a rule regarding the ethical scope of Internet research on jurors or prospective jurors, nor has the California State Bar issued an opinion on that subject. The California State Bar website provides a link to the ABA opinion discussed above as well as links to opinions from the Association of the Bar of the City of New York and the Oregon State Bar. Formal Opinion No. 2012–2, issued by the ABCNY, largely mirrors the ABA opinion, except that the ABCNY would prohibit any Internet research that notified the juror such research occurred (such as using LinkedIn in a manner that sent an automatic notification informing the user that another user had visited his or her profile). Formal Opinion No. 2013–189, issued by the Oregon State Bar provides, unlike the ABA or the ABCNY, that a lawyer may affirmatively request access to private aspects of a juror's social media profiles, provided the lawyer accurately represents his or her role in a case when asked by the juror. Neither the New York City opinion nor the Oregon opinion addressed the judge's discretion in prohibiting such searches or access requests.

In *United States v. Norwood*, No. 12–CR–20287, 2014 WL 1796644 (E.D.Mich. May 6, 2014) (Judge Mark A. Goldsmith), the defendants opposed a plan to empanel an anonymous jury (which would protect the jury from intimidation in a case involving a violent criminal enterprise). Defendants argued that their counsel needed access to the jurors' identifying information to monitor their social media accounts during the trial to ensure compliance with the no-discussion admonition. Judge Goldsmith rejected the defendants' argument because the proposed monitoring would “unnecessarily chill the willingness of jurors summoned from [the] community to serve as participants in our democratic system of justice.” *Id.* at *4 (quoting *United States v. Kilpatrick*, No. 10–20403, 2012 WL 3237147, at *1 (E.D.Mich. Aug. 7, 2012)
In *Carino v. Muenzen*, No. A–5491–08T1, 2010 WL 3448071, at *10 (N.J.Super.App.Div. Aug. 30, 2010), a trial court in New Jersey prohibited the plaintiff's counsel from using the Internet to investigate the jurors because they had failed to notify opposing counsel that they would be conducting such searches, although the trial court cited no basis for requiring such notification. The New Jersey Appellate Division determined that the trial court abused its discretion by imposing such a prohibition "in the name of 'fairness' or maintaining a 'level playing field.'” *Ibid.*

Oracle cites *Sluss v. Commonwealth*, 381 S.W.3d 215, 226–227 (Ky.2012), for the contention that counsel's lack of access to social media “effectively precluded” full voir dire, but that decision did not address a prohibition on social media and Internet searches. Rather, it addressed two jurors' false statements made during oral voir dire regarding their respective relationships to the victim's mother. A review of the jurors' respective Facebook profiles later revealed that both jurors were Facebook “friends” with the victim's mother. One of the jurors in question unequivocally denied having a Facebook account (which later proved false). Thus, the case was remanded for a hearing regarding the jurors' honesty and whether the true facts warranted for-cause removal.

Finally, in *Steiner v. Superior Court*, 220 Cal.App.4th 1479, 1493, 164 Cal.Rptr.3d 155 (2013), as modified on denial of rehearing (Nov. 26, 2013), the California Court of Appeal recognized that although certain tools are available to ensure that jurors do not conduct research about the attorneys or the case, a judge lacks the authority “to impose, as a prophylactic measure, an order requiring” defense counsel to remove pages from their website to ensure they could not be viewed by the jurors, which "constituted an unlawful prior restraint on [counsel's] constitutional right to free speech.”

* * *

Both sides shall inform the Court By MARCH 31 AT NOON, whether they will consent to a ban against Internet research on the venire or the empaneled jury until the trial is over.

IT IS SO ORDERED.

All Citations

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NOTE: These rules shall be referred to as the Rules of Professional Conduct and shall be abbreviated as "RPC."
RPC 1.0 Terminology

(a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent."

(c) "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

(f) "Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

(g) "Partner" denotes a member of a partnership, a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

(h) "Primary responsibility" denotes actual participation in the management and direction of the matter at the policy-making level or responsibility at the operational level as manifested by the continuous day-to-day responsibility for litigation or transaction decisions.

(i) "Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

(j) "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

(k) "Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

(l) "Screened" denotes the isolation of a lawyer from any participation in a matter through the timely adoption and enforcement by a law firm of a written procedure pursuant to RPC 1.10(f) which is reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.

(m) "Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.
(n) "Tribunal" denotes a court, an arbitrator in an arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

(o) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or videorecording, electronic communication, and embedded information (metadata) in an electronic document. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

(p) "Metadata" is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins.

Note: Adopted November 17, 2003 to be effective January 1, 2004; paragraph (o) amended and new paragraph (p) adopted August 1, 2016 to be effective September 1, 2016.

RPC 1.1 Competence

A lawyer shall not:

(a) Handle or neglect a matter entrusted to the lawyer in such manner that the lawyer's conduct constitutes gross negligence.

(b) Exhibit a pattern of negligence or neglect in the lawyer's handling of legal matters generally.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

(a) A lawyer shall abide by a client's decisions concerning the scope and objectives of representation, subject to paragraphs (c) and (d), and as required by RPC 1.4 shall consult with the client about the means to pursue them. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall consult with the client and, following consultation, shall abide by the client's decision on the plea to be entered, jury trial, and whether the client will testify.
(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not counsel or assist a client in conduct that the lawyer knows is illegal, criminal or fraudulent, or in the preparation of a written instrument containing terms the lawyer knows are expressly prohibited by law, but a lawyer may counsel or assist a client in a good faith effort to determine the validity, scope, meaning or application of the law.

A lawyer may counsel a client regarding New Jersey's medical marijuana laws and assist the client to engage in conduct that the lawyer reasonably believes is authorized by those laws. The lawyer shall also advise the client regarding related federal law and policy.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (c) amended, and paragraph (e) deleted and redesignated as RPC 1.4(d) November 17, 2003 to be effective January 1, 2004; paragraph (d) amended August 1, 2016 to be effective September 1, 2016.

RPC 1.3 Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.4 Communication

(a) A lawyer shall fully inform a prospective client of how, when, and where the client may communicate with the lawyer.

(b) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

(c) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

(d) When a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall advise the client of the relevant limitations on the lawyer's conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new paragraphs (a) and (d) adopted and former paragraphs (a) and (b) redesignated as paragraphs (b) and (c) November 17, 2003 to be effective January 1, 2004.
RPC 1.5 Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated in writing to the client before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by law or by these rules. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.
(e) Except as otherwise provided by the Court Rules, a division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer, or, by written agreement with the client, each lawyer assumes joint responsibility for the representation; and

(2) the client is notified of the fee division; and

(3) the client consents to the participation of all the lawyers involved; and

(4) the total fee is reasonable.

Note: Adopted July 12, 1984 to be effective September 10, 1984; new subparagraph (e)(2) added and former subparagraphs (e)(2) and (e)(3) redesignated as subparagraphs (e)(3) and (e)(4) November 17, 2003 to be effective January 1, 2004.

RPC 1.6  Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c), and (d).

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client or another person:

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another; or

(2) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to perpetrate a fraud upon a tribunal.

(c) If a lawyer reveals information pursuant to RPC 1.6(b), the lawyer also may reveal the information to the person threatened to the extent the lawyer reasonably believes is necessary to protect that person from death, substantial bodily harm, substantial financial injury, or substantial property loss.

(d) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to rectify the consequences of a client's criminal, illegal or fraudulent act in the furtherance of which the lawyer's services had been used;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, or to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer based upon the conduct in which the client was involved; or
(3) to prevent the client from causing death or substantial bodily harm to himself or herself;

(4) to comply with other law; or

(5) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership, or resulting from the sale of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client. Any information so disclosed may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest.

(e) Reasonable belief for purposes of RPC 1.6 is the belief or conclusion of a reasonable lawyer that is based upon information that has some foundation in fact and constitutes prima facie evidence of the matters referred to in subsections (b), (c), or (d).

(f) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Official Comment (August 1, 2016)

Paragraph (d)(5) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering merger, or a lawyer is considering the purchase of a law practice. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person’s intentions are known to the person’s spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed written consent. A lawyer’s fiduciary duty to the lawyer’s firm may also govern a lawyer’s conduct when exploring an association with another firm and is beyond the scope of these Rules.

Any information disclosed pursuant to paragraph (d)(5) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (d)(5) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (d)(5). Paragraph (d)(5) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, such as when a lawyer in a firm discloses information to another
lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

Paragraph (f) requires a lawyer to act competently to safeguard information, including electronically stored information, relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons or entities who are participating in the representation of the client or who are subject to the lawyer's supervision. The unauthorized access to, or the inadvertent or unauthorized disclosure of, confidential information relating to the representation of a client does not constitute a violation of paragraph (f) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent in writing to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.

Official Comment (September 1, 2018)

The Court adopts the comment in the Restatement (Third) of the Law Governing Lawyers on confidential information, which states:

Whether information is “generally known” depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended, new paragraph (c) added, former paragraph (c) redesignated as paragraph (d), and former paragraph (d) amended and redesignated as paragraph (e) November 17, 2003 to be effective January 1, 2004; former subparagraph (d)(3) redesignated as subparagraph (d)(4) and new subparagraph (d)(3) adopted July 19,
RPC 1.7 Conflict of Interest: General Rule

(a) 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:

(1) the representation of one client will be directly adverse to another client; or

(2) 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.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) each affected client gives informed consent, confirmed in writing, after full disclosure and consultation, provided, however, that a public entity cannot consent to any such representation. When the lawyer represents multiple clients in a single matter, the consultation shall include an explanation of the common representation and the advantages and risks involved;

(2) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(3) the representation is not prohibited by law; and

(4) 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.

Note: Adopted July 12, 1984 to be effective September 10, 1984; text deleted and new text adopted November 17, 2003 to be effective January 1, 2004.

RPC 1.8 Conflict of Interest: Current Clients; Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:
(1) the transaction and terms in which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner that can be understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel of the client's choice concerning the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) Except as permitted or required by these rules, a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client after full disclosure and consultation, gives informed consent.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent, or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client; and

(3) a legal services or public interest organization, a law school clinical or pro bono program, or an attorney providing qualifying pro bono service as defined in R. 1:21-11(a), may provide financial assistance to indigent clients whom the organization, program, or attorney is representing without fee.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
(3) information relating to representation of a client is protected as required by RPC 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or no contest pleas, unless each client gives informed consent after a consultation that shall include disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client fails to act in accordance with the lawyer's advice and the lawyer nevertheless continues to represent the client at the client's request. Notwithstanding the existence of those two conditions, the lawyer shall not make such an agreement unless permitted by law and the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may: (1) acquire a lien granted by law to secure the lawyer's fee or expenses, (2) contract with a client for a reasonable contingent fee in a civil case.

(j) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

(k) A lawyer employed by a public entity, either as a lawyer or in some other role, shall not undertake the representation of another client if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client.

(l) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Note: Adopted September 10, 1984 to be effective immediately; paragraph (e) amended July 12, 2002 to be effective September 3, 2002; caption amended, paragraphs (a), (b), (c), (f), (g), (h) amended, former paragraph (i) deleted, former paragraph (j) redesignated as paragraph (i), former paragraph (k) deleted, and new paragraphs (j), (k) and (l) added November 17, 2003 to be effective January 1, 2004; subparagraph (e)(3) amended July 22, 2014 to be effective January 1, 2015.
RPC 1.9   Duties to Former Clients

(a) A lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer, while at the former firm, had personally acquired information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter unless the former client gives informed consent, confirmed in writing.

Notwithstanding the other provisions of this paragraph, neither consent shall be sought from the client nor screening pursuant to RPC 1.10 permitted in any matter in which the attorney had sole or primary responsibility for the matter in the previous firm.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

(d) A public entity cannot consent to a representation otherwise prohibited by this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, paragraphs (a) and (b) amended, and new paragraphs (c) and (d) added November 17, 2003 to be effective January 1, 2004.

RPC 1.10   Imputation of Conflicts of Interest: General Rule

(a) When lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by RPC 1.7 or RPC 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.
(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by RPC 1.6 and RPC 1.9(c) that is material to the matter.

(c) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under RPC 1.9 unless:

(1) the matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility;

(2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

(d) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in RPC 1.7.

(e) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by RPC 1.11.

(f) Any law firm that enters a screening arrangement, as provided by this Rule, shall establish appropriate written procedures to insure that: (1) all attorneys and other personnel in the law firm screen the personally disqualified attorney from any participation in the matter, (2) the screened attorney acknowledges the obligation to remain screened and takes action to insure the same, and (3) the screened attorney is apportioned no part of the fee therefrom.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (b) corrected in Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 217-18 (1988); caption and paragraphs (a), (b), and (c) amended, paragraph (d) deleted, former paragraph (e) amended and redesignated as paragraph (d), new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.
RPC 1.11   Successive Government and Private Employment

   (a) Except as law may otherwise expressly permit, and subject to RPC 1.9, a lawyer who formerly has served as a government lawyer or public officer or employee of the government shall not represent a private client in connection with a matter:

   (1) in which the lawyer participated personally and substantially as a public officer or employee, or

   (2) for which the lawyer had substantial responsibility as a public officer or employee; or

   (3) when the interests of the private party are materially adverse to the appropriate government agency, provided, however, that the application of this provision shall be limited to a period of six months immediately following the termination of the attorney's service as a government lawyer or public officer.

   (b) Except as law may otherwise expressly permit, a lawyer who formerly has served as a government lawyer or public officer or employee of the government:

   (1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party or information that the lawyer knows is confidential government information about a person acquired by the lawyer while serving as a government lawyer or public officer or employee of the government, and

   (2) shall not represent a private person whose interests are adverse to that private party in a matter in which the information could be used to the material disadvantage of that party.

   (c) In the event a lawyer is disqualified under (a) or (b), the lawyer may not represent a private client, but absent contrary law a firm with which that lawyer is associated may undertake or continue representation if:

   (1) the disqualified lawyer is screened from any participation in the matter and is apportioned no part of the fee therefrom, and

   (2) written notice is given promptly to the appropriate government agency to enable it to ascertain compliance with the provisions of this Rule.

   (d) Except as law may otherwise expressly permit, a lawyer serving as a government lawyer or public officer or employee of the government:

   (1) shall be subject to RPC 1.9(c)(2) in respect of information relating to a private party acquired by the lawyer while in private practice or nongovernmental employment,
(2) shall not participate in a matter (i) in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, or (ii) for which the lawyer had substantial responsibility while in private practice or nongovernmental employment, or (iii) with respect to which the interests of the appropriate government agency are materially adverse to the interests of a private party represented by the lawyer while in private practice or nongovernmental employment, unless under applicable law no one is, or by lawful delegation may be, authorized to act in the lawyer's stead in the matter or unless the private party gives its informed consent, confirmed in writing, and

(3) shall not negotiate for private employment with any person who is involved as a party or as attorney for a party in a matter in which the lawyer is participating personally and substantially or for which the lawyer has substantial responsibility, except that a lawyer serving as a law clerk shall be subject to RPC 1.12(c).

(e) As used in this Rule, the term:

(1) "matter" includes any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties; and any other matter covered by the conflict of interest rules of the appropriate government agency;

(2) "confidential government information" means information that has been obtained under governmental authority and that, at the time this rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose, and that is not otherwise available to the public.

Comment by Court (Regarding 2008 Amendment)

In In re ACPE Opinion 705, 192 N.J. 46 (2007), the Court deferred to the Legislature in the spirit of comity and held that the post-government employment restrictions imposed by the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-17, apply in the context of former State attorneys. The 2008 amendment to paragraph (c) implements that decision.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended, text of paragraph (b) deleted and new text adopted, new paragraph (c) adopted, former paragraphs (c) and (d) amended and redesignated as paragraphs (d) and (e), and former paragraph (e) merged into redesignated paragraph (e) November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 9, 2008 to be effective September 1, 2008.
RPC 1.12   Former Judge, Arbitrator, Mediator or Other Third-Party Neutral or Law Clerk

(a) Except as stated in paragraph (c), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer, arbitrator, mediator or other third-party neutral, or law clerk to such a person, unless all parties to the proceeding have given consent, confirmed in writing.

(b) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(c) A lawyer shall not negotiate for employment with any person who is involved as a party or as an attorney for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral. A lawyer serving as law clerk to such a person may negotiate for employment with a party or attorney involved in a matter in which the law clerk is participating personally and substantially, but only after the lawyer has notified the person to whom the lawyer is serving as law clerk.

(d) An arbitrator selected by a party in a multi-member arbitration panel is not prohibited from subsequently representing that party.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended, new paragraph (b) adopted, former paragraphs (b) and (c) amended and redesignated as paragraphs (c) and (d) November 17, 2003 to be effective January 1, 2004.

RPC 1.13   Organization as the Client

(a) A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. For the purposes of RPC 4.2 and 4.3, however, the organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data
respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

(1) asking reconsideration of the matter;

(2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and

(3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) When the organization's highest authority insists upon action, or refuses to take action, that is clearly a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and is likely to result in substantial injury to the organization, the lawyer may take further remedial action that the lawyer reasonably believes to be in the best interest of the organization. Such action may include revealing information otherwise protected by RPC 1.6 only if the lawyer reasonably believes that:

(1) the highest authority in the organization has acted to further the personal or financial interests of members of that authority which are in conflict with the interests of the organization; and

(2) revealing the information is necessary in the best interest of the organization.

(d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer believes that such explanation is necessary to avoid misunderstanding on their part.
(e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of RPC 1.7. If the organization's consent to the dual representation is required by RPC 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

(f) For purposes of this rule "organization" includes any corporation, partnership, association, joint stock company, union, trust, pension fund, unincorporated association, proprietorship or other business entity, state or local government or political subdivision thereof, or non-profit organization.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996.

RPC 1.14    Client Under a Disability

(a) When a client's capacity to make adequately considered decisions in connection with the representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by RPC 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under RPC 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (a) and (b) amended and new paragraph (c) adopted November 17, 2003 to be effective January 1, 2004.

RPC 1.15    Safekeeping Property

(a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in a financial institution in New Jersey. Funds of the lawyer that are reasonably sufficient to pay bank charges may, however, be deposited therein. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property
shall be kept by the lawyer and shall be preserved for a period of seven years after the event that they record.

(b) Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

(c) When in the course of representation a lawyer is in possession of property in which both the lawyer and another person claim interests, the property shall be kept separate by the lawyer until there is an accounting and severance of their interests. If a dispute arises concerning their respective interests, the portion in dispute shall be kept separate by the lawyer until the dispute is resolved.

(d) A lawyer shall comply with the provisions of R. 1:21-6 ("Recordkeeping") of the Court Rules.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 1.16  Declining or Terminating Representation

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the Rules of Professional Conduct or other law;

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; or

(3) the lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer may withdraw from representing a client if:

(1) withdrawal can be accomplished without material adverse effect on the interests of the client;

(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;

(3) the client has used the lawyer's services to perpetrate a crime or fraud;
(4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;

(5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(7) other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned or incurred. The lawyer may retain papers relating to the client to the extent permitted by other law. No lawyer shall assert a common law retaining lien.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b), (c), and (d) amended November 17, 2003 to be effective January 1, 2004; paragraph (d) amended March 25, 2013 to be effective April 1, 2013.

RPC 1.17  Sale of Law Practice

A lawyer or law firm may sell or purchase a law practice, including good will, if the following conditions are satisfied:

(a) The seller ceases to engage in the private practice of law in this jurisdiction.

(b) The entire practice is sold to one or more lawyers or law firms.

(c) Written notice is given to each of the seller's clients stating that the interest in the law practice is being transferred to the purchaser; that the client has the right to retain other counsel; that the client may take possession of the client's file and property; and that if no response to the notice is received within sixty days of the sending of such notice, or in the event the client's rights would be prejudiced by a failure to act during that time, the purchaser may act on behalf of the client until otherwise notified by the client.
(1) If the seller is the estate of a deceased lawyer, the purchaser shall cause the notice to be given to the client and the purchaser shall obtain the written consent of the client provided that such consent shall be presumed if no response to the notice is received within sixty days of the date the notice was sent to the client's last known address as shown on the records of the seller, or the client's rights would be prejudiced by a failure to act during such sixty-day period.

(2) In all other circumstances, not less than sixty days prior to the transfer the seller shall cause the notice to be given to the client and the seller shall obtain the written consent of the client prior to the transfer, provided that such consent shall be presumed if no response to the notice is received within sixty days of the date of the sending of such notice to the client's last known address as shown on the records of the seller.

(3) The purchaser shall cause an announcement or notice of the purchase and transfer of the practice to be published in the *New Jersey Law Journal* and the *New Jersey Lawyer* at least thirty days in advance of the effective date of the transfer.

(d) The fees charged to clients shall not be increased by reason of the sale of the practice.

(e) If substitution in a pending matter is required by the tribunal or these Rules, the purchasing lawyer or law firm shall provide for same promptly.

(f) Admission to or withdrawal from a partnership, professional corporation, or limited liability entity, retirement plans and similar arrangements, or sale limited to the tangible assets of a law practice shall not be deemed a sale or purchase for purposes of this Rule.

**Note:** Adopted October 16, 1992, to be effective immediately; paragraph (f) amended July 10, 1998, to be effective September 1, 1998; paragraph (b) amended November 17, 2003 to be effective January 1, 2004.

**RPC 1.18 Prospective Client**

(a) A lawyer who has had communications in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.

(b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or a substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (c).
(c) If a lawyer is disqualified from representation under (b), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except that representation is permissible if (1) both the affected client and the former prospective client have given informed consent, confirmed in writing, or (2) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the former prospective client.

(d) A person who communicates with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a “prospective client,” and if no client-lawyer relationship is formed, is a “former prospective client.”

Official Comment (August 1, 2016)

A person who communicates with a lawyer to disqualify that lawyer is not considered a prospective client. For example, an uninvited electronic communication is not, without more, considered to be a consultation with a prospective client.

Note: Adopted November 17, 2003 to be effective January 1, 2004; paragraphs (a) and (d) amended, and Official Comment adopted, August 1, 2016 to be effective September 1, 2016.

RPC 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations, such as moral, economic, social and political facts, that may be relevant to the client's situation.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 2.2 (Reserved)

Note: RPC 2.2 (“Intermediary”) adopted July 12, 1984 to be effective September 10, 1984; caption and rule deleted November 17, 2003 effective January 1, 2004.

RPC 2.3 Evaluation for Use by Third Persons

(a) A lawyer may provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client.
(b) When the lawyer knows or reasonably should know that the evaluation is likely to affect the client's interests materially and adversely, the lawyer shall not provide the evaluation unless:

(1) the lawyer describes the conditions of the evaluation to the client, in writing, including disclosure of information otherwise protected by RPC 1.6;

(2) the lawyer consults with the client; and

(3) the client gives informed consent.

(c) Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by RPC 1.6.

(d) In reporting an evaluation, the lawyer shall indicate any material limitations that were imposed on the scope of the inquiry or on the disclosure of information.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended and redesignated as paragraphs (a) and (b), former paragraph (b) redesignated as paragraph (d), and paragraph (c) amended November 17, 2003 to be effective January 1, 2004.

RPC 2.4 Lawyer Serving as Third-Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator, or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

(b) A lawyer serving as a third-party neutral shall inform the parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third-party neutral and a lawyer's role as one who represents a client.

Note: Adopted November 17, 2003 to be effective January 1, 2004.

RPC 3.1 Meritorious Claims and Contentions

A lawyer shall not bring or defend a proceeding, nor assert or controvert an issue therein unless the lawyer knows or reasonably believes that there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law, or the establishment of new law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.
Note: Adopted July 12, 1984 to be effective September 10, 1984; amended November 17, 2003 to be effective January 1, 2004.

RPC 3.2   Expediting Litigation

A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client and shall treat with courtesy and consideration all persons involved in the legal process.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 3.3   Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures; or

(5) fail to disclose to the tribunal a material fact knowing that the omission is reasonably certain to mislead the tribunal, except that it shall not be a breach of this rule if the disclosure is protected by a recognized privilege or is otherwise prohibited by law.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.
RPC 3.4  Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value, or counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

(d) in pretrial procedure make frivolous discovery requests or fail to make reasonably diligent efforts to comply with legally proper discovery requests by an opposing party;

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or an employee or other agent of a client; and

(2) the lawyer reasonably believes that the person’s interests will not be adversely affected by refraining from giving such information.

(g) present, participate in presenting, or threaten to present criminal charges to obtain an improper advantage in a civil matter.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990.

RPC 3.5  Impartiality and Decorum of the Tribunal

A lawyer shall not:
(a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law;

(b) communicate ex parte with such a person except as permitted by law;

(c) engage in conduct intended to disrupt a tribunal; or

(d) contact or have discussions with a judge or other adjudicative officer, arbitrator, mediator, or other third-party neutral (hereinafter "judge") about the judge's post-retirement employment while the lawyer (or a law firm with or for whom the lawyer is a partner, associate, counsel, or contractor) is involved in a pending matter in which the judge is participating personally and substantially.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (b) and (c) amended and new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.

RPC 3.6 Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense, or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) the information contained in a public record;

(3) that an investigation of the matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Official Comment by Supreme Court (November 17, 2003)

A statement referred to in paragraph (a) ordinarily is likely to have such an effect when it refers to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration, and the statement relates to:

(1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness other than the victim of a crime, or the expected testimony of a party or witness;

(2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(1) amended October 1, 1992, to be effective immediately; paragraph (a) amended, paragraph (b) deleted and restated in Official Comment, paragraph (c) amended and redesignated as paragraph (b), and new paragraph (c) adopted November 17, 2003 to be effective January 1, 2004.
RPC 3.7   Lawyer as Witness

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or RPC 1.9.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 3.8   Special Responsibilities of a Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important post-indictment pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

(e) not subpoena a lawyer in a grand jury or other criminal proceeding to present evidence about a past or present client unless the prosecutor reasonably believes:
(1) either the information sought is not protected from disclosure by any applicable privilege or the evidence sought is essential to an ongoing investigation or prosecution; and

(2) there is no other feasible alternative to obtain the information;

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under RPC 3.6 or this Rule.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraphs (c) and (d) amended and new paragraphs (e) and (f) adopted November 17, 2003 to be effective January 1, 2004.

RPC 3.9 Advocate in Nonadjudicative Proceedings

A lawyer representing a client before a legislative body or administrative tribunal in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of RPC 3.3(a) through (d), RPC 3.4(a) through (g), and RPC 3.5(a) through (c).

Note: Adopted July 12, 1984 to be effective September 10, 1984; amended November 17, 2003 to be effective January 1, 2004.

RPC 4.1 Truthfulness in Statements to Others

(a) In representing a client a lawyer shall not knowingly:

(1) make a false statement of material fact or law to a third person; or

(2) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

(b) The duties stated in this Rule apply even if compliance requires disclosure of information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.
RPC 4.2 Communication with Person Represented by Counsel

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, including members of an organization's litigation control group as defined by RPC 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Official Comment by Supreme Court (November 17, 2003)

Concerning organizations, RPC 4.2 addresses the issue of who is represented under the rule by precluding a lawyer from communicating with members of the organization's litigation control group. The term "litigation control group" is not intended to limit application of the rule to matters in litigation. As the Report of the Special Committee on RPC 4.2 states, "... the 'matter' has been defined as a 'matter whether or not in litigation.'" The primary determinant of membership in the litigation control group is the person's role in determining the organization's legal position. See Michaels v. Woodland, 988 F.Supp. 468, 472 (D.N.J. 1997).

In the criminal context, the rule ordinarily applies only after adversarial proceedings have begun by arrest, complaint, or indictment on the charges that are the subject of the communication. See State v. Bisaccia, 319 N.J. Super. 1, 22-23 (App. Div. 1999).

Concerning communication with governmental officials, the New Jersey Supreme Court Commission on the Rules of Professional Conduct agrees with the American Bar Association's Commission comments, which state:

Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with a governmental official. For example, the constitutional right to petition and the public policy of ensuring a citizen's right of access to government decision makers, may permit a lawyer representing a private party in a controversy with the government to communicate about the matter with government officials who have authority to take or recommend action in the matter.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996; amended November 17, 2003 to be effective January 1, 2004.
RPC 4.3   Dealing with Unrepresented Person; Employee of Organization

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. If the person is a director, officer, employee, member, shareholder or other constituent of an organization concerned with the subject of the lawyer's representation but not a person defined by RPC 1.13(a), the lawyer shall also ascertain by reasonable diligence whether the person is actually represented by the organization's attorney pursuant to RPC 1.13(e) or who has a right to such representation on request, and, if the person is not so represented or entitled to representation, the lawyer shall make known to the person that insofar as the lawyer understands, the person is not being represented by the organization's attorney.

Note: Adopted September 10, 1984, to be effective immediately; amended June 28, 1996, to be effective September 1, 1996.

RPC 4.4   Respect for Rights of Third Persons

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

(b) A lawyer who receives a document or electronic information and has reasonable cause to believe that the document or information was inadvertently sent shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the sender (2) return the document to the sender and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible.

A lawyer who receives a document or electronic information that contains privileged lawyer-client communications involving an adverse or third party and who has reasonable cause to believe that the document or information was wrongfully obtained shall not read the document or information or, if he or she has begun to do so, shall stop reading it. The lawyer shall (1) promptly notify the lawyer whose communications are contained in the document or information (2) return the document to the other lawyer and, if in electronic form, delete it and take reasonable measures to assure that the information is inaccessible. A lawyer who has been notified about a document containing lawyer-client communications has the obligation to preserve the document.

Official Comment (August 1, 2016)

Lawyers should be aware of the presence of metadata in electronic documents. “Metadata” is embedded information in electronic documents that is generally hidden from view in a printed copy of a document. It is generated when
documents are created or revised on a computer. Metadata may reflect such information as the author of a document, the date or dates on which the document was revised, tracked revisions to the document, and comments inserted in the margins. It may also reflect information necessary to access, understand, search, and display the contents of documents created in spreadsheet, database, and similar applications.

A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent. When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic “mining” software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simple computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata.

A document will not be considered “wrongfully obtained” if it was obtained for the purposes of encouraging, participating in, cooperating with, or conducting an actual or potential law enforcement, regulatory, or other governmental investigation. Government lawyers, namely, lawyers at the offices of the Attorney General, County Prosecutors, and United States Attorney, who have lawfully received materials that could be considered to be inadvertently sent or wrongfully obtained under this Rule are not subject to the notification and return requirements when such requirements could impair the legitimate interests of law enforcement. These specified government lawyers may also review and use such materials to the extent permitted by the applicable substantive law, including the law of privileges.

Note: Adopted July 12, 1984 to be effective September 10, 1984; text redesignated as paragraph (a) and new paragraph (b) adopted November 17, 2003 to be effective January 1, 2004; paragraph (b) amended and Official Comment adopted August 1, 2016 to be effective September 1, 2016.
RPC 5.1   Responsibilities of Partners, Supervisory Lawyers, and Law Firms

(a) Every law firm, government entity, and organization authorized by the Court Rules to practice law in this jurisdiction shall make reasonable efforts to ensure that member lawyers or lawyers otherwise participating in the organization's work undertake measures giving reasonable assurance that all lawyers conform to the Rules of Professional Conduct.

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or ratifies the conduct involved; or

(2) the lawyer having direct supervisory authority over the other lawyer knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

(d) No law firm or lawyer on behalf of a law firm shall pay an assessment or make a contribution to a political organization or candidate, including but not limited to purchasing tickets for political party dinners or for other functions, from any of the firm's business accounts while a municipal court judge is associated with the firm as a partner, shareholder, director, of counsel, or associate or holds some other comparable status with the firm.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption and paragraph (a) amended November 17, 2003 to be effective January 1, 2004; new paragraph (d) adopted July 19, 2012 to be effective September 4, 2012.

RPC 5.2   Responsibilities of a Subordinate Lawyer

(a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.

(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 5.3   Responsibilities Regarding Nonlawyer Assistance
With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) every lawyer, law firm or organization authorized by the Court Rules to practice law in this jurisdiction shall adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers retained or employed by the lawyer, law firm or organization is compatible with the professional obligations of the lawyer.

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or ratifies the conduct involved;

(2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action; or

(3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

Official Comment (August 1, 2016)

Paragraph (a) requires lawyers with managerial authority within a law firm to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that nonlawyers in the firm and nonlawyers outside the firm who work on firm matters act in a way compatible with the professional obligations of the lawyer. Paragraph (b) applies to lawyers who have supervisory authority over such nonlawyers within or outside the firm. Paragraph (c) specifies the circumstances in which a lawyer is responsible for the conduct of such nonlawyers within or outside the firm that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer.

Nonlawyers Within the Firm

Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

Nonlawyers Outside the Firm
A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer’s professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdiction in which the services will be performed, particularly with regard to confidentiality. When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer’s conduct is compatible with the professional obligations of the lawyer.

Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer should reach an agreement in writing with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

Note: Adopted July 12, 1984 to be effective September 10, 1984; paragraph (a) amended November 17, 2003 to be effective January 1, 2004; title amended and Official Comment adopted August 1, 2016 to be effective September 1, 2016.

RPC 5.4 Professional Independence of a Lawyer

Except as otherwise provided by the Rules of Court:

(a) A lawyer or law firm shall not share legal fees with a nonlawyer, except that:

(1) an agreement by a lawyer with the lawyer's firm, partner, or associate may provide for the payment of money, over a reasonable period of time after the lawyer's death, to the lawyer's estate or to one or more specified persons;

(2) a lawyer who undertakes to complete unfinished legal business of a deceased lawyer may pay to the estate of the deceased lawyer that proportion of the total compensation that fairly represents the services rendered by the deceased lawyer;

(3) lawyers or law firms who purchase a practice from the estate of a deceased lawyer, or from any person acting in a representative capacity for a disabled
or disappeared lawyer, may, pursuant to the provisions of RPC 1.17, pay to the estate or other representative of that lawyer the agreed upon price;

(4) a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement; and

(5) a lawyer may share court-awarded legal fees with a nonprofit organization that employed, retained, or recommended employment of the lawyer in the matter.

(b) A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

(d) A lawyer shall not practice with or in the form of a professional corporation, association, or limited liability entity authorized to practice law for profit, if:

(1) a nonlawyer owns any interest therein, except that a fiduciary representative of the estate of a lawyer may hold the stock or interest of the lawyer for a reasonable time during administration;

(2) a nonlawyer is a corporate director or officer thereof; or

(3) a nonlawyer has the right to direct or control the professional judgment of a lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a)(2) amended and paragraph (a)(3) adopted October 16, 1992, to be effective immediately; paragraph (d) amended July 10, 1998, to be effective September 1, 1998; paragraph (a) amended November 17, 2003 to be effective January 1, 2004.

RPC 5.5 Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law

(a) A lawyer shall not:

(1) practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(2) assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.
(b) A lawyer not admitted to the Bar of this State who is admitted to practice law before the highest court of any other state, territory of the United States, Puerto Rico, or the District of Columbia (hereinafter a United States jurisdiction) may engage in the lawful practice of law in New Jersey only if:

(1) the lawyer is admitted to practice pro hac vice pursuant to R. 1:21-2 or is preparing for a proceeding in which the lawyer reasonably expects to be so admitted and is associated in that preparation with a lawyer admitted to practice in this jurisdiction; or

(2) the lawyer is an in-house counsel and complies with R. 1:27-2; or

(3) under any of the following circumstances:

(i) the lawyer engages in the negotiation of the terms of a transaction in furtherance of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice and the transaction originates in or is otherwise related to a jurisdiction in which the lawyer is admitted to practice;

(ii) the lawyer engages in representation of a party to a dispute by participating in arbitration, mediation or other alternate or complementary dispute resolution program and the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission pursuant to R. 1:21-2 is required;

(iii) the lawyer investigates, engages in discovery, interviews witnesses or deposes witnesses in this jurisdiction for a proceeding pending or anticipated to be instituted in a jurisdiction in which the lawyer is admitted to practice;

(iv) the out-of-state lawyer's practice in this jurisdiction is occasional and the lawyer associates in the matter with, and designates and discloses to all parties in interest, a lawyer admitted to the Bar of this State who shall be held responsible for the conduct of the out-of-State lawyer in the matter; or

(v) the lawyer practices under circumstances other than (i) through (iv) above, with respect to a matter where the practice activity arises directly out of the lawyer's representation on behalf of an existing client in a jurisdiction in which the lawyer is admitted to practice, provided that such practice in this jurisdiction is occasional and is undertaken only when the lawyer's disengagement would result in substantial inefficiency, impracticality or detriment to the client.

(c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to paragraph (b) above shall:
(1) be licensed and in good standing in all jurisdictions of admission and not be the subject of any pending disciplinary proceedings, nor a current or pending license suspension or disbarment;

(2) be subject to the Rules of Professional Conduct and the disciplinary authority of the Supreme Court of this jurisdiction;

(3) consent in writing on a form approved by the Supreme Court to the appointment of the Clerk of the Supreme Court as agent upon whom service of process may be made for all actions against the lawyer or the lawyer's firm that may arise out of the lawyer's participation in legal matters in this jurisdiction, except that a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above shall be deemed to have consented to such appointment without completing the form;

(4) not hold himself or herself out as being admitted to practice in this jurisdiction;

(5) comply with R. 1:21-1(a)(1); and

(6) except for a lawyer who acts in this jurisdiction pursuant to subparagraph (b)(3)(ii) or (b)(3)(iii) above, annually register with the New Jersey Lawyers' Fund for Client Protection and comply with R. 1:20-1(b) and (c), R. 1:28-2, and R. 1:28B-1(e) during the period of practice.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, former text designated as paragraph (a), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004; paragraph (c) amended July 28, 2004 to be effective September 1, 2004; subparagraphs (b)(3)(ii) and (b)(3)(iii) amended, former subparagraph (b)(3)(iv) redesignated as subparagraph (b)(3)(v) and amended, new subparagraph (b)(3)(iv) adopted, and paragraph (c) and subparagraphs (c)(3) and (c)(6) amended July 23, 2010 to be effective September 1, 2010; subparagraph (b)(3)(iv) amended July 19, 2012 to be effective September 4, 2012; subparagraph (c)(5) amended July 9, 2013 to be effective September 1, 2013.

RPC 5.6 Restrictions on Right to Practice

A lawyer shall not participate in offering or making:

(a) a partnership or employment agreement that restricts the rights of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or

(b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a controversy between private parties.

Note: Adopted July 12, 1984 to be effective September 10, 1984.
RPC 6.1.  **Voluntary Public Interest Legal Service**

Every lawyer has a professional responsibility to render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups or organizations, by service in activities for improving the law, the legal system or the legal profession, and by financial support for organizations that provide legal services to persons of limited means.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984; caption and text amended November 17, 2003 to be effective January 1, 2004.

RPC 6.2  **Accepting Appointments**

A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:

(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;

(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or

(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984.

RPC 6.3  **Membership in Legal Services Organization**

A lawyer may serve as a director, officer or member of a legal services organization, other than the law firm with which the lawyer practices, notwithstanding that the organization serves persons having interests adverse to a client of the lawyer if:

(a) the organization complies with RPC 5.4 concerning the professional independence of its legal staff; and

(b) when the interests of a client of the lawyer could be affected, participation is consistent with the lawyer's obligations under RPC 1.7 and the lawyer takes no part in any decision by the organization that could have a material adverse effect on the interest of a client or class of clients of the organization or upon the independence of professional judgment of a lawyer representing such a client.

**Note:** Adopted July 12, 1984 to be effective September 10, 1984.
RPC 6.4   Law Reform Activities Affecting Client Interests

A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer. When the lawyer knows that the interests of a client may be materially benefited by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client, except that when the organization is also a legal services organization, RPC 6.3 shall apply.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 6.5   Nonprofit and Court-Annexed Limited Legal Service Programs

(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter:

(1) is subject to RPC 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and

(2) is subject to RPC 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by RPC 1.7 or 1.9(a) with respect to the matter.

(b) Except as provided in paragraph (a)(2), RPC 1.10 is inapplicable to a representation governed by this RPC.

Note: Adopted November 17, 2003 to be effective January 1, 2004.

RPC 7.1   Communications Concerning a Lawyer's Service

(a) A lawyer shall not make false or misleading communications about the lawyer, the lawyer's services, or any matter in which the lawyer has or seeks a professional involvement. A communication is false or misleading if it:

(1) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading;

(2) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law;
(3) compares the lawyer’s services with other lawyers’ services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernible manner: "No aspect of this advertisement has been approved by the Supreme Court of New Jersey"; or

(4) relates to legal fees other than:

(i) a statement of the fee for an initial consultation;

(ii) a statement of the fixed or contingent fee charged for a specific legal service, the description of which would not be misunderstood or be deceptive;

(iii) a statement of the range of fees for specifically described legal services, provided there is a reasonable disclosure of all relevant variables and considerations so that the statement would not be misunderstood or be deceptive;

(iv) a statement of specified hourly rates, provided the statement makes clear that the total charge will vary according to the number of hours devoted to the matter, and in relation to the varying hourly rates charged for the services of different individuals who may be assigned to the matter;

(v) the availability of credit arrangements; and

(vi) a statement of the fees charged by a qualified legal assistance organization in which the lawyer participates for specific legal services the description of which would not be misunderstood or be deceptive

(b) It shall be unethical for a lawyer to use an advertisement or other related communication known to have been disapproved by the Committee on Attorney Advertising, or one substantially the same as the one disapproved, until or unless modified or reversed by the Advertising Committee or as provided by Rule 1:19A-3(d).

Official Comment by Supreme Court (November 2, 2009)

A truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney’s fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (b) added June 26, 1987, to be effective July 1, 1987; paragraph (a) amended June 29, 1990, to be effective September 4,
RPC 7.2 Advertising

(a) Subject to the requirements of RPC 7.1, a lawyer may advertise services through public media, such as a telephone directory, legal directory, newspaper or other periodical, radio or television, internet or other electronic media, or through mailed written communication. All advertisements shall be predominantly informational. No drawings, animations, dramatizations, music, or lyrics shall be used in connection with televised advertising. No advertisement shall rely in any way on techniques to obtain attention that depend upon absurdity and that demonstrate a clear and intentional lack of relevance to the selection of counsel; included in this category are all advertisements that contain any extreme portrayal of counsel exhibiting characteristics clearly unrelated to legal competence.

(b) A copy or recording of an advertisement or written communication shall be kept for three years after its dissemination along with a record of when and where it was used. Lawyers shall capture all material on their websites, in the form of an electronic or paper backup, including all new content, on at least a monthly basis, and retain this information for three years.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that: (1) a lawyer may pay the reasonable cost of advertising or written communication permitted by this Rule; (2) a lawyer may pay the reasonable cost of advertising, written communication or other notification required in connection with the sale of a law practice as permitted by RPC 1.17; and (3) a lawyer may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (a) amended December 10, 1986, to be effective December 10, 1986; paragraph (c) amended October 16, 1992, to be effective immediately; paragraph (a) amended November 17, 2003 to be effective January 1, 2004; paragraph (b) amended July 27, 2018, to be effective September 1, 2018.

RPC 7.3 Personal Contact with Prospective Clients

(a) A lawyer may initiate personal contact with a prospective client for the purpose of obtaining professional employment, subject to the requirements of paragraph (b).

(b) A lawyer shall not contact, or send a written or electronic or other form of communication to, a prospective client for the purpose of obtaining professional employment if:
(1) the lawyer knows or reasonably should know that the physical, emotional or mental state of the person is such that the person could not exercise reasonable judgment in employing a lawyer; or

(2) the person has made known to the lawyer a desire not to receive communications from the lawyer; or

(3) the communication involves coercion, duress or harassment; or

(4) the communication involves unsolicited direct contact with a prospective client within thirty days after a specific mass-disaster event, when such contact concerns potential compensation arising from the event; or

(5) the communication involves unsolicited direct contact with a prospective client concerning a specific event not covered by section (4) of this Rule when such contact has pecuniary gain as a significant motive except that a lawyer may send a letter by regular mail to a prospective client in such circumstances provided the letter:

(i) bears the word "ADVERTISEMENT" prominently displayed in capital letters at the top of the first page of text and on the outside envelope, unless the lawyer has a family, close personal, or prior professional relationship with the recipient. The envelope shall contain nothing other than the lawyer's name, firm, return address and "ADVERTISEMENT" prominently displayed; and

(ii) shall contain the party's name in the salutation and begin by advising the recipient that if a lawyer has already been retained the letter is to be disregarded; and

(iii) contains the following notice at the bottom of the last page of text: "Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision."; and

(iv) contains an additional notice also at the bottom of the last page of text that the recipient may, if the letter is inaccurate or misleading, report same to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 970, Trenton, New Jersey 08625-0970. The name and address of the attorney responsible for the content of the letter shall be included in the notice.

(c) A lawyer shall not knowingly assist an organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner, or associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, as a private practitioner, if:

(1) the promotional activity involves use of a statement or claim that is false or misleading within the meaning of RPC 7.1; or
(2) the promotional activity involves the use of coercion, duress, compulsion, intimidation, threats, unwarranted promises of benefits, overreaching, or vexatious or harassing conduct.

(d) A lawyer shall not compensate or give anything of value to a person or organization to recommend or secure the lawyer's employment by a client, or as a reward for having made a recommendation resulting in the lawyer's employment by a client except that the lawyer may pay for public communications permitted by RPC 7.1 and the usual and reasonable fees or dues charged by a lawyer referral service operated, sponsored, or approved by a bar association.

(e) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm except as permitted by RPC 7.1. However, this does not prohibit a lawyer or the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm from being recommended, employed or paid by or cooperating with one of the following offices or organizations that promote the use of the lawyer's services or those of the lawyer's partner or associate or any other lawyer affiliated with the lawyer or the lawyer's firm if there is no interference with the exercise of independent professional judgment in behalf of the lawyer's client:

(1) a legal aid office or public defender office:

(i) operated or sponsored by a duly accredited law school.

(ii) operated or sponsored by a bona fide nonprofit community organization.

(iii) operated or sponsored by a governmental agency.

(iv) operated, sponsored, or approved by a bar association.

(2) a military legal assistance office.

(3) a lawyer referral service operated, sponsored, or approved by a bar association.

(4) any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(i) such organization, including any affiliate, is so organized and operated that no profit is derived by it from the furnishing, recommending or rendition of legal services by lawyers and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in
connection with matters when such organization bears ultimate liability of its member or beneficiary.

(ii) neither the lawyer, nor the lawyer’s partner or associate or any other lawyer or nonlawyer affiliated with the lawyer or the lawyer's firm directly or indirectly who have initiated or promoted such organization shall have received any financial or other benefit from such initiation or promotion.

(iii) such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(iv) the member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(v) any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, and at the member or beneficiary's own expense except where the organization’s plan provides for assuming such expense, select counsel other than that furnished, selected or approved by the organization for the particular matter involved. Nothing contained herein, or in the plan of any organization that furnishes or pays for legal services pursuant to this section, shall be construed to abrogate the obligations and responsibilities of a lawyer to the lawyer's client as set forth in these Rules.

(vi) the lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(vii) such organization has first filed with the Supreme Court and at least annually thereafter on the appropriate form prescribed by the Court a report with respect to its legal service plan. Upon such filing, a registration number will be issued and should be used by the operators of the plan on all correspondence and publications pertaining to the plan thereafter. Such organization shall furnish any additional information requested by the Supreme Court.

(f) A lawyer shall not accept employment when the lawyer knows or it is obvious that the person who seeks the lawyer's services does so as a result of conduct prohibited under this Rule.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (b)(4) amended June 29, 1990, to be effective September 4, 1990; new paragraph (b)(4) adopted and former paragraph (b)(4) redesignated and amended as paragraph (b)(5) April 28, 1997, to be effective May 5, 1997; paragraph (b)(5) amended November 17, 2003 to be effective January 1, 2004; subparagraph (b)(5)(i) amended July 23, 2010 to be effective September 1, 2010; paragraphs (b) and (b)(5) amended July 22, 2014, to be effective September 1, 2014; subparagraph (b)(5)(iv) amended April 30, 2018 to be effective immediately.
RPC 7.4 Communication of Fields of Practice and Certification

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer may not, however, state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as provided in paragraphs (b), (c), and (d) of this Rule.

(b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.

(c) A lawyer engaged in admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or a substantially similar designation.

(d) A lawyer may communicate that the lawyer has been certified as a specialist or certified in a field of practice only when the communication is not false or misleading, states the name of the certifying organization, and states that the certification has been granted by the Supreme Court of New Jersey or by an organization that has been approved by the American Bar Association. If the certification has been granted by an organization that has not been approved, or has been denied approval, by the Supreme Court of New Jersey or the American Bar Association, the absence or denial of such approval shall be clearly identified in each such communication by the lawyer.

Note: Adopted July 12, 1984, to be effective September 10, 1984; former rule amended and designated paragraph (a) and new paragraph (b) adopted July 15, 1993, to be effective September 1, 1993; paragraph (a) amended, paragraph (b) redesignated as paragraph (d), and new paragraphs (b) and (c) adopted November 17, 2003 to be effective January 1, 2004.

RPC 7.5 Firm Names and Letterheads

(a) A lawyer shall not use a firm name, letterhead, or other professional designation that violates RPC 7.1. Except for organizations referred to in R. 1:21-1(e), the name under which a lawyer or law firm practices shall include the full or last names of one or more of the lawyers in the firm or office or the names of a person or persons who have ceased to be associated with the firm through death or retirement.

(b) A law firm with offices in more than one jurisdiction may use the same name in each jurisdiction. In New Jersey, identification of all lawyers of the firm, in advertisements, on letterheads or anywhere else that the firm name is used, shall indicate the jurisdictional limitations on those not licensed to practice in New Jersey. Where the name of an attorney not licensed to practice in this State is used in a firm name, any advertisement, letterhead or other communication containing the firm name must include the name of at least one licensed New Jersey attorney who is responsible for the firm's New Jersey practice or the local office thereof.
(c) A firm name shall not contain the name of any person not actively associated with the firm as an attorney, other than that of a person or persons who have ceased to be associated with the firm through death or retirement.

(d) Lawyers may state or imply that they practice in a partnership only if the persons designated in the firm name and the principal members of the firm share in the responsibility and liability for the firm's performance of legal services.

(e) A law firm name may include additional identifying language such as "& Associates" only when such language is accurate and descriptive of the firm. Any firm name including additional identifying language such as "Legal Services" or other similar phrases shall inform all prospective clients in the retainer agreement or other writing that the law firm is not affiliated or associated with a public, quasi-public or charitable organization. However, no firm shall use the phrase "legal aid" in its name or in any additional identifying language. Use of a trade name shall be permissible so long as it describes the nature of the firm's legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, or suggestive of the ability to obtain results. Such trade names shall be accompanied by the full or last names of one or more of the lawyers practicing in the firm or the names of lawyers who are no longer associated in the firm through death or retirement.

(f) In any case in which an organization practices under a trade name as permitted by paragraph (a) above, the name or names of one or more of its principally responsible attorneys, licensed to practice in this State, shall be displayed on all letterheads, signs, advertisements and cards or other places where the trade name is used.

Official Comment to RPC 7.5(e) by Supreme Court (July 27, 2015)

By way of example, "Millburn Tax Law Associates, John Smith, Esq." would be permissible under the trade name provision of this rule, as would "Smith & Jones Millburn Personal Injury Lawyers," provided that the law firm's primary location is in Millburn and its primary practice area is tax law or personal injury law, respectively. "John Smith Criminal Defense and Municipal Law" would also be permissible. However, neither "Best Tax Lawyers" nor "Tax Fixers" would be permissible, the former being comparative and the latter being suggestive of the ability to achieve results. Similarly, "Budget Lawyer John Smith, Esq." is not permissible as it is comparative and likely to be misleading; "Million Dollar Personal Injury Lawyer John Smith, Esq." is not permissible as it suggests the ability to achieve results; and "Tough As Nails Lawyer John Smith, Esq." is not permissible as it purports to describe the lawyer and does not describe the nature of the firm's legal practice.

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraphs (a) and (d) amended, paragraph (e) amended and redesignated as paragraph (f) and new paragraph (e) added June 29, 1990, to be effective September 4, 1990; paragraph (a) amended January 5, 2009 to be effective immediately; paragraph (e) amended, and Official Comment adopted July 27, 2015 to be effective September 1, 2015.
RPC 8.1 Bar Admission and Disciplinary Matters

An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:

(a) knowingly make a false statement of material fact; or

(b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this Rule does not require disclosure of information otherwise protected by RPC 1.6.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 8.2 Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications of a judge, adjudicatory officer or other public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who has been confirmed for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

Note: Adopted July 12, 1984 to be effective September 10, 1984.

RPC 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by RPC 1.6.

(d) Paragraph (a) of this Rule shall not apply to knowledge obtained as a result of participation in a Lawyers Assistance Program established by the Supreme Court and administered by the New Jersey State Bar Association, except as follows:
(i) if the effect of discovered ethics infractions on the practice of an impaired attorney is irremediable or poses a substantial and imminent threat to the interests of clients, then attorney volunteers, peer counselors, or program staff have a duty to disclose the infractions to the disciplinary authorities, and attorney volunteers have the obligation to apply immediately for the appointment of a conservator, who also has the obligation to report ethics infractions to disciplinary authorities; and

(ii) attorney volunteers or peer counselors assisting the impaired attorney in conjunction with his or her practice have the same responsibility as any other lawyer to deal candidly with clients, but that responsibility does not include the duty to disclose voluntarily, without inquiry by the client, information of past violations or present violations that did not or do not pose a serious danger to clients.

Note: Adopted July 12, 1984, to be effective September 10, 1984; new paragraph (d) adopted October 5, 1993, to be effective immediately; paragraphs (a) and (b) amended November 17, 2003 to be effective January 1, 2004.

RPC 8.4   Misconduct

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of the Code of Judicial Conduct or other law;

(g) engage, in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm.

Official Comment by Supreme Court (May 3, 1994)
This rule amendment (the addition of paragraph g) is intended to make discriminatory conduct unethical when engaged in by lawyers in their professional capacity. It would, for example, cover activities in the court house, such as a lawyer's treatment of court support staff, as well as conduct more directly related to litigation; activities related to practice outside of the court house, whether or not related to litigation, such as treatment of other attorneys and their staff; bar association and similar activities; and activities in the lawyer's office and firm. Except to the extent that they are closely related to the foregoing, purely private activities are not intended to be covered by this rule amendment, although they may possibly constitute a violation of some other ethical rule. Nor is employment discrimination in hiring, firing, promotion, or partnership status intended to be covered unless it has resulted in either an agency or judicial determination of discriminatory conduct. The Supreme Court believes that existing agencies and courts are better able to deal with such matters, that the disciplinary resources required to investigate and prosecute discrimination in the employment area would be disproportionate to the benefits to the system given remedies available elsewhere, and that limiting ethics proceedings in this area to cases where there has been an adjudication represents a practical resolution of conflicting needs.

"Discrimination" is intended to be construed broadly. It includes sexual harassment, derogatory or demeaning language, and, generally, any conduct towards the named groups that is both harmful and discriminatory.

Case law has already suggested both the area covered by this amendment and the possible direction of future cases. In re Vincenti, 114 N.J. 275 (554 A.2d 470) (1989). The Court believes the administration of justice would be better served, however, by the adoption of this general rule than by a case by case development of the scope of the professional obligation.

While the origin of this rule was a recommendation of the Supreme Court's Task Force on Women in the Courts, the Court concluded that the protection, limited to women and minorities in that recommendation, should be expanded. The groups covered in the initial proposed amendment to the rule are the same as those named in Canon 3A(4) of the Code of Judicial Conduct.

Following the initial publication of this proposed subsection (g) and receipt of various comments and suggestions, the Court revised the proposed amendment by making explicit its intent to limit the rule to conduct by attorneys in a professional capacity, to exclude employment discrimination unless adjudicated, to restrict the scope to conduct intended or likely to cause harm, and to include discrimination because of sexual orientation or socioeconomic status, these categories having been proposed by the ABA's Standing Committee on Ethics and Professional Responsibility as additions to the groups now covered in Canon 3A(4) of the New Jersey Code of Judicial Conduct. That Committee has also proposed that judges require attorneys, in proceedings before a judge, refrain from manifesting by words or conduct any bias or prejudice based on any of these categories. See proposed Canon 3A(6). This revision to the RPC further reflects the Court's intent to cover all discrimination where the attorney intends to cause
harm such as inflicting emotional distress or obtaining a tactical advantage and not to cover instances when no harm is intended unless its occurrence is likely regardless of intent, e.g., where discriminatory comments or behavior is repetitive. While obviously the language of the rule cannot explicitly cover every instance of possible discriminatory conduct, the Court believes that, along with existing case law, it sufficiently narrows the breadth of the rule to avoid any suggestion that it is overly broad. See, e.g., In re Vincenti, 114 N.J. 275 (554 A.2d 470) (1989).

Note: Adopted July 12, 1984, to be effective September 10, 1984; paragraph (g) adopted July 18, 1990, to be effective September 4, 1990; paragraph (g) amended May 3, 1994, to be effective September 1, 1994; paragraph (e) amended November 17, 2003 to be effective January 1, 2004.

RPC 8.5 Disciplinary Authority; Choice of Law

(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is subject also to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

(b) Choice of Law. In the exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be:

(1) for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise; and

(2) for any other conduct, the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct. A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

Note: Adopted July 12, 1984 to be effective September 10, 1984; caption amended, text amended and redesignated as paragraph (a) with caption added, new paragraph (b) with caption adopted November 17, 2003 to be effective January 1, 2004; subparagraph (b)(2) amended August 1, 2016 to be effective September 1, 2016.
Attorney Advertising Guidelines  
(As approved by the Supreme Court of New Jersey)

Attorney Advertising Guideline 1

In any advertisement by an attorney or law firm, the advertisement shall include contact information for the attorney or law firm. The contact information for the attorney or law firm may be any of the following: (a) street address of the regular place of business, (b) mailing address, (c) telephone number, (d) fax number, (e) email address, or (f) website URL.

Note: Adopted June 29, 1990, to be effective September 4, 1990; amended August 14, 2013 to be effective October 1, 2013; amended September 10, 2019 to be effective immediately.

Attorney Advertising Guideline 2

(a) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i), at the top of the first page of text of a solicitation letter, must be at least two font sizes larger than the largest size used in the advertising text in the body of the letter.

(b) The font size of notices required by RPC 7.3(b)(5)(ii and iii) must be no smaller than the font size generally used in the advertisement.

(c) The word "ADVERTISEMENT" required by RPC 7.3(b)(5)(i) on the face of the outside of the envelope must be at least one font size larger than the largest font size used on the envelope. If any words on the outside of the envelope are in bold, the word "ADVERTISEMENT" must also be in bold. Pursuant to Committee Opinion 20, if the envelope contains a message relating to the subject matter of the correspondence to be found inside, the attorney must ensure that the face of the envelope also includes the notices required by RPC 7.3(b)(5)(ii) and (iii).

Note: Adopted March 2, 2005, to be effective immediately; paragraphs (a) and (c) amended August 14, 2013 to be effective October 1, 2013.

Attorney Advertising Guideline 3

Attorney Advertisements: Use of Quotations or Excerpts From Judicial Opinions About the Legal Abilities of an Attorney

An attorney or law firm may include, on a website or other advertisement, an accurate quotation or excerpt from a court opinion (oral or written) about the attorney's abilities or legal services. The following disclaimer must be prominently displayed in proximity to such quotation or excerpt: "This comment, made by a judge in a particular case, is not an endorsement of my legal skill or ability."
Official Comment to Guideline 3 by the Supreme Court (October 15, 2014)

It is the responsibility of the attorney to confirm the accuracy of the quotation or excerpt. Court opinions or official transcripts of proceedings are the proper source to confirm statements posted on a website or used in some other form of advertising.

Note: Adopted May 15, 2012 to be effective June 1, 2012; revised Guideline and Official Comment adopted October 15, 2014 to be effective immediately.