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CLE Materials
New York & New Jersey Tracks | Sunday

January 16, 2022

Fordham Law School
Live Broadcast via Zoom
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**Speaker Bios**

**Inessa Abayev**
Assistant Deputy Public Defender  
Office of Public Defender  
Inessa Abayev is an Assistant Deputy Public Defender at the Office of the Public Defender, Hudson Trial Region, in New Jersey where she has worked the past five years. She defends and represents indigent adults charged with felony allegations ranging from theft to homicide. Prior to joining her office she worked in civil litigation at the Port Authority, and before that, she served as a law clerk to the Hon. J. Randall Corman, J.S.C., in Middlesex County. Inessa is a native New Yorker and graduated from Fordham Law School in 2013 where she was a member of the Stein Scholars for Public Interest and a PIRC regular.

**Alex Berke**
Attorney  
Berke-Weiss Law PLLC  
Alex Berke is an employment lawyer and provides advice and counsel on sexual harassment and discrimination cases, including pregnancy, disability, race and gender as well as religious discrimination. Ms. Berke drafts, reviews and negotiates employment and severance agreements, including non-competition provisions. Ms. Berke also provides advice and counsel regarding employer policies, health insurance and COBRA eligibility for employees and employers. She also spearheads Berke-Weiss Law’s Pregnancy Project, providing pregnant women and families with the necessary tools to exercise their rights during and after pregnancy. Learn more about Ms. Berke’s speaking engagements and publications below. Ms. Berke can be reached by email at alex@berkeweisslaw.com.

**Senator Alessandra Biaggi**
New York State  
Alessandra Biaggi is the Democratic New York State Senator in her home district (Bronx/Westchester), and Chair of the revived Ethics and Internal Governance Committee. The granddaughter of Italian immigrants who lived in Hunts Point, she is the fourth generation of her family to live in District 34. Within her first two months in office, Senator Biaggi chaired the first public hearings in 27 years on sexual harassment in the workplace, and led the charge in New York to pass legislation that strengthens protections for survivors and holds employers accountable for addressing sexual misconduct. In a joint effort with her colleagues in the Democratic conference, the Senator worked to pass transformational legislation including tenant-centered housing reforms, bold climate-change initiatives, unprecedented criminal justice reform, comprehensive workplace protections, and expansive legislation making it easier to vote. Before launching her campaign, she served in Governor Andrew Cuomo’s Counsel’s Office focusing on the New York State’s women’s policy agenda, advocating for passage of the Reproductive Health Act and the Comprehensive Contraceptive Coverage Act. During the historic 2016 election, Alessandra was the Deputy National Operations Director for Hillary Clinton’s presidential campaign, overseeing a budget of $500 million, 38 state directors and 45 associated staff. Her run for office was preceded by a decade of advocacy and service to the people of New York. She interned for the Kings County D.A.’s Office, the U.S. Attorney’s Office for the Southern District of New York, and was a legal fellow for New York State Homes and Community Renewal, working to ensure that families across New York State had access to affordable housing. She served as Assistant General Counsel for Governor Cuomo’s Office of Storm Recovery, working with small businesses and municipalities to rebuild New York after Hurricane Sandy. She was a 2015 New Leaders Council (NLC) fellow, and sat on NLC’s Advisory Board. Alessandra attended Pelham public schools and holds degrees from New York University and Fordham Law School. She is also a graduate of the Women’s Campaign School at Yale University.

**Paola Bettelli**
Independent Consultant  
Adjunct Professor of Law, Fordham Law School  
Ms. Bettelli is an attorney admitted to practice in New York, New Jersey and Colombia, South America. She has more than 20 years of...
experience in the fields of international law, environmental law and sustainable development. Working as a diplomat, she was the lead negotiator for the Colombian government in multilateral climate change, biodiversity and the movement of hazardous wastes negotiations. She headed the Climate Change Office of the Colombian Ministry of the Environment and was responsible for setting national policies on climate change and representing the Colombian government in climate change meetings. She also worked for the United Nations as Senior Economic Affairs Officer in the New York Office of the UN Regional Commissions. In that capacity she actively participated in high-level UN task forces on climate change and on the implementation of the Millennium Development Goals (MDGs). More recently, she provided strategic guidance to the UN Regional Commissions on their positioning in the context of the 2030 Sustainable Development Agenda.

Ms. Bettelli also has experience working for the private sector as Environmental Markets Director for ICAP Securities in Colombia, as an analyst and consultant for the Andean Center for Environmental Economics (CAEMA), and as an ENB writer and Outreach and Fund Development Officer for the International Institute of Sustainable Development (IISD). She has published articles on sustainable development in Colombia and in publications of the New York Bar association. Ms. Bettelli also taught International Environmental Law at Universidad de los Andes’ Law School.

Ms. Bettelli currently works as an independent consultant in the fields of international law, environmental law and sustainable development. She is an attorney admitted to practice in New York, New Jersey and Colombia and currently teaches legal writing for non-J.D. students as adjunct professor at Fordham Law School.

Natacha Carbajal-Evangelista
Deputy Director
NYS Workers’ Compensation Board

Natacha Carbajal-Evangelista serves as Deputy Director for the NYS Workers’ Compensation Board, directly overseeing several of the Board’s program areas and advising the Chair and Executive Director on policy and operation matters.

Prior, Natacha served as the Assistant Secretary for Labor and Workforce for New York State, providing daily strategic leadership to seven dynamic labor and workforce-related agencies and boards, with budgets of more than $5 billion impacting operations and policy for over 9.6 million working New Yorkers, including more than 170,000 New York State employees. She led the Statewide implementation of groundbreaking initiatives, including New York’s Paid Family Leave. Natacha started her state service as Special Counsel for Ethics, Risk and Compliance, focusing on the New York State Department of Labor.

Before joining State government, Natacha was a senior associate at Baker & Hostetler LLP., where she focused her practice on bankruptcy litigation and advised the Securities Investor Protection Act (SIPA) Trustee for the liquidation of Bernard L. Madoff Investment Securities LLC. Natacha served as a Judicial Law Clerk serving the Hon. Elizabeth S. Stong of the U.S. Bankruptcy Court E.D.N.Y. and the Hon. Arthur J. Gonzalez (retired), former Chief Judge of the U.S. Bankruptcy Court S.D.N.Y.

Natacha is a proud graduate of Fordham Law School and Cornell University’s School of Industrial and Labor Relations and active member of the American Bar Association (Business Law Section), Hispanic National Bar Association, Cafecito Network and Hudson Valley Hispanic Bar Association.

Angie Byun
CEO, AB World, LLC
Adjunct Professor of Law, Fordham Law School

Angie Byun is the CEO of AB WORLD, LLC – a global consultancy representing leading U.S., Asian and international media, entertainment and luxury companies seeking to monetize their IP and lifestyle brands on new digital and social media platforms, expand their influence and reach new consumers through strategic cross-border business opportunities.

Prior to starting AB WORLD, Angie was at Condé Nast for 13 years and held various executive level positions in new business development, sales and international licensing for brands like VOGUE, GQ, WIRED, and GOLF DIGEST – successfully
launching and managing new international editions, digital products, experiences, global advertising buys and over 100+ brand extensions in 30+ markets worldwide. As one of the most senior Asian American businesswomen in media, she is also actively involved in Diversity, Equity and Inclusion initiatives and has a strong track record of leading diverse teams and bringing emerging brands and multicultural talent into the forefront of the media, entertainment, luxury and sports industry.

Angela received her J.D. from the University of Wisconsin-Madison Law School, B.A. in Political Science and History from the University of California at Berkeley, and has also studied Politics, Philosophy and Economics (PPE) at Oxford University.

Annie Chen
Program Director
SAFE Initiative at Vera’s Center on Immigration and Justice

Annie Chen is the program director for the Safety and Fairness for Everyone (SAFE) Initiative at Vera’s Center on Immigration and Justice. Launched in 2017, SAFE is a unique collaboration among local governments, immigration legal service providers, and advocates working together to build a movement for universal representation—a public defender system for all immigrants facing deportation. Annie has worked nationally to advance universal representation for immigrants since joining Vera in 2013. Previously, Annie was in private practice where she dedicated herself to the pro bono representation of immigrants. She also worked at the Legal Aid Society’s Immigration Law Unit, where she represented immigrants in detention facing deportation. She holds a BA from Columbia College and a JD from Fordham Law School. Before law school, Annie worked at the Brennan Center for Justice. Annie is a Coro Immigrant Civic Leadership Program alum and lives in Brooklyn with her family.

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 as the association’s Secretary. 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 OutstandingLatinos Award in 2012. Mr. De Leon is admitted to practice law in the state and federal courts of New York and New Jersey.

Rhonda J. Eiger
Partner
Goldzweig, Green, Eiger & Biedzynski
Rhonda J. Eiger concentrates her practice on residential real estate, municipal court, and wills, trusts and estates at Goldzweig, Green, Eiger & Biedzynski, LLC. Mrs. Eiger is a member of the Monmouth County Bar Association and the New Jersey State Bar Association. Ms. Eiger is a past president of the Marlboro Jewish Center. She received her B.A. from Brandeis University and her J.D. from The American University Washington College of Law. Mrs. Eiger served as a judicial clerk to the Honorable Samuel P. Supnick. She also has served as a mock trial judge, a New Jersey Bar Association Ethics Committee Fee Arbitration Chairperson, and NJ Bar Association faculty for ICLE, Lawline, Fordham Law School, CLE and the New York City Bar Association.

Veronica Escobar
Attorney
The Law Office of Veronica Escobar
Veronica Escobar Attorney, The Law Office of Veronica Escobar Native New Yorker Veronica Escobar has been practicing law in her home state for very close to eighteen years. For the past ten 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 writer and lecturer to lawyers and the public on issues in elder and special needs law and estate planning. She also produces and hosts her own podcast named “Aging Wisely” where she centers the aging and disabled communities, their issues and brings them to the microphone. 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 and the United States Supreme Court. She graduated summa cum laude from Fordham College at Rose Hill, Fordham University, where she was 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 a chair of the Solo and Small Firm Affinity Group and the AAC Solo and Small Firm Subcommittee at Fordham Law.

Palmina Fava
Partner, Vinson & Elkins, LLP
President, Fordham Law Alumni Association
Palmina Fava is a partner at Vinson & Elkins, LLP based in New York office. With over 20 years of experience, Palmina represents clients in internal and government investigations, litigation, and corporate governance counseling, with a principal focus on matters involving the Foreign Corrupt Practices Act (FCPA), international anti-corruption, anti-money laundering and anti-bribery laws, accounting irregularities, bid rigging and unfair trade practices, off-label pharmaceutical marketing, misappropriation of trade secrets, fraud, cybersecurity, and data privacy. Palmina regularly represents companies in matters before the United States Department of Justice (DOJ), the Securities and Exchange Commission (SEC), other federal and state agencies, and international regulatory bodies. She leads teams in investigations in Latin America, throughout Western and Eastern Europe, Asia, Africa, and the Middle East. Relying on her extensive language skills, she is capable of assisting clients in Spanish, Portuguese, Italian, and English. Palmina also designs and implements comprehensive, practical, and user-friendly corporate compliance programs tailored to a client’s particular risks and growth strategies. She provides employee and third-party training; conducts proactive reviews of a client’s high-risk business areas; structures commercial arrangements to protect against compliance risks; and handles due diligence of agents, joint venture partners, and targets in mergers and acquisitions or other investment transactions. Palmina’s litigation practice focuses on commercial, business tort, and intellectual property disputes. She has served as lead litigation and trial counsel in matters involving breaches of fiduciary duty, breaches of contract, fraud, negligence, misappropriation of trade secrets, and insurance coverage. She has tried and defended cases in federal and state courts (including the US Supreme Court), and before arbitration panels, and has represented clients in appellate arguments, mediations, and negotiations.

Alexandra Fisher
Senior Staff Attorney
Brooklyn Defenders Services

Noberto Garcia
Civil Trial Attorney
Blume Forte Fried Zerres & Molonari
Norberto A. Garcia is a civil trial attorney with offices at 1 Main Street in Chatham, New Jersey, 26 Journal Square in Jersey City, New Jersey and 7300 Bergenline Avenue in North Bergen, New Jersey. He is a partner at Blume Forte Fried Zerres & Molinari. He is on the New Jersey Association of Justice Board of Governors and a trustee of the New Jersey Association for Justice Education Foundation. He is the secretary of the executive board of the New Jersey State Bar Association where he has been a trustee since 2019. He was the president of the Hudson County Bar
Association from 2012-2013 and has been a trustee of the Hudson County Bar Foundation since 2010. He is the immediate past president of the New Jersey State Bar Foundation. He was the co-chair of the New Jersey State Bar Diversity Committee and is a member of the executive committee of the New Jersey State Bar Civil Trial Section. He is a member of the State of New Jersey Bar Examination Committee on Character. He is a trustee of the New Jersey Lawyers’ Fund for Client Protection. 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 president of the North Hudson Lawyers Club in 2003. He has been co-chairperson of the Hudson County Civil Practice Committee since 2003. He served on the Office of Attorney Ethics of the Supreme Court, 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. He has been a member of the American Board of Trial Advocates since 2004. 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. Mr. Garcia resides in Kinnelon, New Jersey with his wife and two sons.

Mary Goodwin-Oquendo
Attorney, Jo Anne Simon PC
Adjunct Professor of Law, Fordham Law School
Mary J. Goodwin-Oquendo has well over a decade of disability civil rights experience. She has worked at Jo Anne Simon PC since 2008, where she represents individuals with physical, cognitive, and psychiatric disabilities who have experienced discrimination and/or require accommodations from standardized testing and licensing entities and post-secondary and professional educational institutions. She has drafted policy commentary that has been adopted by the federal agencies that are charged with enforcing the ADA, as well as various professional organizations. She is a member of the New York State Bar Association, and an appointed member of the Committee on Disability Rights, where she has organized CLE programming and sits on a subcommittee that is responsible for editing the organization’s Disability Law and Practice treatise. She has been invited to present at professional conferences and private schools, including colleges and law schools. She has served on the executive board of the New York Urban League Young Professionals and the National Urban League Young Professionals Programs Committee and has worked with various other non-profit and professional organizations to fight for equality of opportunity for all.

Edward Greason
Of Counsel
Dunnington, Bartholow & Miller LLP
Edward Greason is Counsel to the firm of Dunnington, Bartholow & Miller LLP where he is a member of the firm’s Trust & Estates Department. His practice is concentrated in estate planning, preparing Wills and Trusts, Probate and Administration of decedent’s estates, Will contests, Fiduciary accountings, and trust administration. He also handles matters involving not-for-profit entities and charities and has served on the Boards of a number of companies, foundations and trusts. Ed has been called upon to assist in several litigations involving estates of Holocaust victims where family members are attempting to recover art seized by the Nazis. He has been retained by other firms to assist with aspects of valuation of unusual assets and auction house consignment agreements. Ed has lectured on various aspects of trusts and estates before a number of groups on topics of estate planning and probate. Ed is admitted to practice in New York. He is a member of the Trusts and Estates sections of the American Bar Association, the New York State Bar Association, and the New York County Lawyers Association. Ed is a graduate of Lafayette College and Fordham University School of Law.

Honorable Allan L. Gropper
U.S. Bankruptcy Judge for the Southern District of New York
Adjunct Professor of Law, Fordham Law School
Allan L. Gropper was appointed as a United States Bankruptcy Judge for the Southern District of New York on October 4, 2000 and retired on January 9, 2015. Prior thereto he was a member of the law firm of White & Case, active in bankruptcy and
reorganization cases.
Judge Gropper presently serves as a consultant and expert witness in litigated matters and as an arbitrator and mediator. He is an adjunct professor of law at Fordham Law School, a member of the National Bankruptcy Conference and a Fellow of the American College of Bankruptcy. He is a member of the United States delegation to Working Group V (Insolvency Law) of the United Nations Commission on International Trade Law (UNCITRAL). He is also a member of the American Arbitration Association Roster of Neutrals and the INSOL International College of Mediation. He is a graduate of Yale College and Harvard Law School.
Judge Gropper has frequently lectured on bankruptcy-related issues and has participated in educational sessions in several nations. His publications include The Curious Disappearance of Choice of Law as an Issue in Chapter 15 Cases, 9 Brook. J. Corp. Fin. & Com. L. 57 (2015), and The Arbitration of Cross-Border Insolvencies, 86 Amer. Bankr. L. J. 201 (2012).

Abdul Hafiz
Law Clerk to Magistrate Judge Katharine H. Parker
Southern District of New York
Abdul Hafiz is a 2019 graduate of Fordham University School of Law where he was a member of the Moot Court Board, Urban Law Journal, Black Law Students Association (BLSA), and the Muslim Law Students Association (MLSA). He is currently a Law Clerk to the Honorable Katharine H. Parker, Magistrate Judge, Southern District of New York. Prior to clerking, Abdul was a litigation associate at White & Case LLP focusing on complex commercial litigation and counseling clients in high-stake antitrust matters, including the representation of global pharmaceutical manufacturers. Abdul also counseled clients on privacy and cybersecurity issues that arose in the protection and transfer of consumer and business data, and the management of information and operational systems across various jurisdictions. Abdul is a Certified Information Privacy Professional (CIPP/US).

Jeffrey Hellman
Senior Vice President and Assistant General Counsel, PVH Corp
Adjunct Professor of Law, Fordham Law School
Jeffrey Hellman is the Senior Vice President and Assistant General Counsel at PVH Corp. PVH Corp. is a global apparel company whose brand portfolio consists of nationally and internationally recognized brand names, including Tommy Hilfiger, Calvin Klein, Warner’s, Olga and True&Co.
He works on mergers and acquisition transactions (including acquisitions of The Warnaco Group, Inc. and Tommy Hilfiger B.V.), joint ventures, financings and securities offerings and handles corporate governance, securities law, creditors’ rights and commercial litigation matters.
He is an adjunct professor at Fordham University Law School, where he teaches Fashion Law & Finance, and also serves as pro bono counsel to the Fashion Scholarship Fund, a non-profit organization that provides scholarships to college students planning to pursue careers in the fashion industry, a member of the Board of Directors of Comprehensive Youth Development, a non-profit organization that partners with New York City public high schools to prepare young adults for successful futures.
Mr. Hellman holds a J.D. from the University of Pennsylvania Law School and a B.S. Economics, Finance from the University of Pennsylvania.

William Jannace
Research Affiliate, Fletcher Network for Sovereign Wealth and Global Capital
Adjunct Professor of Law, Fordham Law School
William Jannace has worked nearly 35 years in the securities industry at the American and New York Stock Exchanges, FINRA and several investment banking firms. He currently serves as an expert witness for The Bates Group on securities litigation matters. He is a member of the faculty advisory group of ESG Competent Boards which provides professional development and advisory services on ESG and Sustainability to boards, investors, and executives globally. He is also an adjunct professor/lecturer at Fordham School of Law, the U.S. Army War College, the Global Financial Markets Institute, Baruch University, and Metropolitan College, where he teaches courses covering: Broker-Dealer Operations and
Compliance; Investment Adviser and Investment Company Regulation; Capital Markets and Corporate Governance; Corporate Social Responsibility, ESG and Impact Investing; AML/FCPA; and Geopolitics, Climate Change, National Security, U.S. Foreign Policy, and Grand Strategy.

He is also a research affiliate with the Fletcher Network for Sovereign Wealth and Global Capital, and a member of the: Bretton Woods Committee, NGO Committee to Stop Trafficking in Persons, and International Institute for Strategic Studies. Mr. Jannace has also conducted training programs in: Russia; Uganda; Burundi; Tanzania; Kenya; Saudi Arabian; India; Ukraine; Romania; Jordan; Turkey; Albania; China; Taiwan and Spain.

Kate Lang
Senior Staff Attorney
Justice in Aging
Kate Lang joined Justice in Aging’s economic security team in December 2012. She serves as a senior staff attorney in the Washington, DC office where she works on Social Security and Supplemental Security Income-related issues. She was formerly a staff attorney at the Legal Aid Bureau in Riverdale, MD where she was an advocate for low-income older adults and persons with disabilities. In her previous positions, Kate worked as an attorney at the National Legal Aid and Defender Association and Bread for the City Legal Clinic in Washington, DC, as well as at Doherty, Cella, Keane and Associates, LLP. She also served as a staff attorney for Legal Services of Northern California. She received her B.A. from Oberlin College and her J.D. from Fordham University School of Law.

Computer Engineering and Master’s degree from Stevens Institute of Technology.

Karen Leyva-Drivin
Senior Corporate Counsel
Bloomberg L.P.
Karen Leyva-Drivin is a Senior Corporate Counsel for Bloomberg L.P., where she handles IP enforcement as well as complex transactional and legal matters. Prior to joining Bloomberg, Karen was a patent litigator with Ropes & Gray and Kenyon & Kenyon. Karen is actively involved in initiatives supporting diversity and inclusion, as well as the Hispanic community. She is a board member of the Sonia and Celina Sotomayor Judicial Internship Program, an HNBA National Past-President of the Young Lawyers Division, past Deputy Regional President for HNBA Region II, and most recently served as a Commissioner on the HNBA’s Latina Commission. At Bloomberg, she served as the New York Chapter Lead of the Bloomberg Latinx Community (BLC) and Co-Chair of the Pro Bono Committee. Karen earned her J.D. from Fordham Law and a Bachelor of Engineering in Computer Engineering and Master’s degree from Stevens Institute of Technology.

Honorable Grace E. Lee
Administrative Law Judge
New York State
Honorable Grace E. Lee has dedicated her career to public service and currently serves as an Administrative Law Judge for New York State. In her judicial role, Judge Lee has adjudicated over 2000 proceedings involving federal, state and local public benefits. Prior to her appointment, 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 impacting New York constituents.

Judge Lee is passionate about diversity on the bench and the protection of due process rights and speaks on the topics in various forums. Judge Lee received a B.A. from Boston College and J.D. from Fordham University School of Law and is an active member of several volunteer organizations and bar associations including the Asian American Bar Association of New York and Brooklyn Women’s Bar Association. Judge Lee also serves as the Diversity, Equity and Inclusion Chair of the Fordham Law Alumni Association’s Recent Graduates Committee and has previously served on the New York State Bar Association’s President’s Committee on Access to Justice.
Khasim Lockhart
Litigation Associate, Frankfurt Kurnit Klein & Selz
Adjunct Professor of Law, Fordham Law School
Khasim Lockhart attended Fordham University School of Law from 2015-2018. He spent each of his three years fully engaged in the life of the School. As a member of the law school’s moot court team, he served as captain of the team that was victorious in the Pepperdine Law School Entertainment Law Competition. He also served as president of Fordham’s Black Law Students Association and for his BLSA leadership, he won two awards: the association’s Student of the Year award and the Chapter President of the Year award from the Northeast Black Law Students Association. At graduation, he received the Eugene J. Keefe Award presented to the person who made the most important contribution to the Fordham Law community. Khasim is currently a litigation associate at Frankfurt Kurnit Klein & Selz where he represents clients in a variety of areas. His practice focuses on entertainment, intellectual property, employment, legal ethics, and professional responsibility. He is also an adjunct professor at Fordham University School of Law, teaching Peer Mentoring and Leadership.

Wendy J. Luftig, Esq
Senior Manager, Global Drug Development, Novartis Pharmaceuticals Corporation
Adjunct Professor of Law, Fordham Law School
Wendy Luftig is a seasoned health care attorney with experience in a variety of sectors, including industry, non-profit academic medical centers, and legal entities. She is currently a Senior Manager in the Global Drug Development unit at Novartis Pharmaceuticals Corporation, where she oversees a portfolio of legal documentation related to medical research for complex, multi-site clinical trials. In this capacity, she advises on challenging negotiation impasses, intellectual property issues, and privacy law concerns, as well as implements key legal and compliance initiatives. Prior to assuming an industry role, Ms. Luftig worked in the Office of Science and Research at NYU Langone Medical Center negotiating transactional agreements with pharmaceutical companies, private foundations, and governmental entities, such as the NIH and CDC. Earlier in her career, she practiced as a corporate litigator at several major New York firms, including Dewey Ballantine. Ms. Luftig is a former Chair of the Bioethical issues Committee of the New York City Bar Association and a recipient of the 2012 Jeremy Epstein Award for pro bono service for her work representing cancer patients through the Cancer Advocacy Project of the City Bar Justice Center. She has published in the areas of bioethics and organ transplantation. Since 2015, she has served as an Adjunct Law Professor at Fordham Law School, teaching seminars in Health Care Policy & the Law and Pharmaceutical Law.
Ms. Luftig received her J.D. from Columbia University School of Law, where she was a Harlan Fiske Stone Scholar, has done graduate work in bioethics at Columbia University and holds an undergraduate degree from Hamilton College.

Deborah Mantell
Attorney
Mental Hygiene Legal Service
Deborah Mantell has been an attorney with the Mental Hygiene Legal Service for the Second Judicial Department for over four years, representing individuals contesting involuntary hospitalizations, guardianships, and discharges from group homes. Previously, she was an attorney in the Departmental Office of the MHLS for the First Judicial Department, where she focused primarily on appeals and strategic litigation involving post-prison civil commitments. Deborah graduated from Fordham Law school in 2007 and completed a federal clerkship before starting her career with MHLS. Prior to law school, Deborah worked at The Legal Aid Society’s Prisoners’ Rights Project, advocating for prisoners in New York City jails and state prisons regarding conditions of confinement.

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Mary Beth Quaranta Morrissey, Esq., PhD, MPH, JD, is a New York licensed attorney, concentrating her practice in health and public health law and policy, and a social science researcher. Her work is interdisciplinary and cuts across law and policy, public health, social work and psychology, and gerontology. She is the New York State Bar Association Health Law Section COVID-19 Task Force chair and co-chairs the Section’s Public Health Law Committee. She also serves on the NYSBA Long-Term Care COVID-19 Task Force. In addition, she is actively engaged in the American Psychological Association COVID-19 advocacy, as well as NASW NYC. Dr. Morrissey holds a research fellow appointment in Fordham University’s Global Healthcare Innovation Management Center, Gabelli School of Business, and adjunct faculty appointments in Fordham’s Graduate School of Social Service and Graduate School of Business. She also serves as senior advisor for health policy and ethics, Finger Lakes Geriatric Education Center, University of Rochester Medical Center, and under the joint sponsorship and support of the FLGEC, the Westchester County Department of Aging, and the Collaborative for Palliative Care, NY, directs a postgraduate certificate program with concentrations in public health and palliative care.

Dr. Morrissey’s scholarship, law and policy practice, advocacy, and research concentrate on pain, suffering and resilience in marginalized populations— including older adults, persons with dementia, nursing home residents, persons with disabilities, older inmates and immigrants. In her recent work, she is leading efforts to develop and disseminate next-generation models of palliative care through integration of medical and social care for persons with serious illness, building palliative environments across all care settings and levels of the society, expanding community-based palliative care through cooperation with aging services agencies and faith-based communities, and developing generalist-level palliative care workforce standards. She has led dialogues about the critical importance of palliative care during the pandemic. Morrissey has authored numerous publications, drawing on her interdisciplinary expertise. Morrissey is founder and president of the Collaborative for Palliative Care, New York, a statewide leader in palliative care education and training, and current co-chair of the American Public Health Association Aging & Public Health Section’s policy committee. She is also past president of the American Psychological Association Society for Theoretical and Philosophical Psychology, the National Committee for the Prevention of Elder Abuse, the State Society on Aging of New York and the Public Health Association of New York City, and immediate past chair of the New York City Bar Bioethical Issues Committee.

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John Owens Jr.
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John Owens Jr. serves as counsel to the Honorable Robert R. Reed, Justice of the Supreme Court, New York County, Commercial Division. Prior to this appointment, John served as Acting Deputy General Counsel at the New York City Board of Elections. John began his legal career as an Assistant District Attorney in the Bronx County
District Attorney’s Office. John received his J.D. from Fordham University School of Law and earned a B.S. in criminal justice (cum laude) and an M.A. in sociology from St. John’s University. John is the immediate past chair of the New York City Bar Association’s New York City Affairs Committee. He served as chair of the New York State Bar Association’s General Practice Section and is a member of the section’s Election Law and Government Affairs Committee. John is a member of the Board of Directors for Fordham Law Alumni Association. John serves as an Adjunct Professor of Law at Fordham University School of Law.

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Jennifer Prevete is in-house counsel at Altice USA, where she handles litigation matters, including contract disputes, consumer class actions, government investigations and regulatory activity, and intellectual property matters. Prior to joining Altice, she was an associate at a boutique litigation firm, Walden Macht & Haran LLP. Jennifer was also previously a litigation associate at Davis Polk & Wardwell LLP. Her practice has focused on commercial litigation, white collar defense, government investigations, and internal investigations. Before joining Davis Polk, she clerked for the Honorable Joan M. Azrack in the Eastern District of New York. In 2015, Jennifer graduated from St. John’s University School of Law, magna cum laude, where she was an Associate Managing Editor of the St. John’s Law Review.

Kiran Rosenkilde
Judicial Law Clerk to Magistrate Judge Sarah L. Cave of the Southern District of New York

Kiran Rosenkilde is a judicial law clerk to Magistrate Judge Sarah L. Cave of the Southern District of New York. He began his legal career as an Assistant District Attorney at the Bronx District Attorney’s Office, where he served from 2013-2017 in the Criminal Court, Grand Jury, and Public Integrity Bureaus. As an ADA, Kiran prosecuted a range of violent crimes and public corruption offenses. After the District Attorney’s office, Kiran served from 2017-2020 as an Assistant Corporation Counsel and then Senior Counsel in the Special Federal Litigation Division of the New York City Law Department, where he represented the City in federal civil rights litigation brought under 42 U.S.C. § 1983. Kiran defended the City and its officers in several federal trials while at the Law Department. Kiran graduated with honors from the Benjamin N. Cardozo School of Law in 2013, and he was awarded the Jacob Burns Medal at commencement. Kiran received his undergraduate degree with honors from Tulane University in 2009. Kiran is a member of the Federal Bar Council’s First Decade Committee and previously served on the Federal Courts Committee of the New York City Bar Association.

Diana Santos
Senior Attorney
IBM

Diana is a Senior Attorney at IBM, where she supports IBM’s Global Markets organization, which drives innovation via the adoption of hybrid cloud and artificial intelligence and guidance from IBM Consulting professionals. Prior to joining IBM, she was Assistant General Counsel at Memorial Sloan Kettering Cancer Center and Associate Counsel at the New York Genome Center. Diana has counseled senior executives and worked closely with compliance and business teams to analyze issues and mitigate risks related to hardware, software (on-premises and SaaS), cloud computing, artificial intelligence, intellectual property ("IP"), data use and collection, healthcare regulations, and collaborative works. She has also collaborated with subject matter experts to address privacy and consumer protection laws and information security teams to address cybersecurity risks. Before becoming in-house counsel, Diana spent 9 years as a Big Law associate, where I advised major software, hardware, e-commerce, technology, investment, automotive, biopharmaceutical, and consumer product companies, as well as startup companies, through transactions and litigation. She counseled on and led teams addressing a variety of IP and technology issues relating to commercial agreements, diligence for investments (M&A), invention and product development, branding,
Giancarlo Stanton is currently the Chief Operating Officer at Cover Whale Insurance Solutions - a venture backed InsurTech company utilizing data and machine learning to transform the commercial auto space. He also advises several highly regulated tech companies in the HealthTech, PropTech, and InsurTech sectors. He was previously the General Counsel and VP of Claims at Swyfft, a P&C InsurTech - his first in-house role after working in private practice. Giancarlo holds a J.D. from Fordham University School of Law class of 2014, and a bachelor’s degree in Political Science from George Washington University.

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Hon. Patty Shwartz
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Patty Shwartz is a United States Circuit Judge of the United States Court of Appeals for the Third Circuit. Judge Shwartz was born in Paterson, New Jersey. She earned her Bachelor of Arts degree from Rutgers University in 1983, with highest honors, and her Juris Doctor from University of Pennsylvania Law School in 1986, where she was a member of the University of Pennsylvania Law Review. After graduating from law school, she worked as an associate at Pepper, Hamilton & Scheetz. Judge Shwartz clerked for Judge Harold A. Ackerman of the United States District Court for the District of New Jersey from 1987 to 1989. She then worked for the U.S. Attorney’s Office for the District of New Jersey from 1989 until 2003. During this time she held the following positions: Deputy Chief of the Criminal Division (1995 to 1999), Chief of the Criminal Division (1999 to 2001 and 2002 to 2003) and Executive Assistant United States Attorney (2001 to 2002). Since 2009, Judge Shwartz has taught as an adjunct professor of Law at Fordham University School of Law and Rutgers Law School.

Jocelyn Strutt
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Ariana J. Tadler
Founding Partner
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Ariana J. Tadler is the founding partner of Tadler Law LLP, a WBENC-certified, women-owned boutique law firm handling complex litigation on behalf of businesses, consumers, and investors. Ariana has 28+ years’ experience litigating and managing securities, consumer and data breach class actions and complex litigation. She is recognized as one of the nation’s leading authorities on electronic discovery and the only plaintiffs’ lawyer to be ranked repeatedly as a Band 1 e-Discovery Practitioner by Chambers and Partners in the Global-USA and USA-Nationwide categories, an unprecedented achievement. In 2017, she was appointed by United States Supreme Court Chief Justice Roberts to serve on the Federal Civil Rules Advisory Committee; now serving in her second term, Ariana currently serves on the Social Security, multidistrict litigation (MDL), and Discovery subcommittees. Fordham University School of Law, J.D. – 1992 Hamilton College, B.A. – 1989

Geeta Tewari
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Geeta Tewari is an Assistant Professor of Law at Widener University Delaware Law School. She received her B.A. from Cornell University, her J.D.
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She also served as the Director of the Urban Law Center at Fordham Law School, where she launched the Women in Urban Law Leadership Initiative and collaborated with UN-Habitat on projects focused on urban planning laws. In 2019, she was a Visiting Artist Scholar at the American Academy in Rome, and founded the Narrative Justice Project, with non-profit status through the New York Foundation for the Arts, to support collaboration between artists and lawyers for dialogue vital to justice and humanity. She has spoken on numerous topics, including feminist lawyering, narrative justice, inclusivity on corporate boards, and equal pay as a human right.

**Honorable Mimi Tsankov**

**Immigration Judge**

**New York Federal Plaza Immigration Court**

Mimi Tsankov is an Immigration Judge at the New York Federal Plaza Immigration Court. In the past 15 years presiding at Immigration Courts in New York, Colorado, and California, she has held a variety of national leadership roles including Pro Bono Liaison Judge, contributing editor to the Immigration Judge Benchbook, Chair, Immigration Court - Board of Immigration Appeals Precedent Committee, Mentor Judge, and Juvenile Docket Best Practices Committee Chair. She is currently the elected President of the National Association of Immigration Judges (NAIJ) (2021 - 2023). In her personal capacity, she has been elected to the Federal Bar Association (FBA) Board of Directors, and serves as Immediate Past President of the FBA Southern District of New York (SDNY) Chapter. She is a prior Chair of the FBA national International Law Section. Presently she serves on the Board of the Judicial Division and the Diversity and Inclusion Committee. In Fall 2020, she co-chaired a national law student three-part webinar program entitled, Racial Equality and the SDGs: A Certificate Training Program for Law Students. This program was accessible to all law students, nationwide. In Spring 2021, she launched an International Courts Topical Webinar Series at the FBA.

At the American Bar Association (ABA), Judge Tsankov is Secretary of the Judicial Division National Conference of Administrative Law Judges (NCAIJ), serves as Liaison to the ABA Commission on Immigration, and has an ABA Presidential Appointment to the United Nations Department of Global Communications, in her capacity as President of the NAIJ.* Judge Tsankov is co-chair of the National Association of Women Judges (NAWJ) Immigration Law Committee, and Vice President of Publications, in her capacity as President of the NAIJ.*. She serves as an adjunct faculty member at the Fordham Law School in New York. Judge Tsankov publishes regularly in peer-reviewed, and general interest journals. She speaks regularly before members of the immigration law community at international, national, and regional conferences.

Judge Tsankov completed her J.D. at the University of Virginia School of Law and was awarded an M.A. in International Relations at the University of Virginia Graduate School of Politics. She completed her undergraduate degree at James Madison University.

*DISCLAIMER: The author is the President of the National Association of Immigration Judges. The views expressed here do not necessarily represent the official position of the United States Department of Justice, the Attorney General, or the Executive Office for Immigration Review. The
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Emily Weissler
Litigation Counsel
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Emily Weissler currently works as a Litigation Counsel at Uber Technologies, Inc. At Uber Emily focuses on managing a volume of complex litigation and advising on risk for the Company’s delivery products, which include Uber Eats, Postmates, Drizly, and Cornershop. Prior to joining Uber in September 2021, Emily worked as a litigator at a boutique law firm, Clarick Gueron Reisbaum LLP, which focused on commercial litigation and cases in the art and intellectual property sphere. Prior to working at that boutique Emily was a litigation associate at Paul, Weiss LLP and she also clerked for Hon. Brian M. Cogan in the Eastern District of New York. Prior to law school Emily she spent two years as a paralegal with the Department of Justice focusing on criminal international law issues, she received her undergraduate degree from Yale University.

Alexander Wentworth-Ping
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Alexander (Alex) Wentworth-Ping is an Assistant United States Attorney in the Criminal Division of the U.S. Attorney’s Office in the Northern District of New York in Albany, New York where he has served since June 2020. As an AUSA, he handles federal criminal cases and has prosecuted individuals involved in drug trafficking, possession of firearms and explosives, fraud, tax evasion, cybercrime, and domestic terrorism, among other offenses. In November 2021, Alex was awarded a certificate of recognition for his outstanding prosecutive skills and assistance provided to the FBI. Prior to joining the U.S. Attorney’s Office, Alex handled criminal and civil litigation matters in private practice at Quinn Emanuel Urquhart & Sullivan, LLP and Allen & Overy LLP in New York City. He clerked for Magistrate Judge James Orenstein from 2014 to 2015 in the U.S. District Court for the Eastern District of New York. He graduated from Fordham Law School in 2013. Prior to going to law school, Alex served as a Peace Corps Volunteer in Peru from 2008 to 2010. He obtained his undergraduate degree from Williams College in 2008.

Gregory Xethalis
General Counsel and Chief Compliance Officer
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Prior to joining Multicoin, Greg was a partner in the Investment Management and FinTech practices at Chapman and Cutler LLP. At Chapman, he spearheaded cryptocurrency efforts with a focus on asset managers, CeFi institutions, and stablecoins. He also represented traditional equity, debt and commodity asset managers, with a specialty in novel registered products. Greg is a crypto veteran and understands the markets and regulatory environment. He began working in the space in late 2012, crafting the first financial markets disclosure on bitcoin and addressing early federal and state regulatory and asset classification matters. Over the last decade, he has represented a diverse set of parties across the crypto ecosystem, including traditional financial institutions, custodians, trading platforms, miners, developers, asset managers and individual investors.

Shlomit Yanisky-Ravid
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Professor Shlomit Yanisky-Ravid, PhD is a professor of Intellectual Property (IP) Law, focusing on the challenges of advanced technology, artificial intelligence (AI), blockchain, cyberspace, privacy and competition laws, from theoretical perspective as well as on comparative and international aspects. Prof. Yanisky-Ravid is a Visiting Professor at Fordham Law (from 2012), where she teaches the courses “IP and the Challenges of Advanced Technology: AI and Blockchain” and previously: “Beyond IP: Theoretical, Comparative and International Perspectives”. Professor Shlomit Yanisky-Ravid is the Head of the “IP - AI & Blockchain Research Project” at Fordham Law CLIP working with Prof. Joel Reidenberg. Professor Shlomit Yanisky-Ravid’s research focuses on Intellectual Property (IP) Law, focusing on the
challenges of advanced technology, artificial intelligence (AI), blockchain, cyberspace, privacy and competition laws, from theoretical perspective as well as on comparative and international aspects. She is also a Law Professor Research Fellow at the Yale University Law School, ISP, since 2011, when she completed post-doctoral studies at Yale Law School, and where she conducted two seminars: "Law and Society In Israel: Contemporary Issues" and "Advanced Legal Studies for the VR Graduate Program". Prof. Yanisky-Ravid is a full time Senior Law Faculty Member at the Ono Academic College, Law School, which is the largest law school in Israel, and the founder and director of the Shalom Comparative Research Institute, Eliyahu Law and Tech Center at Ono. Professor Shlomit Yanisky-Ravid has published many articles and books and has won awards and scholarships for her works. Recently, she researched the challenges of advanced technology, focusing on AI and blockchain and its impact on the legal regime. One of her studies, titled "Generating Rembrandt: Artificial Intelligence, Copyright, and Accountability in the 3A Era—the Human-Like Workers are Already Here—A New Model", was chosen as the 2017 Visionary Article in Intellectual Property Law and in addition won an award, by Michigan State University. She was recently identified as "the foremost thinker on AI and copyright" in the American Copyright Society Annual Event by Judge Katherine Forrest. Her article "Equality and Privacy By Design" addresses big data, that AI systems must "swallow", as the major source of biases, including at workplaces, rather than the algorithm, and suggests a new model of AI data transparency (Fordham U.L.J., special edition on AI and big data). Her article "From the Myth of Babel to Google Translate" discusses, among other topics, AI biases and discriminative results. Currently, she is writing two books, one of them discussing the interconnections between IP and AI. Some of her latest works discuss blockchain platform in regard to intellectual property regime, addressing questions of the advantages and disadvantages regarding the use of blockchain platforms for selling IP assets - is it "the Promised Land" or "the Dark Side of the Moon". Previously, her article "The Right to Privacy and the Balloon Theory" was judged by West (Thomson Reuters) Publisher as one of the best law review articles related to entertainment, publishing and/or the arts published within 2014 in the U.S. Her work on the book "Intellectual Property at Workplaces: Theoretical and Comparative Perspective" won the Van Calker Fund Award, awarded to selected scholars and was described as a profound academic work on the field. She won the Minerva Center for Human Rights award as well as the Silbert grant for other research she has done. Professor Yanisky-Ravid is a sought after lecturer at leading universities around the world, such as: Harvard University, Berkman K. Center for Internet & Society, Columbia University, Miami University, NYU Law, Center for Labor and Employment Law American University in the U.S. as well as at Lausanne University, Switzerland, Urbino University, Italy, Oxford, UK and others. In addition, she has actively collaborated, for more than a decade, with international organizations, such as the World Intellectual Property Organization (WIPO) in Geneva and the Swiss Institute of Comparative Law, Lausanne. She is a member of many boards and forums around the world in her fields of expertise. Last year she launched the AI-IP project as part of the Fordham Law CLIP researching the challenges of advanced technology, mainly artificial intelligence and blockchain on intellectual property regime. She holds BAs in Life Science and in Psychology from Bar Ilan Univ., Israel (both Cum Laude); LLB in Law, Tel Aviv Univ., Israel (Cum Laude and 3 times dean award); PhD Law, Hebrew Univ., Direct Program for Outstanding Students; Post Doc. Graduate Program, Yale Law School.

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the Young Lawyers Subcommittee of the Family Law Executive Committee since 2019. Ms. Yu also serves on the Executive Committee of the Fordham Law Alumni Attorneys of Color affinity group as the Social Media Chair and Vice Chair of the New Attorney Division.

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.

**Alex Zozos**  
Counsel  
Coinbase  

Alex Zozos currently works as a Product Counsel at Coinbase Inc. a cryptocurrency company. He works collaboratively with product managers advising on how to best navigate the often unclear legal and regulatory concerns surrounding cryptocurrencies and related products. Specifically, he has advised on a number of acquisitions and various digital asset security and crypto derivative initiatives. Prior to this in-house role, Alex was a corporate counsel at Lowenstein Sandler LLP in the Investment Management Group. His practice focused on broker-dealer regulatory issues as well as the related fin-tech space. Alex began his legal career at the U.S. Securities and Exchange Commission as a Special Counsel in the Division of Trading and Markets. While at the Commission, Alex helped oversee the secondary trading markets and assisted in reviewing the Bitcoin ETFs proposals as well as the various rulemakings. Alex graduated from Fordham Law School in 2014. Prior to law school Alex worked at J.P. Morgan for three years in the prime brokerage division and completed his undergraduate studies in finance and accountancy at Villanova University.
Reading List


In a negligence action brought by a pedestrian who slipped and fell on ice, the court adopted the ongoing storm rule because the limiting principles established in the court's precedent warranted the adoption of that rule; [2]-Under the ongoing storm rule, commercial landowners do not have a duty to remove the accumulation of snow and ice until the conclusion of the storm; [3]-However, unusual circumstances may give rise to a duty before then, and the court established two exceptions that could impose a duty. The first exception arises if the owner's conduct increases the risk, and the second exception arises if the danger is pre-existing.

ISSUE: Are commercial landowners obligated to clear snow and ice while precipitation is still falling?

HOLD: No. The court adopted the ongoing storm rule, under which commercial landowners do not have a duty to remove the accumulation of snow and ice until the conclusion of the storm. However, it also held that there are two exceptions that could impose a duty: if the owner’s conduct increases the risk or the danger is pre-existing.

FACTS: In January 2015, plaintiff Angel Alberto Pareja was walking to work when he slipped on ice, fell, and broke his hip. The sidewalk area on which he fell was on property owned and managed by defendant Princeton International Properties, Inc. (Princeton International). The night before, a wintry mix of light rain, freezing rain, and sleet began to fall. Around the time of his fall, light rain and pockets of freezing rain were falling. Pareja’s expert opined that Princeton International could have successfully reduced the hazardous icy condition by pre-treating the sidewalk.

PROCEDURE: Pareja filed a complaint, and the trial court granted summary judgment to Princeton International. The Appellate Division reversed, holding that Princeton International had a duty of reasonable care to maintain the sidewalk even when precipitation was falling. The New Jersey Supreme Court reversed. “We disagree with the Appellate Division’s holding and decline to adopt the Appellate Division’s articulation of the commercial landowner’s duty of ordinary and reasonable care. Rather, we find that the standard established in our precedent supports the adoption of the ongoing storm rule,” the court wrote. “In addition to adopting the rule, we also recognize two exceptions that could impose a duty: if the owner’s conduct increases the risk, or the danger is pre-existing.”

In reaching its decision, the New Jersey Supreme Court summarized existing precedent regarding the removal of snow and ice from sidewalks. While there was initially no legal duty, in Stewart v. 104 Wallace St., Inc., 87 N.J. 146, 157 (1981), the New Jersey Supreme Court carved out an exception for commercial landowners, holding that they “are responsible for maintaining in reasonably good condition the sidewalks abutting their property and are liable to pedestrians injured as a result of their negligent failure to do so.” In Mirza v. Filmore Corp., 92 N.J. 390, 400 (1983), the court extended that duty to expressly include the “removal or reduction of the hazard of snow and ice.” Mirza and later cases discuss the imposition of a duty to remove snow and ice only after the cessation of the hazardous precipitation.
The New Jersey Supreme Court added the ongoing storm rule to the above precedent. “The premise of the rule is that it is categorically inexpedient and impractical to remove or reduce hazards from snow and ice while the precipitation is ongoing. We agree,” the court held. “Our precedent makes clear, and we reiterate today, that absent unusual circumstances, a commercial landowner’s duty to remove snow and ice hazards arises not during the storm, but rather within a reasonable time after the storm.”

The New Jersey Supreme Court went on to explain that although the ongoing storm rule does not impose a duty on commercial landowners until the conclusion of the storm, unusual circumstances may give rise to a duty before then. First, commercial landowners may be liable if their actions increase the risk to pedestrians and invitees on their property. Second, a commercial landowner may be liable where there was a pre-existing risk on the premises before the storm. The court also noted that its rule does not preclude a jury from hearing questions of fact such as when the storm concluded or whether the accumulation of snow or ice was from a previous storm.

Finally, the New Jersey Supreme Court concluded that the trial court’s ruling was correct. Princeton International owed Pareja a duty only in unusual circumstances, none of which occurred. Princeton International took no action to increase Pareja’s risk, and the record shows that the ice on the sidewalk was not a pre-existing condition.


[1]-In a dog bite case, the affirmation of summary judgment to defendant based on the Reynolds independent contractor exception was reversed because the Dog Bite Statute's, N.J.S.A. 4:19-16's, plain language revealed no legislative intent to recognize an exception to strict liability under the Dog Bite Statute for any category of injured plaintiffs; [2]-However, the Comparative Negligence Act, N.J.S.A. §§ 2A:15-5.1 to - 2A:15-5.8, applied to plaintiff's strict liability claim under the Dog Bite Statute, and that plaintiff's status as a professional experienced in the care of dogs was relevant to an allocation of fault under the Act.

ISSUE: Is there an exception for strict liability imposed by dog bite statute, based on assumption of risk, for independent contractors hired to care for a dog?

HOLD: Dog bite statute’s strict liability applies to claim of independent contractor or a plaintiff who agrees to care for dog. No exception for any category of plaintiff. HOWEVER, Comparative Negligence Act applies to the strict liability claim. Plaintiff can also proceed on common law grounds of liability.

FACTS: Plaintiff is a groomer and kennel assistant. Dog was a Rottweiler mix. Plaintiff suffers severe facial injuries. Defendant owner had told the groomer that the dog had nipped son and urged caution when handling the dog. Also told that the 2 dogs must be fed separately. Plaintiff admits that he did not read intake form until after bite. He was feeding the two dogs together. Dog euthanized after incident.


EFFECT: Comparative negligence finding by jury can bar or diminish recovery in damages.

Estate of Gonzalez v. City of Jersey City, 247 N.J. 551 (2021)

[1]-The police officers' actions did not implicate the Good Samaritan Act because none of their actions involved medical or emergency care, and their failure to act was not the kind of good faith rendering of care immunized by N.J.S.A. § 2A:62A-1.1, and they were not entitled to immunity; [2]-Because neither officer believed that the driver was intoxicated, they did not make the necessary determination that would allow their actions to be immunized under N.J.S.A. § 26:2B-16; [3]-The facts that were in dispute warranted presentation to a jury of the threshold factual questions essential to determine whether the officers' conduct was ministerial, for which the ordinary negligence standard applied, or discretionary, and if discretionary, whether the officers' conduct was palpably unreasonable.

FACTS: JC cops find plaintiff after a one car accident at 2:30AM on a Saturday night on the Lincoln Highway Bridge. Car disabled and gets towed. Cops offer Plaintiff a ride, which plaintiff refuses: “I'm not driving with no Jersey City cops.” Tells cops his brother is a Newark detective and will pick him up (turns out Newark Detective was just family friend—detective later states that cops called him and stated he needs to pick up (“it would be nice if someone picked up”) drunk brother-cops deny call). Cops leave...
him at scene. He is later struck and killed while walking on bridge—had a .209 BAC. Cops did not think he was intoxicated. Cops claim no procedure in place where a person refuses a cop car ride away from dangerous area.

PROCEDURE: Cops argue immunity. Trial court grants defendant Summary Judgment. Appellate Division reverses because the cop’s role was ministerial at time of contact with plaintiff.

S. CRT HOLD: Good Samaritan Act and Title 59 may not apply here. Defendants acts may discretionary, not ministerial. Facts in dispute- case remanded.

If ministerial: No immunity under T59.

If discretionary: qualified immunity applies and jury must determine if conduct was palpably unreasonable.

DICRETIONARY (Immunity applies/palpably unreasonable) Act involving exercise of personal judgment and conscience; High level policy making decisions involving the balancing of competing interest; what is contained in a policy manual.

MINISTERIAL: (No immunity) Act performed without independent exercise of discretion or judgment; Acts a person performs in a given state of facts in a prescribed manner of obedience to the mandate of legal authority without regard to judgment on propriety of act (the when, how, where).


[1]-The trial court erred by awarding summary judgment to an attorney in a legal malpractice case because a reasonable jury could find that the attorney's breach of his professional duty was a substantial factor in, and thus a proximate cause of, the client's harm, specifically, had the attorney not breached his duty by advising the client to accept a guilty plea for offenses she did not commit, there would have been no conviction to report, which would mean no failure to report the conviction, which would mean no inquiry leading to the discovery of prior failures to report, which, in turn, would mean no imposition of disciplinary charges or the other adverse consequences the client asserted as damages.

This was a legal malpractice case. The Law Division granted summary judgment to defendant, finding that proximate causation was lacking. The Appellate Division affirmed. The Supreme Court’s ruling today reversed the summary judgment and remanded for further proceedings.

In summary, defendant represented plaintiff’s ex-husband, Monroe Gilbert, in the defense of a number of traffic summonses. When plaintiff and Monroe divorced, Monroe took sole possession of the family car, though it was registered in plaintiff's name. Monroe was to change the registration to his name, but he did not do that. Monroe incurred many traffic tickets, which were mailed to plaintiff's address, but Monroe took them out of her mailbox so that plaintiff did not see them.

Plaintiff, Monroe, and his lawyer, defendant, appeared in Municipal Court together. Though plaintiff was not defendant’s client, plaintiff said that defendant told her, as Justice Fernandez-Vina recounted, that “the optimal resolution would be for her to plead guilty to the charges because Monroe was at greater risk of license suspension due to his poor driving record, whereas plaintiff would likely only be subjected to a fine.” But plaintiff would later allege, in her malpractice case against defendant, that defendant had not told her that she would be sentenced to community service or that the guilty plea might affect her employment (about which more below). Plaintiff also said that if she had known she would have to do community service, she would never have agreed to plead guilty.

Justice Fernandez-Vina recounted that “[p]laintiff later testified that she reluctantly agreed to plead guilty and accept a fine because she wanted ‘to get this over with’ and ‘move forward with [her] life.’” Since plaintiff “fell on the sword,” as the Municipal Court judge said, the charges against Monroe were dismissed.

But plaintiff did not merely have to pay a fine. She was employed as a probation supervisor in the same county where she appeared in Municipal Court. Under her employer’s policy, she was required to report her own involvement, or that of any immediate family member, in (among other things) any criminal or quasi-criminal matter in a municipal court. She reported the event with Monroe, and her manager opened an investigation. The investigation revealed that plaintiff had been a defendant in a Municipal Court case in a different municipality and that her driver’s license had been suspended for a period of time. Plaintiff
had not reported either of those things. Moreover, while under suspension, she “regularly took trips to
Trenton to attend meetings using a state vehicle, and she continued to use an employee parking pass in
violation of Judiciary policy,” Justice Fernandez-Vina noted.
Disciplinary charges were brought against plaintiff. Her manager testified that the charges were brought
due to plaintiff’s lack of candor, not because of her municipal court involvement itself. Plaintiff
eventually resolved the charges by accepting a fifty-day suspension without pay, and a demotion. She
then sued defendant for malpractice.
The lower courts granted summary judgment for defendant because, as plaintiff’s manager had said,
plaintiff’s lack of candor, not the substance of municipal court charges, were the reasons for plaintiff’s
suspension and demotion. The Supreme Court disagreed, applying the de novo standard of review.
Justice Fernandez-Vina noted that “[t]he issue of causation is ordinarily left to the factfinder.” The
“substantial factor” test applies to proximate cause. Here, while the Court did not “condone plaintiff’s
failure to report prior violations, [the Court found] that a jury could reasonably conclude that defendant’s
legal advice was a substantial factor in her demotion and suspension, and accordingly find that plaintiff
met her burden to prove proximate cause by a preponderance of the evidence.”
Defendant “knew plaintiff worked for the Judiciary in probation and offered that information to the
municipal court judge before plaintiff confirmed it with the judge. Defendant should have known that
there would be employment consequences for a Judiciary employee who enters a guilty plea, even if he
was unaware what other infractions plaintiff had.” Plaintiff had asserted that she would not have pled
guilty if properly advised, so a jury could rule in her favor. Defendant disputed some of the facts, but that
dispute was for a jury, not summary judgment.

Coleman v. Martinez, 247 N.J. 319 (2021)
[1] - The Court held that the victim of a violent assault by a social worker's patient may bring a negligence
claim against the social worker and if the victim could prove that the standard of care required alerting the
patient's psychiatrist of her hallucinations, it would be fair to impose a duty on the social worker to
mitigate that threat; [2] - The Court found that the social worker had ample opportunity and ability to avoid
the harm realized as she became aware that the patient experienced hallucinations more than seven
months before the assault on the victim and witnessed suspected hallucinations and could have referred
the patient to the psychiatrist.

Dissent by Justice Albin: The implication of the majority's holding is that a licensed social worker's
common law duty to warn or protect is greater than that of any of the named mental health professionals
in N.J.S.A. 2A:62A-16. In other words, the majority evidently maintains that a licensed social worker --
who has less training, experience, and expertise than a psychiatrist or licensed clinical social worker in
predicting the potential for a client's violence -- has a duty to warn or protect when a psychiatrist or
licensed clinical social worker does not.

TRENTON - A state employee stabbed 23 times in her Camden office can sue her attacker's social
worker for negligence, the state Supreme Court has ruled. The high court gave a narrow victory to Leah
Coleman, splitting 4-3 in favor of her lawsuit against Sonia Martinez, an employee of Hispanic Family
Center of Southern New Jersey at the time of the 2014 attack. The majority ruling noted Martinez failed
to seek immediate psychiatric care for Taisha Edwards, a client with a history of violence, after being told
the woman was hearing voices in her head. It also said Martinez “inexplicably” disclosed to Edwards,
who was trying to regain custody of her five children, that the damaging information had come from
Coleman, an employee of the state Division of Child Protection and Permanency. The decision, which
upheld an appeals court ruling in Coleman’s favor, found the danger posed by Edwards was foreseeable
to Martinez. The minority opinion, mirroring an initial ruling by a trial judge in Camden, took the
opposite view. It argued Edwards had not made a direct threat against Coleman and the attack was not
precended by violent behavior. Leah Coleman Edwards, 37, is serving a 13-year term for Coleman’s
attempted murder. She has a parole eligibility date in December 2025. In her position at DCPP, Coleman
“was tasked with ensuring the welfare of (Edwards') children,” the majority ruling said. It said the agency
removed Edwards’ children after a 2012 incident when the mother allegedly stood in the middle of a street, "screaming and clutching one of her children." Edwards at that time said aliens were pursuing her and voices in her head were commanding self-harm, according to the ruling by Justice Lee Solomon.

It noted Edwards one year earlier had thrown hot oil on a friend, stabbing her and hitting her with a frying pan. Edwards also attacked a landlord in 2007, punching, biting and stabbing him.

The ruling said Martinez, in an Oct. 1, 2014, letter to Coleman, said Edwards was “ready and able to begin having unsupervised visits with her children.” But in an Oct. 28 email to Martinez, Coleman said Edwards had told a family member she hears “commanding voices” and that “she has failed to report (the voices) to her therapists and psychiatrist.” According to the ruling, Martinez later acknowledged the email “suggested psychosis” that required immediate attention. But Martinez did not contact Edwards’ psychiatrist, who had last seen the woman in July, and she told the mother about Coleman’s email during a Nov. 7 meeting. It noted Martinez at that time was aware of Edwards’ history of violence and paranoid thoughts, and that she knew clients with children were often upset with DCPP. Edwards called Coleman later that day, denying she was hearing voices. Coleman told the mother to seek a lawyer’s advice, saying DCPP would maintain she could not parent independently “due to her mental health issues.” Six days later, Edwards made an unscheduled visit to DCPP offices on Haddon Avenue, where she repeatedly stabbed Coleman in the face, chest, arms, shoulders and back.

The majority ruling acknowledged Edwards did not direct a specific threat at Coleman. But it said Martinez’s “identification of Coleman and failure to immediately refer (Edwards) to a psychiatrist, combined with the information she had at the time, made it particularly foreseeable that (Edwards) would lash out violently against Coleman.”

It also found Martinez had a duty to warn Coleman, adding her failure to refer Edwards for immediate psychiatric care “allowed the ultimate harm realized.”

**Huggins v. Aquilar, 246 N.J. 75 (2021)**

The trial court correctly declared that the disputed coverage provision in the subject garage policy constituted an invalid escape clause and struck the provision as unenforceable because it attempted to exclude from the duty to provide liability coverage for cars owned by the insured, a car dealership, and loaned to customers that were involved in accidents when driven by the customers who had personal insurance of at least $15,000, N.J.S.A. § 39:6B-1(a).

Case involved John Mallon of Chasan Lamparello and Joe Siclari of Patrick Patel’s office.

In a case involving a motor vehicle insurance policy issued to an automobile dealership, the New Jersey Supreme Court held that an insurance policy which barred coverage for customers who were using dealership owned vehicles and had their own personal insurance policies was an invalid escape clause and directed the carrier to provide coverage in limits mandated by N.J.A.C. 13:21-15.2(l).

In Huggins, Mary Aguilar brought her car in for maintenance by Trend Motors. Trend provided her with a loaner vehicle and she was subsequently involved in an accident with plaintiff Huggins. At the time of the accident, Aguilar had her own automobile insurance policy with liability coverage of $15,000.00 per person and $30,000.00 per accident – the minimum limits mandated by N.J.S.A. 39:6B-1(a). Huggins sustained severe injuries in the accident. Trend held a garage policy with Federal Insurance Company that insured Trend’s vehicles for up to $1 million in liability coverage. However, the policy contained a provision insuring customers up to the minimum limits of $15,000.00/$30,000.00 mandated by N.J.S.A. 39:6B-1(a) if they had no other available insurance, and barring coverage to the customer if the customer had their own personal coverage.

The trial Court held that Federal was obligated to provide Aguilar with coverage up to the policy limits of $1 million. The Supreme Court upheld the trial Court’s finding that Federal was obligated to provide coverage in excess of $15,000.00/$30,000.00, but directed Federal to provide coverage up to the limits of $100,000.00 per person/$250,000.00 per accident required by N.J.A.C. 13:21-15.2(l).
This somewhat complicated insurance case involved two separate issues: illegal escape clauses and step-down clauses.
Pursuant to N.J.S.A. 39:10-19, as a condition of engaging in the business of buying, selling or dealing in automobiles, a license must be obtained from the Motor Vehicle Commission (MVC). Among the requirements are those previously cited that an automobile dealership must provide liability coverage insuring all vehicles in the minimum amount of $100,000.00 per person and $250,000.00 per accident. This is higher than the mandatory minimum for personal automobiles required by N.J.S.A. 39:6B-1(a).

The Supreme Court first held that the policy provision barring coverage for customers who had their own availability insurance constituted an illegal escape clause which improperly circumvented the requirements of N.J.S.A. 39:10-19 and the governing regulations concerning minimum levels of insurance for dealership vehicles. The Court pointed to numerous other examples where statutes have required higher levels of minimum insurance than those mandated by N.J.S.A. 39:6B-1: transportation network drivers must maintain liability insurance of $50,000.00/$100,000.00 under N.J.S.A. 39:5H-10(b); limousines must maintain liability insurance of $1.5 million under N.J.S.A. 48:16-14; and N.J.A.C. 8:40-3.3(c)(1) requires ambulance service providers to maintain liability insurance of at least $500,000.00 per accident.

The Court held that the Federal policy provision contained an impermissible escape clause. The Court then discussed the reformation of the insurance contract and directed Federal to provide coverage in the amount of $100,000.00 rather than $1 million.

The Court noted that the policy provision was not a proper “step-down clause” which provides one level of coverage for a named insured and a lower level of coverage for an additional insured. The Court noted that while step-down clauses have been approved in first-party underinsured motorist cases, such policies have not been approved with respect to third-party mandatory liability coverage to accident victims. The Court noted that Federal must comply with the applicable compulsory minimum liability coverage mandated for automobile dealerships and directed it to provide coverage in the amount of $100,000.00/$250,000.00, modifying the trial Court’s imposition of the $1 million policy amount.

The New Jersey Tort Claims Act (TCA) applied to a public transit system, and the transit system and its bus drivers were held to the same negligence standard under the TCA as other common carriers, which was to exercise the utmost caution to protect their passengers as would a very careful and prudent person under similar circumstances, N.J.S.A. §§ 59:2-2(a), 59:3-1(a); thus, the bus driver's common-carrier duties required him to exercise the "utmost caution" in transporting his passengers safely, including telling the unruly teenager passengers to stop harassing a female passenger or to get off the bus, or stopping the bus and alerting the transit's control center, or summoning the police.

Bus passenger brought negligence action against state transit system and bus driver arising from incident in which co-passenger threw glass bottle at her causing facial injuries following her harassment by group of male teenage co-passengers at back of bus.

The Superior Court entered judgment upon jury verdict for passenger. Defendants appealed. The Superior Court, Appellate Division, affirmed in part, vacated in part, and remanded. Cross-petitions for certification were granted.

In a case of first impression, the Supreme Court held that:
- Heightened standard governing private common carriers applies equally, under Tort Claims Act (TCA), to public common carriers;
- TCA immunity for failure to provide police protection did not apply;
- TCA immunity for failure to enforce a law did not apply;
- TCA immunity for good-faith enforcement of a law did not apply; and
- TCA required allocation of fault between defendants as negligent tortfeasors and unidentified bottle-thrower as intentional tortfeasor.

In this wrongful death, N.J.S.A. 2A:31-1 to -6, and Survivor's Act, N.J.S.A. 2A:15-3, action, the appellate court granted defendants Todd W. Kasper, Kazz, Inc. d/b/a Kasper's Corner, and Kasper Automotive, leave to appeal from two January 22, 2021 orders entered by the Law Division, denying defendants' motion for partial summary judgment, and permitting plaintiff to amend her previously filed complaint to correct her standing by designating herself both as Administrator Ad Prosequendum and the General Administrator of her deceased father's estate. According to defendants' arguments before the motion judge and now on appeal, plaintiff could not have standing to bring the Survivor's Act action because no estate existed at the time she filed her complaint. And, by the time letters of administration were issued to plaintiff and she sought to amend her complaint, the statute of limitations for the Survivor's Act action ran years before. The motion judge acknowledged the deficiency in plaintiff's initial standing but still denied defendants' motion to dismiss as a matter of equity. We reverse that determination and remand for entry of orders dismissing plaintiff's Survivor's Act action for lack of standing because plaintiff's original complaint was a nullity and any amendment sought after the statute of limitations ran could not relate back to that complaint.

Brutal decision that the legislature is moving to amend.

Odd facts: Car accident that killed decedent on 12/21/16. Suit not filed until 12/18/18 (3 days before statute expires). Wrongful death (for family) and Survivorship (for pain decedent suffered before death) counts filed but only an Administrator Ad Prosequendum secured for daughter. Discovery and mediation take place. A motion for SJ by defendants on the Survivorship count filed by Defendants on November 2020 where they raise the issue of lack of standing for the first time. Shortly after filing of motion, letters of General Administration are secured by daughter on 12/2020. Family alleges family conflict for delay.

IMPORTANT NOTE: Daughter alleges that surrogate told her that she did not have to be named General Administrator until there were assets in estate, i.e., when the case settled—given misinformation by the surrogate!

TRIAL COURT: Allows relation back to avoid statute defense and equity.

APP DIV: Reverses! Relies on Repko v. Outr Lady of Lourdes (where plaintiff filed complaint on a client they did not know had died—amends with estate after SOL expires—court finds that filing was a nullity and dismisses complaint)


[1]-In a suit brought by a student who was injured during girls' field hockey practice, the motion judge erred in applying the heightened recklessness standard as the cases that have applied the Crawn reckless conduct standard involved circumstances where one player collided with, or somehow directly injured another player, in the course of the actual sporting activity, which was not the facts presented in the case at bar; [2]-In the case at bar, the varsity field hockey coach who gave the student permission to take a shot on goal was not a co-participant, thus, the case law decisions applying the recklessness standard in circumstances involving two equally situated participants where one directly injured the other during the course of the sporting activity itself did not apply.

Case turns on negligent supervision during practice as opposed to an injury during a game. Plaintiff appealed from the order of the trial court that granted summary judgment in favor of defendants. Plaintiff was a member of her school's field hockey team and was injured during a team practice. The field hockey team was practicing on a field adjacent to the school's soccer team. Plaintiff was struck in the head near the base of her skull by a soccer ball that had been unintentionally kicked over a ball stopper separating the two areas of the field where the teams were practicing.

Plaintiff filed suit against the school district and school officials, alleging that their negligence caused her injuries. Defendants moved for summary judgment dismissal of the complaint. The trial court granted defendants' motion, applying a recklessness standard of proof to plaintiff's claim to find that she could not
show that the school's sports coaches disregarded a substantial risk of injury to plaintiff in organizing and supervising the practices. The trial court also denied plaintiff's subsequent motion for reconsideration of the summary judgment motion. On appeal, the court reversed and remanded the trial court's grant of defendants' summary judgment motion. The court noted that it had previously held in Rosania v. Carmona, 308 N.J. Super. 365, that coaches owed a duty to players or athletes not to increase the risks of athletic activities over and above the risks already inherent to the activity. The court ruled that the trial court erred by imposing a recklessness standard, noting that such a standard was applicable in cases where a sports injury was caused by a co-participant. The court also noted that, in Rosania, the coach or instructor was a co-participant in a drill with the injured athlete. However, the court found that in the present case, defendants were not participating in the sports practices with plaintiff and the other students but instead were merely supervising the practices. Therefore, the court ruled that defendants, as public employees, were simply subject to the duties and responsibilities imposed on all public employees by the New Jersey Tort Claims Act.

[1] Plaintiff was required to demonstrate not only the lost opportunity to pursue a case against the manufacturer, installer, or maintenance provider because of defendant's spoliation of the sprinkler head, but also that it suffered actual damages because of defendant's negligence; [2] As to this second aspect of the proximate cause element, plaintiff was not required to demonstrate the underlying suit would have succeeded, but it needed to marshal more than simply an expert's opinion that there could have been three reasons for the sprinkler head's failure and, hence, three possible target defendants. Plaintiff failed to do so, and, as a result, the judge properly granted summary judgment. FACTS: Property damaged by water after sprinkler goes off for “no apparent reason”. Sprinkler turned over to Plaintiff’s insurance company to see if it malfunctioned (so they can bring a subrogation claim). Insurance company loses the sprinkler head (despite plaintiff notice to retain same) after determining there was no viable subrogation. Plaintiff property owner loses tenant (and millions in rent) because property is untenantable. [there was a separate lawsuit by plaintiff against tenant in federal court]. Plaintiffs sought adverse inference based on spoliation that expert inspection of the sprinkler would have revealed a defect. Expert opinion, while nota net opinion (reversing trial judge) only pointed finger at three possible targets and nothing more. NOTE: Plaintiff not suing true defendant (manufacturer of sprinkler head) but party that lost the evidence. HOLD: Spoliation of adverse inference remedy is not appropriate in this case because defendant did not cause the flooding. Case not viable under “Tortious interference” because it cannot be proven that there was a viable case against sprinkler company.

[1] In consolidated cases arising from two motor vehicle accidents that occurred about a year apart in approximately the same location, the grant of summary judgment to the State was upheld because enforcement immunity under N.J.S.A. 59:2-4 applied, and the State cannot be held liable for damages for its alleged failure to apply existing or past regulatory requirements to the convenience store's driveway entrances; [2]-As such, with respect solely to the issue of the State's issuance of an approval for the construction of driveway entrances and its alleged failure to revoke that approval in later years, plaintiffs' claims were barred by N.J.S.A. § 59:2-5. FACTS: 2 consolidated lawsuits alleging same thing: That WAWAs and State were negligent in not doing more to prevent cars from making an illegal left turn into a WAWAs from a highway (Black Horse Pike) that had a double yellow line on it. Bad injuries and a fatality for motorcyclists.
HOLD: Refuse to extend “off premise” liability to WAWA where accident did not occur on their property. Fact that they may gain some economic benefit from cars left turning into their property was not enough. Tort Claims Act immunizes the state under these circumstances.

[1]-The trial court erred by finding that defendant engaged in the unauthorized practice of law, N.J.S.A. § 2C:21-22, because the trial court did not apply the amended version of N.J. R. Prof. Conduct 5.5 in assessing plaintiff's claims that defendant engaged in the unauthorized practice of law; [2]-The trial court erred by awarding summary judgment to plaintiff in her action under N.J.S.A. § 2C:21-22a because the evidence did not show that defendant engaged in the unauthorized practice of law, nor did it show that plaintiff sustained an ascertainable loss, nor did it establish a causal nexus between defendant's alleged unauthorized practice of law and plaintiff's claimed loss. [Trial Court Judgment reversed]

FACTS: A Pennsylvania lawyer/professor not licensed in NJ assists in representation of a client in a medical malpractice case. The case settles for $500,000, lawyer gets a fee (improperly) and then plaintiff files a legal malpractice because the medical malpractice was not conducted properly. Based on Defendant’s answer, the trial judge grants summary judgment on disgorgement of referral fee and awards treble damages (total of $308,181)
HOLD: Because disgorgement is a remedy, not a cause of action, AND because the plaintiff suffered no ascertainable loss, appellate court reverses.

[1]-Inhabitants of an assisted living residence may not assert a private cause of action for the facility's alleged breach of their statutory bill of rights; [2]-The court held that after closely analyzing the statutes applicable to assisted living residences as well as other legislative enactments for similar facilities, it concluded the Legislature did not intend to create a private cause of action despite having done so in similar circumstances; the court also declined the invitation to incorporate such a private cause of action into the common law.

Defendants appealed from the grant of plaintiff's motion for partial summary judgment. Decedent was admitted to defendants' facility, suffering from dementia. Decedent was later transferred to another long-term care facility, where he died 11 days later. Plaintiff, decedent's estate, filed the present wrongful death action against defendants, alleging that decedent died from substandard care that he received from defendants, including suffering multiple falls, pressure ulcers, and infections. Although plaintiff initially conceded that no statutory or regulatory violation was being asserted, plaintiff later moved for partial summary judgment for a ruling that defendants were subject to observing the rights afforded under the Rooming and Boarding House Act and an order permitting the jury to consider whether defendants had violated decedent's rights under the act. The act expressly authorized a private cause of action for enforcement of the rights under the act. The trial court granted the motion, subject to plaintiff proving at trial that defendants operated a facility subject to a private cause of action under the act. The trial court found that legislative policy sought to protect people suffering with dementia by affording them a private cause of action for breach of their rights. On appeal, defendants argued that they operated an assisted living facility, and while the legislature had enacted a bill of rights for assisted living facility residents, the legislature did not expressly grant a right to a private cause of action in that statute. The court agreed and reversed the trial court's order. The court found that, although the legislature had created private causes of action in similar statutes affording rights to vulnerable persons, it had not done so in the statute applicable to defendants' facility. The court further declined to find a private cause of action under the common law to assert those applicable rights.

Residents of an assisted living facility cannot maintain a private cause of action for breach of the facility’s statutory bill of rights, based upon a New Jersey appellate ruling of June 15, 2021. In Estate of Burns v. Care One at Stanwick, LLC, 2021 N.J. Super. LEXIS 79, the court overturned a trial court’s ruling that allowed the estate of a resident to pursue a private cause of action for claims against Care One, an assisted living facility.
The estate of a prior resident of Care One sought an order establishing that Care One is subject to the 1979 Rooming and Boarding House Act. The trial court granted the motion “subject to plaintiff proving at trial that Care One was a facility that, by legislation, allowed plaintiff a private cause of action.” The trial court concluded that there was a private cause of action for the breach of the rights in the Rooming and Boarding House Act. However, on Care One’s appeal of that ruling, the appellate court disagreed and found that the 2011 bill that set forth the rights of assisted living residents did not establish a private cause of action for the violation of a bill of rights.

In coming to its conclusion, the appellate court looked to the history and language of the legislation affecting assisted living facilities, nursing homes and “dementia care homes.” In 1953, the legislature began regulating residential health care facilities. In 1976, it enacted the Nursing Home Responsibilities and Residents’ Rights Act. In 1979, it expanded its regulation of “residential health care facilities” to include rooming and boarding houses. In 1997, it incorporated patients afflicted with Alzheimer’s, dementia and other related disorders into the protections for residents of residential health care facilities, and in 2016 it began regulating “dementia care homes.” In all these instances, the legislature declared bills of rights for residents and expressly authorized private causes of action for a violation of those rights.

According to the court, however, when the legislature recognized assisted living residences in 2002 and enacted a bill of rights for assisted living residences in 2011, the legislature did not make the same express authorization for private causes of action that it did in prior related legislation. The legislature “just didn’t say anything about it.” Thus, the court found that it had to “tread lightly” and could not find or establish a new cause of action that the legislature did not set forth as it had in prior legislation. Although this ruling barred private causes of action for the breach of the statutory bill of rights, assisted living facilities are still subject to these statutory requirements. Failure to abide by the bill of rights may affect licensing, and the Department of Health still may sue for such violations.


The trial court properly awarded summary judgment to an insurer in a declaratory judgment action by the insured, an attorney who practiced as an LLC, seeking reformation of the policy to provide coverage for claims resulting from misappropriated client funds because the insurance requirements of R. 1:21-1B did not conflict with any statute, the Rule did not compel the insured to purchase a particular professional liability policy, the Rule did not mandate the scope of coverage provided by the insurer, and the Rule regulated the conduct of attorneys, not insurers.

ProAssurance Casualty Co. does not owe a New Jersey law firm malpractice coverage for funds a paralegal misappropriated from a client trust account, a state appeals court has ruled. An exclusion for misappropriated client funds in the Cadre Law Firm LLC’s professional liability policy bars coverage for the paralegal’s actions. The exclusion applies despite the policy's lack of compliance with N.J. Stat. Ann. R. 1.21-1B, which requires law firms operating as limited liability companies to acquire coverage for claims "arising out of the performance of professional services by attorneys employed by the limited liability company in their capacities as attorneys," the panel said.

According to the opinion written for the panel by Judge Carmen Messano, attorney Jill Cadre purchased a professional liability policy for her firm from ProAssurance through codefendant All Point Insurance Agency. The policy covers damages, including monetary judgments, awards or settlements, the firm is legally obligated to pay because of a person's acts, errors or omissions, or failure to render professional services, up to a $1 million limit per claim and in the aggregate, the opinion said.

While preparing for a state compliance audit in 2015, Jill Cadre discovered that paralegal Miguel Mayorga had misappropriated about $800,000 from funds held in a trust account for real estate closings, the opinion said. Cadre replaced the funds and told All Point to notify ProAssurance of the loss, the opinion said. ProAssurance declined coverage, however, saying the policy did not cover reimbursement of misappropriated funds. The attorney sued ProAssurance in the Bergen County Superior Court and moved for summary judgment, seeking to reform the policy to cover the claim. She also sued All Point
for negligence and breach of fiduciary and contractual obligations by failing to obtain a policy that complied with Rule 1:21-1B. ProAssurance cross-moved for summary judgment to dismiss the suit. Superior Court Judge Mary F. Thurber dismissed the action, and All Point reached a settlement with Cadre. Cadre then appealed, urging the panel to reverse the dismissal and remand the action with a declaration that coverage exists "for breach of a fiduciary obligation that results in misappropriation of client funds." Cadre, represented by Francis X. Garrity and Jane Garrity Glass of Garrity, Graham, Murphy, Garofalo & Flinn PC, argued that ProAssurance was obligated to issue a policy that complied with Rule 1:21-1B's minimum requirements. Citing the New Jersey Supreme Court in First American Title Insurance Co. v. Lawson, 827 A.2d 230 (N.J. 2003), the appeals panel said the rule requires an LLC to carry insurance for misappropriation of client funds. However, the rule allows for more than one policy to provide the required coverage, Judge Messano said, adding that a compliant policy may limit coverage. ProAssurance, argued that the rule governs attorneys' conduct, not an insurer's, and that it does not mandate a specific scope of coverage. The panel agreed with ProAssurance and affirmed Judge Thurber's decision. "Simply put, the rule regulates the conduct of attorneys, not insurers," Judge Messano said.


In a third-party automobile negligence case, the trial court erred by molding the verdict in defendant's favor because plaintiff was entitled to a full recovery under the Comparative Negligence Act, N.J.S.A. § 2A:15-5.3(a), after the jury found defendant was more than 60 percent at fault for the accident, despite defendant's inability to obtain contribution under the Joint Tortfeasors Contribution Law, N.J.S.A. § 2A:53A-3, from plaintiff's UM insurance carrier; [2]-The trial court had the authority to grant plaintiff's application to reopen the case in response to defendant's motion for a directed verdict because defendant was not prejudiced, it took no time to do, and ultimately it helped defendant's theory of the case by attributing fault for the accident to the driver of the phantom vehicle. This third-party automobile negligence appeal requires us to determine whether defendant Nancy Patel's inability to obtain contribution under the Joint Tortfeasors Contribution Law (JTCL), N.J.S.A. 2A:53A-1 to -5, from plaintiff's uninsured motorist (UM) insurance carrier, precludes plaintiff's right under the Comparative Negligence Act (CNA), N.J.S.A. 2A:15-5.1 to -5.8, to full recovery of the $200,000 verdict from Patel.

The jury found two joint tortfeasors responsible for the accident: Patel (sixty percent) and the driver of a phantom vehicle (forty percent). Under the CNA, a plaintiff is entitled to full recovery of damages from a defendant found at least sixty percent at fault. Meanwhile, under the JTCL, that defendant may then seek contribution for the amount paid in excess of his or her pro rata share from any other joint tortfeasor also found at fault. Patel recognizes she cannot obtain contribution directly from the driver of the phantom vehicle because it is a fictitious party named solely to apportion fault. But through no fault of plaintiff, who responsibly obtained UM coverage to protect his interests in a case like this, neither can Patel obtain full contribution directly from plaintiff's UM carrier.

Plaintiff named a third driver, George Benjamin, as a defendant, but as to Benjamin, the jury returned a verdict of no cause of action. Benjamin is not involved in this appeal.

Here, the judge entered judgment by molding the verdict in Patel's favor. He required Patel to pay $120,000 (sixty percent), plus costs and prejudgment interest on that amount, and ordered the UM carrier to pay plaintiff $15,000, the UM policy limit. Doing so shortchanged plaintiff $65,000, the balance of the jury's $200,000 verdict.
Patel filed a third-party complaint against her liability carrier, GEICO, but that insurance coverage matter settled. GEICO is not involved in this appeal.

Plaintiff appeals, urging us to reverse, remand, and direct the judge to enter judgment awarding him full recovery. Patel cross-appeals from the same judgment, arguing the judge erred by allowing plaintiff to reopen his case after he rested, and by reserving decision on her motion for a directed verdict until the following morning.

We hold that Patel's inability to obtain contribution from the UM carrier does not preclude plaintiff's full recovery under N.J.S.A. 2A:15-5.3(a) of the CNA, where the plain text makes clear that a defendant found more than sixty percent at fault is liable for the full award. From a practical standpoint, plaintiff's UM carrier, which we emphasize was not a joint tortfeasor in plaintiff's third-party negligence action, will pay plaintiff $15,000. This payment, which Patel will receive as an offset, forecloses a potential double recovery to plaintiff and comports with the UM scheme. Contrary to Patel's assertion, however, she cannot obtain contribution from the UM carrier for the amount above her pro rata share.

On the appeal, we reverse, remand, and direct the judge to enter judgment and mold the verdict in accordance with this opinion. On the cross-appeal, we affirm.

[1]-The court held that a volunteer who fails to discharge his commitment to the police that he or she will take charge of a person who appears to be unfit to drive and who thereafter willingly allows that visibly intoxicated motorist to resume driving can bear a portion of the civil liability for an ensuing motor vehicle accident caused by that drunk driver; [2]-The court made clear that if the drunk vehicle owner coerces the volunteer to return the vehicle, the obligation for the volunteer to act reasonably could encompass a duty to call 9-1-1 and advise the police that the impaired motorist has resumed driving.

Plaintiff and the police defendants appealed from the trial court's order partially dismissing plaintiff's complaint and police defendants' related cross-claims for contribution. Police had stopped a motorist traveling the wrong way down a one-way street. Concluding that the motorist was too intoxicated to drive, police allowed the motorist to contact a friend, defendant, who arrived on scene and advised officers that he would drive the motorist and his vehicle to a safe location. The police accordingly issued the motorist a moving violation and allowed defendant to drive him and the vehicle away. However, shortly thereafter defendant returned the vehicle to the motorist at a railroad crossing and went his separate way. The motorist then resumed driving, ultimately crashing into plaintiff's vehicle and causing plaintiff to sustain injuries. Plaintiff then filed suit against various parties, including defendant and the police defendants, who asserted cross-claims against defendant. Defendant moved to dismiss plaintiff's claims against him, arguing that he had no legal duty that would make him liable for the accident. The trial court agreed and dismissed plaintiff's claims and the police defendants' cross-claims.

HOLD: On appeal, the court reversed, ruling that a volunteer who, despite contrary representation to law enforcement, allowed an intoxicated motorist to resume driving their vehicle could bear liability for a subsequent accident caused by the intoxicated motorist. However, the court ruled that such a duty was contingent on the volunteer being advised by police or otherwise having reason to know that failing to carry out their promise to safely transport the intoxicated motorist and their vehicle could result in civil liability. The court accordingly remanded for further development of the record.

The motion court abused its discretion by determining that plaintiff did not present sufficient evidence to satisfy the "extraordinary circumstances" required by the New Jersey Tort Claims Act, N.J.S.A. § 59:8-9 to file a late notice of claim because the motion court did not give proper consideration to the traumatic ramifications of the catastrophic, life-altering injuries plaintiff suffered in the accident and plaintiff's
adjustment to the physical limitations associated with living as a quadriplegic; plaintiff's motion to file a late notice of claim was only thirty-five days beyond the ninety-day timeframe, N.J.S.A. § 59:8-8. RARE reversal of denial of a late notice of claim. Fact sensitive, injuries severe (tetraplegia-inability to move upper and lower parts of body). Judge Fuentes. Accident on 4/9/17, released to Kessler on 4/17/17, gets bill from hospital on 10/24/17, retains counsel on 11/15/17, counsel files motion for late NOC on 3/20/18.

The trial court properly declined to award summary judgment to a trampoline park owner in a parent's negligence action because the third-party who signed the park's waiver of rights, which included an arbitration provision, was not the child's parent, guardian, or attorney-in-fact and lacked apparent authority to execute the waiver regarding the child's personal injury claims, and the owner could not rely solely on its own general admission procedure to support the reasonableness of its belief that the third-party had authority to act for the parent and execute the waiver; the parent had no direct or indirect communication with the owner and there was no relevant "practice" or pattern of conduct between the parent and the owner.

FACTS: Mother Ms. Tongol brings son and his friend to SkyZone—Plaintiff Justin Gayles's mother had dropped her son off in Ms. Tongol's home. Tongol signs in all 10 kids, different last names, and signs an agreement that includes waiver of liability, arbitration clause, a $5,000 penalty for filing suit and the payment of defense attorney fees.

PROCEDURE: Trial court denies motion to compel arbitration because Tongol lacked apparent authority and defense staff took no steps to question how she could be the parent of 10 kids with different last names. Defense appeals

HOLD: Judge Messano—affirms denial of arbitration. Rejects “Apparent Authority” argument. [Apparent authority imposes liability on the principal not as a result of an actual contractual relationship, but because the principal’s actions have misled a third party into believing that a relationship of authority exists. The party seeking to rely on the apparent authority of the putative agent bears the burden of proof. That party must establish that: 1. That the apparent authority has been created by the conduct of the alleged principal and it cannot be established alone and solely by proof of conduct by the supposed agent and 2. That a third party has relied on the agent’s apparent authority to act for the principal and 3. That the reliance was reasonable under the circumstances]

AT THE END: Court gives instructions as to what Sky Zone should do: Defendant could include a document on its website that parents can sign—THAT IS WHAT THEY NOW DO!!

The trial court mistakenly exercised its discretion by denying plaintiffs' motion to reinstate their complaint and erred as a matter of law by dismissing the complaint with prejudice because the trial court applied the "exceptional circumstances" standard in R. 1:13-7(a) at a juncture in the case when application of that standard did not serve the purpose of the rule, the record was devoid of any blame directly attributable to plaintiffs, and the certification of plaintiffs' initial counsel expressly specified that the blame lay with the firm's staffing issues.

FACTS: Decedent committed suicide. Family alleges it was because of opioids prescribed by defendants.

PROCEDURE: Suit filed 9/17/18; Case dismissed for lack of prosecution on 3/26/19; Motion to restore filed on 8/6/19 (beyond 90 days where there are 2 defendants and exceptional circumstance applies). Trial court denies motion to reinstate based on R. 1:13-7.

APP DIV HOLD: Reverses. Very good language in case: “We conclude the trial court's misapplication of the exceptional circumstances standard under Rule 1:13-7 prevented adjudication of plaintiffs' claims on the merits. Thus, the trial court mistakenly exercised its discretion by denying plaintiffs' motion to reinstate their complaint. We further hold that Rule 1:13-7 neither empowers a trial court to dismiss a cause of action with prejudice nor authorizes a party in a case
to affirmatively seek such a drastic sanction as a form of relief. Accordingly, we reverse and remand the January 10, 2020 Law Division order so the matter can be decided on the merits.”

[1]-The trial court erroneously excluded statements by driver 2's employer that driver 2 could have prevented the accident, drove recklessly, and violated the employer's safety protocols as "ultimate issue" evidence, N.J.R.E. 704, because the statements were admissible as statements of a party opponent, N.J.R.E. 803(b); [2]-Evidence of driver 2's discharge was excludable as a post-event remedial measure, N.J.R.E. 407, but evidence of the employer's post-accident investigation, including the statements that driver 2 violated safety protocols, the collision was preventable, and driver 2 acted "recklessly," was not a subsequent remedial measure and was admissible, N.J.R.E. 403, because the excluded statements had significant probative value, as the evidence was clearly capable of convincing the jury to assign slightly more responsibility to driver 2 and slightly less to driver 1.

FACTS: 51 – 49 liability no cause where plaintiff was rear ended after becoming disabled on the road after an accident. At trial, judge did not allow statements against interest from defendant and defendant supervisors.

HOLD: The Court reviewed a defense-favorable verdict after a rear-end crash involving two commercial trucks. At the trial, the plaintiff sought to introduce testimony from the defendant’s deposition in which he said that rear-ending someone “automatically makes you wrong.” The plaintiff also sought to introduce a letter in which the defendant’s employer stated that the accident was “preventable” and that his “recklessness” caused the crash. The trial court excluded the evidence — and some similar evidence — because it went to the “ultimate issue”. The Court reversed, noting that Rule 704 abolished the “ultimate issue” rule so long as the evidence sought to be introduced is “otherwise admissible”. The Court disagreed with the trial court about whether the evidence was hearsay and ruled the evidence was admissible under Rule 803(b) as statements made by a party opponent.

[1]-The court held that the Affidavit of Merit (AOM) statute, N.J.S.A. § 2A:53A-27, required the affidavit to be served within 60 days (extendable for good cause to 120 days) from the date when the licensed professional files its answer, regardless of whether the pleadings are subsequently amended to name other defendants or assert additional claims; that deadline is subject, however, to the long established AOM exceptions for substantial compliance or extraordinary circumstances; [2]-As such, the court held that the trial court did not misapply the statute or the applicable law by declining to dismiss plaintiffs' revived claims as once it came to light months later that the engineering firm had designed the allegedly-dangerous stairs and could have deviated from related standards of care, plaintiffs were readily prepared to supply-and did supply-the necessary AOMs.

the Appellate Division ruled that the filing of an Amended Complaint does not reset the clock to serve an affidavit of merit against a professional defendant. However, the court held that extraordinary circumstances existed which warranted relaxing the rule and allowing the malpractice claim to go forward.

[1]-The court held that an affidavit of merit (AOM) was not required for a health care facility when the plaintiff's claims in a medical negligence action are limited to vicarious liability for the alleged negligence of its employee, who does not meet the definition of a licensed person under the affidavit of merit statute (AMS), N.J.S.A. § 2A:53A-26; [2]-As such, plaintiff's complaint was reinstated because plaintiff was not required to file an AOM as to the radiology technician who alleged caused his injury as a radiology technician was not a licensed person within the meaning of the AMS and no AOM was required.

1] The grant of summary judgment to a residential hall and the student social guests was affirmed because the three student social guests had no duty to monitor the actions of plaintiff and any duty of the residential hall ended when plaintiff fell asleep with the previously-arranged plan to spend the night in the suite; [2] The court reversed the grant of summary judgment in favor of the university student resident assistants (RAs) because although the university did not directly breach any duty to plaintiff, the university could be vicariously liable in its capacity as the employer of the RAs and questions of fact existed as to whether the four student RAs engaged in any gross negligence or willful or wanton conduct. 

Outcome: Affirmed in part, reversed in part; remanded to trial court for further proceedings.

In this appeal, the New Jersey Appellate Division answered questions concerning the scope of the duty owed to an adult who is not old enough to drink legally but who nonetheless drinks alcohol to excess and injures himself in a car accident. In 2014, Kenneth Franco, a twenty-year-old college student, went to a social gathering in a suite in a residential hall at Fairleigh Dickinson University. Franco told the suitemates and his parents that he planned to spend the night in the suite. In addition to bringing an overnight bag, Franco brought and consumed alcohol. He became visibly intoxicated and then fell asleep on a couch in the suite. Sometime later, the suitemates and remaining guests either left or went to sleep. At about 5 a.m., Franco awoke, left the suite, and was severely injured when his car went off the road, struck a parked vehicle, and flipped over. Franco and his parents sued, arguing that the University and the students in the suite had a duty to take action that would have prevented him from driving while drunk. The trial court granted the defendants’ motion for summary judgment. The Appellate Division reversed and held that, while certain defendants had no duty, the duty of other defendants, namely the RAs, and a related causation issue, presented questions of fact for a jury to resolve.

In September 2014, Kenneth Franco, a 20-year-old Fairleigh Dickerson University student, went to his friends’ on-campus suite, where he became heavily intoxicated and fell asleep on the couch. Mr. Franco brought some alcohol to the party, however, the other guests and the hosts also provided a mix of alcohol to all those who attended. Mr. Franco also brought an overnight bag, as he had intended to stay the night, and head to work in the morning. Mr. Franco awoke several hours later, and left the suite to drive home; however, while en-route, Mr. Franco struck an unoccupied parked vehicle and flipped over causing serious and permanent brain damage. At the hospital, Mr. Franco had a blood alcohol content of 0.164%. It goes without saying that Mr. Franco bears a share of responsibility for his own accident, but as this matter addressed, who else may have contributed to the happening of this accident? The student brought suit against numerous defendants, and after settlement with some defendants, the university, the suitemates, three guests and four RA (resident assistants) were dismissed from the case by the trial court for not having any liability.

On appeal, New Jersey Appellate Division analyzed the duty as to each group.

Were the Suitemates Liable?: The suitemates would only be liable if they knowingly allowed Mr. Franco to consume alcohol on their premises, with the knowledge that he was going to operate a motor vehicle thereafter, which then resulted in causing an injury to a third party (someone other than Mr. Franco). Under these legal criteria, the suitemates could not be held liable for this accident as they believed he was spending the night and thus had no knowledge that he was going to operate a motor vehicle. They facts also did not meet the standard of Mr. Franco injuring a third party, as the only person injured in this matter was Mr. Franco, himself.

Were the Other Guests Liable?: While the social guests may have brought some of the alcohol that Mr. Franco consumed, they owed him no duty to monitor or control his alcohol consumption, and had no knowledge that he was planning on operating a motor vehicle while intoxicated. Without any special relationship where the guests were responsible for Mr. Franco, and especially without any knowledge that he was planning on driving drunk, the other guests were not liable for Mr. Franco’s injuries.

Was Fairleigh Dickinson University Liable?: The on-campus party took place in an FDU suite, which was considered a “wet” dorm (alcohol not prohibited to anyone over 21 years old). FDU, a nonprofit entity
organized to promote higher education, is immune from any lawsuits under the “Charitable Immunity Act” because it (1) was formed for nonprofit purposes; (2) is organized exclusively for educational purposes; and (3) was promoting such objectives and purposes at the time of the injury to Mr. Franco, who was then a beneficiary of the charitable works. It may be difficult to wrap your head around how a night of partying can be qualified as “promoting educational purposes,” however the New Jersey Supreme Court has previously determined that the term “educational” should be interpreted broadly and includes social events amongst students, even if it was in violation of school policy prohibiting underage drinking in a dorm. Therefore, FDU was immune from liability from any potential wrongdoing, barring any showing of “gross negligence,” which could not be shown here.

Were the Resident Assistants Liable?: During the course of the evening, four Resident Assistants (RAs) were present for the party. The RAs had been trained on FDU’s policies and procedures for encountering underage drinking. The on-duty RA for the dormitory stopped by, but did not follow FDU policy regarding parties. Another on-duty RA for a different dormitory attended the party, and observed Mr. Franco consuming alcohol, but he too did not follow FDU policy. In fact, when Mr. Franco passed out, the second RA partook in drawing on Mr. Franco. In addition, two off-duty RAs attended the party, and despite being required to comply with FDU policy and procedures, they did not report suspected underage drinking or call for appropriate medical attention.

While the RAs are also protected under the Charitable Immunity Act, they could be liable if their actions could be considered “gross negligence” or if they were willfully or wantonly indifferent by failing to enforce the university policy regarding drinking. Therefore, would be up to a jury to determine whether the RAs’ actions, or lack thereof, qualify as “gross negligence,” and were a contributing cause of Mr. Franco’s injuries.

Conclusion: The Court dismissed the claims against the Suitemates who hosted the party, the social guests, and FDU, but not against the RAs. This ruling does not mean that the RAs are automatically liable for Mr. Franco’s injuries; it will be up to a jury to determine if the RAs’ behaviors were grossly negligent, and to what percent they were negligent compared to Mr. Franco’s own fault. While people are responsible for their own actions, that does not relieve from liability others who have been tasked with the responsibility to prevent these very dangers from occurring. The case illustrates that an intoxicated driver who is injured in a motor vehicle accident may share liability with a number of other individuals, companies or organizations that played a role, in some way, in contributing to the cause of the accident.

Norberto A. Garcia is a partner at Blume Forte Fried Zerres & Molinari in Jersey City, New Jersey. He is a Certified Civil Trial Attorney and member of the American Board of Trial Advocates (ABOTA). He has represented clients in a broad spectrum of personal injury matters including automobile accidents, construction cases, premises liability and medical malpractice. He was named as a New Jersey Super Lawyer from 2013 to the present. He is a past president (2013) of the Hudson County Bar Association and a current trustee of the Hudson County Bar Foundation. He is currently on the executive board as secretary of the New Jersey State Bar Association and immediate past president of the New Jersey State Bar Foundation. He is a member of the New Jersey State Bar Association Diversity Committee and Civil Trial Section. He is on the New Jersey Association for Justice Board of Governors and sits as a trustee of the New Jersey Association for Justice Education Foundation.

Mr. Garcia is a trustee of the New Jersey Client Protection Fund. He is on the board of the New Jersey State Bar Examination Character and Fitness Committee.

Mr. Garcia has been active in the Hudson County Inns of Court program since 1996 and is currently a master in the program. He served as 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.

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 a member of the American Association for Justice and the Hispanic 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, Fordham Law School, the New Jersey Association for Justice and the Hudson County Bar Association.

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 an active member of St. Mary’s Roman Catholic Church in Pompton Lakes where he is part of the Emmaus Group, on the board of Pathways and a team leader in Men’s Cornerstone.
FORDHAM LAW SCHOOL
BRIDGE THE GAP- CIVIL TRIAL PREPARATION
Sunday, January 16, 2022 at 9:05 -9:55 a.m
Fordham Law School, New York, New York (REMOTE)

-I have been engaged in the practice of civil law for 29 years, 23 of those as a licensed attorney (before I worked at law firms during college and Law School).

-I have nearly 100 full jury trials to verdict. The only way you learn the rules of evidence is when you cannot enter a key piece of evidence during trial. I have been a certified civil trial attorney for 15 years.

-I have been a partner at a big firm, run my own law office and I am currently back to being a partner at a large law office.

-I taught this lecture for ICLE until they moved to mandatory CLE in 2010.

Different than in NY: The Court of Appeals, sitting in Albany and consisting of seven judges, is the state's highest court. The Appellate Division of the New York State Supreme Court is the principal intermediate appellate court. The New York State Supreme Court is the trial court of general jurisdiction in civil cases statewide and in criminal cases in New York City

STRUCTURE OF THE COURT FOR CIVIL MATTERS
SUPERIOR COURT- Original general jurisdiction through NJ Constitution Article 6.
   Special Civil- The court where the amount in controversy cannot exceed $15,000.00. Rule 6:1-2. Forum may be appropriate where dispute is nominal and you want a quick resolution. The Discovery period is much shorter. DANGER: Be careful putting a case in special civil where the initial damages may seem to be less than $15,000 but the damages escalate.
   Law Division- The court where most matters are filed. This is where you will spend most of your time.
   Chancery Division- The court that handles equitable (non-monetary) forms of relief. Rule 4:3-1(a)(1).

Enforce the performance of contracts, trusts and fiduciary obligations; Re-execute or correct instruments lost or erroneously drafted; Set aside transactions that were illegal, fraudulent, etc.; Execute writs of attachment; Stop actions that will cause irreparable harm; Grant the reacquisition of property upon default of mortgage or tax payments

Emergent Applications There are three types of actions that judges hear on an emergent basis:
1) Orders to Show Cause
2) Sheriff’s Evictions
3) Special Medical Guardianships

Foreclosures
Until an Answer is filed, all uncontested foreclosures are handled by the Foreclosure Unit in Trenton, NJ. The Foreclosure Unit forwards all cases in which contested Answers are filed (and all subsequent papers involving the contested foreclosure) to the Essex Vicinage’s Chancery Division
Probate Jurisdiction

Execute wills
Distribute Estates
Protect infants or persons with mental incompetence
Complete gifts according to the donor’s intent

Appellate Division- The intermediate court that handles appeals of final judgments (appealable as a right pursuant to R. 2:2-3(a)(1)) and reviews decisions that are not final (known as interlocutory appeals which must be sought by motion pursuant to Rule 2:2-4 and Rule 2:5-6(b).

A) Standards of Review – Tell the judges how they should consider the argument. The common standards are:

i) Plain Error
   (1) Error that is clearly capable of producing an unjust result. R. 2:10-2.
   (2) "The possibility of an unjust result must be sufficient to raise a reasonable doubt as to whether the error led the jury to a result [that] it otherwise might not have reached." Szczecina v. PV Holding Corp., 414 N.J. Super. 173, 184 (App. Div. 2010) (citation and internal quotation marks omitted).

ii) Issues Not Raised at Trial
   (1) The Appellate Division frequently declines to consider issues not raised at the trial level.

iii) Jury and Bench Trials
   (1) The issue of whether a jury verdict is against the weight of the evidence is not cognizable on appeal unless a motion for a new trial on that ground is first made in the trial court. R. 2:10-1.
   (3) The standard in non-jury trials is generally whether there was "sufficient credible evidence" to support the judge's findings. See Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974).

iv) Doctrine of Invited Error
   (1) If a party urges the judge to adopt a proposition that the party later contends was the product of error, then the party will be unable to raise the error on appeal. Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996).
   (2) When a party urges the judge to admit an exhibit into evidence, then the invited error doctrine may bar that party from later raising as an issue on appeal the prejudicial effect of that document. Venuto v. Lubik Oldsmobile, Inc., 70 N.J. Super. 221, 229 (App. Div. 1961).

v) Discretionary Decisions
   (1) A trial judge has the discretion to enter an order adjourning a trial, extending discovery, admitting testimony and documents into evidence, qualifying an expert, granting a mistrial, and denying reconsideration. See e.g., Litton Indus., Inc. v. IMO Indus., Inc.,
200 N.J. 372, 392 (2009) (recognizing that "[t]he trial court has broad discretion in the conduct of the trial").

(2) Ordinarily, we will not reverse these orders unless the judge abused his or her discretion. Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008).

(3) The "abuse of discretion standard . . . arises when a decision is made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis." Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002) (citation and internal quotation marks omitted).

vi) Legal Decisions


vii) Summary Judgment


(2) In reviewing a grant of summary judgment, the Appellate Division applies the same standard under Rule 4:46-2(c) that governed the trial court. Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 564 (2012).

(3) We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995).

viii) Administrative Appeals

(1) This court generally affords an agency's interpretation of its own regulations "substantial deference." In re Freshwater Wetlands Gen. Permit No. 16, 379 N.J. Super. 331, 341 (App. Div. 2005). This is because "the agency that drafted and promulgated the rule should know the meaning of that rule." Id. at 342.

(2) An appellate court will not reverse the ultimate determination of an administrative agency unless it was "arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies[.]." Campbell v. Dep’t of Civil Serv., 39 N.J. 536, 562 (1963).

SUPREME COURT- the final appellate court in the NJ Court System.

OTHER FORUMS

Tax Court- All state tax matters. Rule 8:2(a)
Office of Administrative Law- Handles contested cases in state administrative agencies. N.J.S.A. 52:14B-10 (c )

INITIAL CLIENT CONTACT
Conflict search – Must have a system in place—look out for maiden names/name changes and corporate entities. **DANGER!! Conflicts have created much harm – loss of clients for firm, loss of careers at firms.**

Interview—What to ask. Hidden traps: Prior litigation/representation, accuracy of social security/identity cards, multiple household coverages, work (on or off the books?), ISO Search. Clients will not be honest with you. Either they honestly forget, purposefully evade or truly believe they are not supposed to disclose certain things to you. You have to earn their trust initially—let them know how privilege works. Let them know that when the courts or adversary find out, their case will be done. Get Complete history, all documents, authorizations, contact information, close friends/family. Trust but verify.

**WHO IS YOUR CLIENT?** In a wrongful death, is client a beneficiary, the executor of estate? Where client is an infant, are both natural parents on board with representation? In business litigation, are the other owners/partners on board? If you are defending a group or business MAKE SURE THERE ARE NO CONFLICTS BETWEEN YOUR CLIENTS!!

Per quod claims.

Retainer- Rule 1:21-7 Contingency Fee; Rule 5:3-5 Family Law retainers. **If you do not have a retainer, you will not be paid.** I worked on the Fee Arbitration Committee and had to force the turnover of funds.

Arbitration Clauses- Many disputes are governed by arbitration clauses and a claim can be extinguished if protocol is not followed. **DANGER!! Especially in employment, contract, consumer and business litigation, many hidden arbitration provisions exist.** If you are not aware and do not exhaust the arbitration provisions, you may extinguish your client’s legal rights and be subject to malpractice. Many of these arbitration provisions have timing and procedural clauses. While most employees are “at will” and do not have employment contracts, some arbitration clauses are contained in the employment application.

Notice Requirements- Analyze all possible claim notices that may apply: Tort Claims Act—municipal, police, fire, county, state. NJSA 59:2-1. Port Authority and Federal Tort claims. Where filed, what claim must contain. **DANGER!! There are public employees hidden in plain sight among private entities. In medical malpractice cases, UMDNJ doctors rotate to private facilities. Govt. contractors work alongside private contractors at construction sites. Govt. entities rent space at private office buildings.**

Investigations- What photographs, statements, evidence preservation steps must be taken. Do these investigations quickly before locations are changed. Go with client to make sure you are talking about the same property. Take photos—mark photos. Watch e-mails from clients that get blocked!! Take witness statements before everyone lawyers up!

Statute of Limitations- 1 year Port Authority, See N.J.S.A. 32:1-163. 2 years personal injury, 6 years contract/property, 2 years medical malpractice, 6 years professional malpractice. See NJ Statute 2A:14-1 through 2. **DANGER: A blown statute is among the most common malpractice, along with notice, not naming a proper defendant or party.**

Instruction on Social Media- Must preserve, cannot change, but client must be made aware that it is discoverable. **No case on point yet in NJ. Most jurisdictions do not allow fishing expeditions but once discovery is established, they will get social media info. Advise client to make their sites private—cannot remove or adjust social media—will lead to spoliation/sanctions/penalty to the lawyer possible. May suggest to make settings private**
Most common client questions- How much will I get, how much will this cost and how long will this take. Don’t ever answer this question. Improper, client will always hold you to most optimistic figures.

PRE-TRIAL PROCEDURE

Jury charge- Always look to what you will have to prove at trial in preparing for a particular case. Begin with the end in mind.

Expert reports- Government reports, medical records, bills, pay stubs, receivables, articles and photos are not enough in most cases to prove your case—you will need an expert to present these losses as evidence. See Evidence Rule 702 and 703. Rule 4:17-4(e). Because discovery moves so quickly once you file suit and an answer is filed, you want to have all your experts lined up before you file suit.

Settlement packages- Make good faith effort to resolve pre-suit because once in court the Discovery Rule train may take you places you do not want to go. The glossier/fancier/more detailed the better. I always make a “recommendation” rather than a demand.

Mediation- Effective when all parties have good faith interest in resolution—does NOT toll discovery schedule. Be careful. Some adversaries simply request mediation to flesh out your strengths, weaknesses and your bottom line settlement numbers.

Injury/lawsuit threshold issues (Title 59 and Title 39)- Make sure your damages claim can breach threshold

Keep client informed!! If circumstances change—if it looks like there are limited “pockets” for recovery, if damages increase because of a change in circumstance, etc.

PLEADINGS

Jurisdiction/Venue- See Rule 4:3-2 for proper county. See Rule 4:5A1 and 2 for Track Assignments. Venue is proper in the county where the cause of action arose, where any party resides when the action is instituted. Some venues are pro-plaintiff, some pro-defense, some pro-tenant, some pro-business, etc. Should consider the calendar, who is on the civil bench.

The Complaint—When to file. (not too soon because you will not be ready when discovery concludes/not to late because of the risk of new parties appearing beyond statute). Pleadings and CIS filed together. See Rule 4:5-2. Must designate trial counsel, demand a jury (otherwise waived). Add John Does. Amount of damages sought do not have to be specific unless it is a specific liquidated amount (book account).

PER QUOD CLAIMS: Loss of consortium in a personal injury matter.

CASE INFORMATION

4:26-4. Fictitious Names; In Personam Actions

In any action, irrespective of the amount in controversy, other than an action governed by R. 4:4-5 (affecting specific property or a res), if the defendant’s true name is unknown to the plaintiff, process may issue against the defendant under a fictitious name, stating it to be fictitious and adding an appropriate description sufficient for identification. Plaintiff shall on motion, prior to judgment, amend the complaint
to state defendant’s true name, such motion to be accompanied by an affidavit stating the manner in which that information was obtained. If, however, defendant acknowledges his or her true name by written appearance or orally in open court, the complaint may be amended without notice and affidavit. No final judgment shall be entered against a person designated by a fictitious name.

**Summons-** All complaints must be served with a summons. See Rule 4:4-1, 4:4-2

**Service-** Rule 4:4-3. The Sheriff OR A COMMERCIAL SERVICE may make service. Rule 4:4-7 provides requirement for proof of service. Most corporations have registered agents—you get this from NJ Secretary of State for a fee. You can serve a defendant by regular and certified mail but this is only effective if defendant wishes to respond to same and file answer—you cannot enter default or judgment by mail service.

**MOTION FOR SUBSTITUTED SERVICE**

Rule 4:4-4. Summons; Personal Service; In Personam Jursidiction; (b) Obtaining In Personam Jurisdiction by Substituted or Constructive Service.

*Austin v. Millard,* 164 N.J. Super. 219, 222 (App. Div. 1978) (citing *Feuchtbaum v. Constantini,* 59 N.J. 167 (1971)); see also *Houie v. Allen,* 192 N.J. Super. 517, 521-22 (App. Div. 1984). Personal jurisdiction may be obtained by substituted service "[i]f it appears by affidavit . . . that despite diligent effort and inquiry personal service cannot be made." "[I]n an automobile collision case where the driver of a vehicle was a New Jersey resident who could not be found for the service of process upon him, such service could be made upon the automobile liability carrier (per R. 4:4-4[b]) without violating rules of due process."

What does court require for proof of insurance as some of these motions are being denied on that basis.

**Answer to Complaint-** See Rule 4:5-3, 4:5-5 (if you fail to deny allegation in pleading, it is admitted); 4:6-2; Counterclaims see Rule 4:7. Every defense, legal or equitable, in law or facr MUST be asserted in the answer.

Lack of jurisdiction over person, insufficiency of process and service are waived if not asserted in answer and raised by a motion within 90 days after answer is filed.

The defenses of lack of subject matter jurisdiction, failure to state a claim and failure to join a party may be raised at any point before trial.

Motion to change venue must be filed right away or waived. (10 days after last responsive pleading due) See Rule 4:3-3(b)

**Counter Claims, cross claims and third party complaints-** Some counter claims are mandatory per Rule 4:7-1—some are permissive.

**Cross claims are governed by Rule 4:7-5** (against co-plaintiffs/co-DEfs)

**Replies:** To Answer—rarely used.
**1:4-8. Frivolous Litigation.** (a) Effect of Signing, Filing or Advocating a Paper. The signature of an attorney or pro se party constitutes a certificate that the signatory has read the pleading, written motion or other paper. By signing, filing or advocating a pleading, written motion, or other paper, an attorney or pro se party certifies that to the best of his or her knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

1. the paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

2. the claims, defenses, and other legal contentions therein are warranted by existing law or by a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

3. the factual allegations have evidentiary support or, as to specifically identified allegations, they are either likely to have evidentiary support or they will be withdrawn or corrected if reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support; and

4. the denials of factual allegations are warranted on the evidence or, as to specifically identified denials, they are reasonably based on a lack of information or belief or they will be withdrawn or corrected if a reasonable opportunity for further investigation or discovery indicates insufficient evidentiary support.

If the pleading, written motion or other paper is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the document had not been served. Any adverse party may also seek sanctions in accordance with the provisions of paragraph (b) of this rule.


**Affidavit of Merit (Malpractice claims):** See N.J.S.A. 2A:53A-26-29—applies to a list of professionals

**Dismissals for Failure to Prosecute—** See Rule 1:13-7. In multi-party cases must restore within 90 days or exceptional circumstances apply.
1:13-7. Dismissal of Civil Cases for Lack of Prosecution

- **(a)** Except in receivership and liquidation proceedings and in condemnation and foreclosure actions governed by R. 4:64-8 and except as otherwise provided by rule or court order, whenever an action has been pending for four months or, if a general equity action, for two months, without a required proceeding having been taken therein as hereafter defined in subsection (b), the court shall issue written notice to the plaintiff advising that the action as to any or all defendants will be dismissed without prejudice 60 days following the date of the notice or 30 days thereafter in general equity cases unless, within said period, action specified in subsection (c) is taken. If no such action is taken, the court shall enter an order of dismissal without prejudice as to any named defendant and shall furnish the plaintiff with a copy thereof. After dismissal, reinstatement of an action against a single defendant may be permitted on submission of a consent order vacating the dismissal and allowing the dismissed defendant to file an answer, provided the proposed consent order is accompanied by the answer for filing, a case information statement, and the requisite fee. If the defendant has been properly served but declines to execute a consent order, plaintiff shall move on good cause shown for vacation of the dismissal. In multi-defendant actions in which at least one defendant has been properly served, the consent order shall be submitted within 60 days of the order of dismissal, and if not so submitted, a motion for reinstatement shall be required. The motion shall be granted on good cause shown if filed within 90 days of the order of dismissal, and thereafter shall be granted only on a showing of exceptional circumstances. In multi-defendant actions, if an order of dismissal pursuant to this rule is vacated and an answering pleading is filed by the restored defendant during or after the discovery period, the restored defendant shall be considered an added party, and discovery shall be extended pursuant to Rule 4:24-1(b). Nothing in this rule precludes the court with respect to a particular defendant from imposing reasonable additional or different procedures to facilitate the timely occurrence of the next required proceeding to be taken in the case with respect to that defendant.

- **(b)** The following events constitute required proceedings that must be timely taken to avoid the issuance by the court of a written notice of dismissal as set forth in subsection (a):
  - (1) proof of service or acknowledgment of service filed with the court; or
  - (2) filing of answer; or
(3) entry of default; or
(4) entry of default judgment. However, in any case involving multiple defendants in which at least one defendant has answered, no defaulted defendant will be noticed for dismissal due to the plaintiff’s failure to timely convert a default into a default judgment as required by R. 4:43-2.

In the event the answer of any defendant is suppressed under R. 4:23-5(a) or otherwise and the plaintiff takes no further action, the court will place the defendant on the dismissal list 120 days from the date of the order of suppression.

No defendant will be automatically noticed for dismissal if a motion has been filed by or with respect to that defendant during the four-month period, unless the court in a particular case directs otherwise.

(c) The order of dismissal required by paragraph (a) shall not be entered if, during the period following the notice of dismissal as therein prescribed, one of the following actions is taken:

(1) a proof of service or acknowledgment of service is filed, if the required action not timely taken was failure to file proof of service or acknowledgment of service with the court;
(2) an answer is filed or a default is requested, if the required action not timely taken was failure to answer or enter default;
(3) a default judgment is obtained, if the required action not timely taken was failure to convert a default request into a default judgment;
(4) a motion is filed by or with respect to a defendant noticed for dismissal. If a motion to remove the defendant from the dismissal list is denied, the defendant will be dismissed without further notice.

(d) Special Civil Part. If original process in an action filed in the Special Civil Part has not been served within 60 days after the date of the filing of the complaint, the clerk of the court shall dismiss the action as to any unserved defendant and notify plaintiff that it has been marked “dismissed subject to automatic reinstatement within one year as to the non-answering defendant or defendants.” The action shall be reinstated without motion or further order of the court if the complaint and summons are served within one year from the date of the dismissal. A case dismissed pursuant to this rule may be restored after one year only by order upon application, which may be made ex parte, and a showing of good cause for the delay in making service and due diligence in attempting to serve the summons and complaint. A new page 2 of the summons and the re-service fee shall be included with the documents submitted to support the application. The entry of such an order
shall not prejudice any right the defendant has to raise a statute of limitations defense in the restored action.

DISMISSALS FOR LACK OF PROSECUTION

Court Rule 1:13-7(a) governs a plaintiff’s course when seeking to restore an administratively-dismissed complaint. The Rule has a differentiated restoration process that depends upon whether the case is single- or multi-defendant. R. 1:13-7(a). In multi-defendant cases, where at least one defendant has been served, the case may be restored within 60 days of dismissal by consent order, within 90 of dismissal upon motion demonstrating good cause, and, thereafter, only upon motion demonstrating “exceptional circumstances.” Id. This is a stricter standard than single-defendant cases, the restoration of which is governed by good cause at all times. Id. The distinction’s intent has been described as follows:

Multi-defendant cases in which at least one defendant has been served present, however, a different management problem in that the case likely will have proceeded and discovery undertaken before the unserved defendant is brought in. Thus vacation of the dismissal against that defendant has the capacity of substantially delaying all further proceedings. To permit appropriate case management, the rule requires the consent order to be submitted within 60 days after the dismissal, and thereafter a motion must be filed. Moreover, good cause is the standard if the motion is filed within 90 days after the dismissal order and thereafter, the exceptional-circumstance standard applies.

Pressler & Verniero, N.J. Court Rules, comment 1.1 on R. 1:13-7 (2012).

What constitutes exceptional circumstances. How often is this issue coming up before the courts.

Recent App Div cases have reversed R. 1:13-7 dismissals.
Uzuriaga v. Smith, Unpublished, A-2493-12T2
Velarde v. Carmichael, Unpublished,

DISCOVERY

Discovery Methods- See Rule 4:10-1
Form Interrogatories- See 4:17-1 and Appendix II of court rules
Supplemental Interrogatories- Limited to 10 with no subparts
Notice to Produce- Document requests. Rule 4:18-1
Inspections of land- See Rule 4:18-1(a)
Physical and mental examinations- Rule 4:19
Request for Admissions- Rule 4:22-1. Not subject to Discovery End Date.
E-Discovery- Social media/Cell phone data/computer files. No controlling case on point regarding social media in NJ…yet!
Subpoenas- Rule 4:14-7(a). Testimony or document request from non-party.
Depositions- Rule 4:14-1. Can object to form or privilege (or right to confidentiality or prior court order) See Rule 4:14-3. Cannot object with explanation that suggests an answer. Contested objections dealt with by getting a judge on the phone. Or, by threat of motion seeking sanctions and cost of re-deposition.
Cannot consult with counsel once deposition has started “while testimony is being taken”. See Rule 4:14-3 (f).
Timing of Discovery/Discovery End Date- See Rule 4:24-1. Track I- 150 days, Track II- 300 days, Track II and IV – 450 days. Discovery End Date dangers—Good cause v. Exceptional circumstances (once an arbitration or trial date is fixed).
4:24-1. Time for Completion of Discovery

- (c) Extensions of Time. The parties may consent to extend the time for discovery for an additional 60 days by stipulation filed with the court or by submission of a writing signed by one party and copied to all parties, representing that all parties have consented to the extension. A consensual extension of discovery must be sought prior to the expiration of the discovery period. If the parties do not agree or a longer extension is sought, a motion for relief shall be filed with the Civil Presiding Judge or designee in Track I, II, and III cases and with the designated managing judge in Track IV cases, and made returnable prior to the conclusion of the applicable discovery period. The movant shall append to such motion copies of all previous orders granting or denying an extension of discovery or a certification stating that there are none. On restoration of a pleading dismissed pursuant to Rule 1:13-7 or Rule 4:23-5(a)(1) or if good cause is otherwise shown, the court shall enter an order extending discovery. Any proposed form of extension order shall describe the discovery to be completed, set forth proposed dates for completion, and state whether the adverse parties consent. Any order of extension may include such other terms and conditions as appropriate. No extension of the discovery period may be permitted after an arbitration or trial date is fixed, unless exceptional circumstances are shown.

Tucci v. Tropicana Casino and Resort, Inc., 364 N.J.Super. 48, 834 A.2d 448 (App.Div.2003) refused to bar a late report. In Tucci, the Appellate Division found that an expert report submitted thirty-nine days after the discovery deadline passed should have been allowed by the motion judge. Id. at 54, 834 A.2d at 451. However, the Appellate Division decision plainly was controlled by the facts presented. According to the Appellate Division, the delay was a result of unavoidable scheduling delays. While the plaintiffs clearly should have sought a discovery extension, "a twelfth hour submission of new information amending discovery by one's adversary requiring a reasonable investigation", at least in the eyes of one trial judge, provides the requisite exceptional circumstances. O'Donnell v. Ahmed, 363 N.J.Super. 44, 51, 830 A.2d 924, 928 (Law Div.2003).

Surely, plaintiff's attorney might well have sought a further extension of the expert-report deadline. On the other hand, he reasonably relied on the cooperation of his adversaries who made no objection to the expert's inspection of the elevator after the submission deadline. We point out, moreover, that the litigation process cannot effectively take place without some measure of cooperation among adversaries. Clearly the court ought not be unduly applied to for relief that the parties are able to arrange for themselves without prejudice to the justice system. Beyond that, the trial court's concern for the additional discovery by defendants that the expert report would require cannot justify the dismissal with prejudice. The May 14 case management order anticipated the necessity for that additional discovery. Hence, the late report simply delayed that supplementary discovery by thirty-nine days. If the thirty-nine-day delay resulted in an inability of the parties to complete the additional discovery in the more than two months remaining prior to the trial date, then the trial date could have been adjourned.
MOTION PRACTICE


Rule 1:6-6. Evidence on Motions; Affidavits: If a motion is based on facts not appearing of record, or not judicially noticeable, the court may hear it on affidavits made on personal knowledge, setting forth only facts which are admissible in evidence to which the affiant is competent to testify and which may have annexed thereto certified copies of all papers or parts thereof referred to therein. The court may direct the affiant to submit to cross-examination, or hear the matter wholly or partly on oral testimony or depositions.

Is it personal knowledge? Are proofs attached? Are facts noticeable? How often is this rule followed/ignored?

Personal knowledge excludes facts based on information and belief. See Wang v. Allstate 125 NJ 2, 16 (1991); Affidavit by lawyer based not on their personal knowledge but on information related to them by their client is IMPROPER. See Murray v. Allstate, 209 NJ Super 163, 169 (App. Div. 1986). Documents attached to motions that are not certified as authentic are IMPROPER. See Celino v. General Acc. Ins. 211 NJ Super 538 (App. Div. 1986)

Discovery Motions- For motions to compel discovery See Rule 4:23-1. For failure to comply with an Order, See Rule 4:23-2. For failure to attend deposition, See Rule 4:23-4. For sanctions, See Rule 6:4-6.

Dismissal for Failure to Provide Discovery/Dismissal with Prejudice- Rule 23-5


SUMMARY JUDGMENT RULE- 30 day requirement
Rule 4:46-1. (Time for Making, Filing and serving Summary Judgment Motion). “...All motions for summary judgment shall be returnable no later than 30 days before the scheduled trial date, unless the court otherwise orders for good cause shown…”

What issues regarding summary judgment and the timing of these motions does the court want the bar to be aware of? Should these motions be made at end of discovery? Just before trial?

Can parties waive rule and have judge entertain a summary judgment application?

Motions for Reconsideration- Rule 4:49-2. Must be filed no later than 20 days after service of order. Must provide a statement of what matters or controlling decisions the court overlooked.

OTHER PRE-TRIAL PROCEDURES

Offer of Judgment- Rule 4:58. Useful tool for defendants and plaintiffs in a civil case. Allow you to recoup fees and costs if an offer/demand is not accepted under certain circumstances.

RULE 4:58. Offer Of Judgment

4:58-1. Time and Manner of Making and Accepting Offer
• (a) Except in a matrimonial action, any party may, at any time more than 20 days before the actual trial date, serve on any adverse party, without prejudice, and file with the court, an offer to take a monetary judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein (including costs). The offer shall not be effective unless, at the time the offer is extended, the relief sought by the parties in the case is exclusively monetary in nature.

• (b) If at any time on or prior to the 10th day before the actual trial date the offer is accepted, the offeree shall serve on the offeror and file a notice of acceptance with the court. The making of a further offer shall constitute a withdrawal of all previous offers made by that party. An offer shall not, however, be deemed withdrawn upon the making of a counter-offer by an adverse party but shall remain open until accepted or withdrawn as is herein provided. If the offer is not accepted on or prior to the 10th day before the actual trial date or within 90 days of its service, whichever period first expires, it shall be deemed withdrawn and evidence thereof shall not be admissible except in a proceeding after the trial to fix costs, interest, and attorney's fee. The fact that an offer is not accepted does not preclude a further offer within the time herein prescribed in the same or another amount or as specified therein.

Note: Source - R.R. 4:73. Amended July 7, 1971 to be effective September 13, 1971; amended July 13, 1994 to be effective September 1, 1994; amended June 28, 1996 to be effective September 1, 1996; amended July 10, 1998 to be effective September 1, 1998; text allocated to paragraphs (a) and (b), and paragraphs (a) and (b) amended July 27, 2006 to be effective September 1, 2006.

4:58-2. Consequences of Non-Acceptance of Claimant's Offer

• (a) If the offer of a claimant is not accepted and the claimant obtains a money judgment, in an amount that is 120% of the offer or more, excluding allowable prejudgment interest and counsel fees, the claimant shall be allowed, in addition to costs of suit: (1) all reasonable litigation expenses incurred following non-acceptance; (2) prejudgment interest of eight percent on the amount of any money recovery from the date of the offer or the date of completion of discovery, whichever is later, but only to the extent that such prejudgment interest exceeds the interest prescribed by R. 4:42-11(b), which also shall be allowable; and (3) a reasonable attorney's fee for such subsequent services as are compelled by the non-acceptance.

• (b) No allowances shall be granted pursuant to paragraph (a) if they would impose undue hardship. If undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

Note: Amended July 7, 1971 to be effective September 13, 1971; amended July 14, 1972 to be effective September 5, 1972; amended July 17, 1975 to be effective September 8, 1975; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text amended and designated as paragraph (a), new paragraph (b) adopted July 27, 2006 to be effective September 1, 2006; paragraph (a) amended July 23, 2010 to be effective September 1, 2010.


• (a) If the offer of a party other than the claimant is not accepted, and the claimant obtains a monetary judgment that is favorable to the offeror as defined by this rule, the offeror shall be allowed, in addition to costs of suit, the allowances as prescribed by R. 4:58-2, which shall
constitute a prior charge on the judgment.

- (b) A favorable determination qualifying for allowances under this rule is a money judgment in an amount, excluding allowable prejudgment interest and counsel fees, that is 80% of the offer or less.

- (c) No allowances shall be granted if (1) the claimant's claim is dismissed, (2) a no-cause verdict is returned, (3) only nominal damages are awarded, (4) a fee allowance would conflict with the policies underlying a fee-shifting statute or rule of court, or (5) an allowance would impose undue hardship. If, however, undue hardship can be eliminated by reducing the allowance to a lower sum, the court shall reduce the amount of the allowance accordingly.

Note: Source - R. R. 4:73; amended July 13, 1994 to be effective September 1, 1994; amended July 5, 2000 to be effective September 5, 2000; amended July 28, 2004 to be effective September 1, 2004; text allocated into paragraphs (a), (b), (c), and paragraphs (a), (b), (c) amended July 27, 2006 to be effective September 1, 2006.

4:58-4. Multiple Claims; Multiple Parties

- (a) Multiple Plaintiffs. If a party joins as plaintiff for the purpose of asserting a per quod claim, the claimants may make a single unallocated offer.

- (b) Multiple Defendants. If there are multiple defendants against whom a joint and several judgment is sought, and one of the defendants offers in response less than a pro rata share, that defendant shall, for purposes of the allowances under R. 4:58-2 and -3, be deemed not to have accepted the claimant's offer. If, however, the offer of a single defendant, whether or not intended as the offer of a pro rated share, is at least as favorable to the offeree as the determination of total damages to which the offeree is entitled, the single offering defendant shall be entitled to the allowances prescribed in R. 4:58-3, provided, however, that the single defendant's offer is at least 80% of the total damages determined.

- (c) Multiple Claims. If a claimant asserts multiple claims for relief or if a counterclaim has been asserted against the claimant, the claimant's offer shall include all claims made by or against that claimant. If a party not originally a claimant asserts a counterclaim, that party's offer shall also include all claims by and against that party.

Note: Adopted July 5, 2000 to be effective September 5, 2000; caption amended, former text redesignated as paragraph (b) and amended, and new paragraphs (a) and (c) adopted July 28, 2004 to be effective September 1, 2004.

4:58-5. Application for Fee; Limitations

If an action is required to be retried, a party who made a rejected offer of judgment in the original trial may, within 10 days after the fixing of the first date for the retrial, serve the actual notice on the offeree that the offer then made is renewed and, if the offeror prevails, the renewed offer will be effective as of the date of the original offer. If the offeror elects not to so renew the original offer, a new offer may be made under this rule, which will be effective as of the date of the new offer.


4:58-6. Application for Fee; Limitations
Applications for allowances pursuant to R. 4:58 shall be made in accordance with the provisions of R. 4:42-9(b) within 20 days after entry of final judgment. A party who is awarded counsel fees, costs, or interest as a prevailing party pursuant to a fee-shifting statute, rule of court, contractual provision, or decisional law shall not be allowed to recover duplicative fees, costs, or interest under this rule.


Settlement Conferences- Most courts provide judges upon request/many schedule post Discover End Date.
Mediation- Does NOT toll Discovery End Date
Mandatory Arbitration- Rule 4:21A-1(a)(1)-(3). For all cases on Track I, II and III. Be very aware of the risks of the Trial De Novo and failure to file/serve on adversary.
DANGER!! Failure to notify client, failure to file trial de-novo/failure to put adversary on notice of trial de-novo. Must present a defense.
Settlements/Subrogation/Liens/Longworth UIM letters Rule 4:80: Settlement of matters for minors/incapacitated must be approved by the court

ADJOURNMENT PROCEDURES
Discuss what is the appropriate practice and procedure for getting an adjournment for arbitration, trial and a motion. What constitutes good cause. Timing requirements. Court personnel to address requests to.

CIVIL TRIALS AND ARBITRATIONS
[AS APPROVED BY THE SUPREME COURT AND PROMULGATED BY DIRECTIVE #6-04]
1. All requests to adjourn a civil trial or an arbitration are governed by Rule 4:36-3(b).
2. A good faith effort shall be made to discuss any request for an adjournment with all other parties before the request is presented to the court.
3. All adjournment requests must be made in writing, submitted to the Civil Division Manager. Faxed submissions are acceptable. Telephone requests will not be accepted absent exceptional circumstances. Requests must be copied to all other parties.
4. Any request for an adjournment must be presented as soon as the need for an adjournment is known. Absent exceptional circumstances, the request must be presented no later than the close of business on the Wednesday preceding the Monday of the week the matter is scheduled for trial or arbitration.
5. The written request must indicate the reason or reasons the adjournment has been requested, and whether the other parties have consented to the proposed adjournment. The written request should also include a new proposed date for trial or arbitration, consented to by all parties. If consent cannot be obtained, the court will determine the matter by conference call with all parties.
6. If the adjournment request is based upon a conflict with another court proceeding, the party requesting the adjournment must indicate whether he or she is designated trial counsel and supply the name of the other matter, the court and county in which
it is pending, and the docket number assigned to the matter.
7. No adjournments will be granted to accommodate dispositive motions returnable on or after the scheduled trial date.
8. A matter should not be considered adjourned until court staff has confirmed that the request for an adjournment has been granted. Timely response will be given to the party requesting the adjournment, who will then be responsible for communicating the decision to all other parties.
9. To the extent any party is dissatisfied with the decision made by the Civil Case Management Office, the following procedure should be followed:
P in master calendar counties, the aggrieved party should present the matter to the Civil Division Manager directly; to the extent that any party is dissatisfied with the decision made by the Civil Division Manager, that party may ask that the matter be presented to the Civil Presiding Judge;
P in individual/team calendar counties, the aggrieved party should present the matter to the Civil Division Manager directly; to the extent that any party is dissatisfied with the decision made by the Civil Division Manager, that party may ask that the matter be presented to the pretrial or managing judge.
10. Requests for adjournment of a civil trial based on expert unavailability are governed by R. 4:36-3(c).

4:36-3. Trial Calendar

- **(a) Notice of Trial.** The court shall advise all parties of the initial trial date no less than ten weeks prior thereto. Cases scheduled for trial shall be ready to proceed on the initial trial date. If a case is not reached during the week in which the trial date falls, it shall be forthwith scheduled for a date certain after consultation with counsel provided, however, that no case shall be relisted for trial sooner than four weeks from the initial trial date without agreement by all counsel. The court shall issue written notice confirming the new trial date.
- **(b) Adjournments, Generally.** An initial request for an adjournment for a reasonable period of time to accommodate a scheduling conflict or the unavailability of an attorney, a party, or a witness shall be granted if made timely in accordance with this rule. The request shall be made in writing stating the reason for the request and that all parties have consented thereto. The written adjournment request, which shall be submitted to the civil division manager, shall also include a proposed trial date, agreed upon by all parties, to occur as soon as possible after the problem requiring the adjournment is resolved. If consent cannot be obtained or if a second request is made, the court shall determine the matter by conference call with all parties. Requests for adjournment should be made as soon as the need is known but in no event, absent exceptional circumstances, shall such request be made later than the close of business on the Wednesday preceding the Monday of the trial week. No adjournments shall be granted to accommodate dispositive motions returnable on or after the scheduled trial date.
- **(c) Adjournments, Expert Unavailability.** If the reason stated for the initial request for an adjournment was the unavailability of an expert witness, no further adjournment request based on that expert's unavailability shall be granted, except upon a showing of exceptional circumstances, but rather that expert shall be required to appear in person or by videotaped testimony taken pursuant to R. 4:14-9 or, provided all parties consent, the expert's de bene esse deposition shall be read to the jury in lieu of the expert's appearance. If appropriate, given the circumstances of the particular case, the court may order that no further adjournments will
be granted for the failure of any expert to appear.

TRIAL

Mandatory Pre-Trial Exchange – Rule 4:25-7 and Appendix XXIII.

PRE-TRIAL EXCHANGE MATERIALS (MOTIONS AND JURY CHARGE)

IN LIMINE MOTIONS AT TRIAL – procedure/service

Rule 4:25-7 (Exchange of Information). “Except as otherwise provided by paragraph (d) of this rule, in cases that have not been pretried, attorneys shall confer and, seven days prior to the initial trial date, exchange the pretrial information... Failure to exchange and submit all the information required by this rule may result in sanctions as determined by the trial judge.”

Paragraph (d): “Waiver of Exchange. The parties may, in writing, waive the requirement of the exchange... but such waiver shall not affect the obligations to provide that information to the court at the commencement of trial.”

Any comments on what aspects of the pre-trial exchange requirement are being followed. Issues with in limine motions. Issues with submitting a complete jury charge/jury verdict sheet.

In Limine motions only mentioned in Appendix XXIII of Court Rules, Pretrial Exchange #4, requiring any in limine motions intended to be made at the commencement of trial. Such motions shall not go on the regular motion calendar.


VOIR DIRE/JURY SELECTION METHODS

Rule 1:8-3: Examination of jurors. Comments discuss Directive 21-06.

(c) Peremptory Challenges in Civil Actions. In civil actions each party shall be entitled to 6 peremptory challenges. Parties represented by the same attorney shall be deemed 1 party for the purposes of this rule. Where, however, multiple parties having a substantial identity of interest in one or more issues are represented by different attorneys, the trial court in its discretion may, on application of counsel prior to the selection of the jury, accord the adverse party such additional number of peremptory challenges as it deems appropriate in order to avoid unfairness to the adverse party.

(e) (3) The passing of a peremptory challenge by any party shall not constitute a waiver of the right thereafter to exercise the same against any juror, unless all parties pass successive challenges. Peremptory challenges used to exclude minority class member on that basis alone See State v. Gilmore, 103 N.J. 508 (1986); Russell v. Rutgers Health Plan, 280 N.J. Super. 445 (App. Div. 1995)

QUESTIONS/NOTES BY JURORS – Rule 1:8-8

(c) Juror Note-Taking. Prior to opening statements, the attorneys or any party may request that the jury be permitted to take notes during the trial or portion thereof, including opening and closing statements. If the court determines to permit note-taking after all parties have had an opportunity to be heard, it shall provide the jurors with note-taking materials and shall take such steps as will ensure the security and confidentiality of each juror’s notes.

(d) Juror Questions. Prior to the commencement of the voir dire of prospective jurors in a civil action, the court shall determine whether to allow jurors to propose questions to be asked of the
witnesses. The court shall make its determination after the parties have been given an opportunity to address the issue, but they need not consent. If the court determines to permit jurors to submit proposed questions, it shall explain to the jury in its opening remarks that subject to the rules of evidence and the court's discretion, questions by the jurors will be allowed for the purpose of clarifying the testimony of a witness. The jurors' questions shall be submitted to the court in writing at the conclusion of the testimony of each witness and before the witness is excused. The court, with counsel, shall review the questions out of the presence of the jury. Counsel shall state on the record any objections they may have, and the court shall rule on the permissibility of each question. The witness shall then be recalled, and the court shall ask the witness those questions ruled permissible. Counsel shall, on request, be permitted to reopen direct and cross-examination to respond to the jurors' questions and the witness's answers. A witness who has been excused shall not be recalled to respond to juror questions unless all counsel and the court agree or unless the court otherwise orders for good cause shown.


Cliché, cliché, but one that is true and one that works...START WITH THE STORY! Jury does not want to hear who you are (they know), does not want to be thanked for service (not at this point)—they want to know why they are here and why should they care. Only a story makes them care. A recitation of facts does not create memories. Only a story creates vivid images in the mind of a juror. It should be like a movie trailer in their minds...not a reading of Cliffs Notes.

Once I Get Going versus Virtuoso: Great athletes, musicians and lawyers are not good “once they get going”. You do not have time to warm up, get settled. This matters because you lose the jury. Jurors will tune you out if you don’t catch them when they are really focused—at the beginning.

Goals of opening: establish your trustworthiness, make vivid your basic facts, defuse your case weaknesses, create doubt about your opponent’s facts, personalize your client.

FIRST IMPRESSIONS: Do not look at the jury panel as they walk in—makes them think you are studying them [there is nothing you are going to learn by looking at them at this early stage of the game. Instead, look at your trial notebook, your client, etc. When you glance occasionally to the jury pool, be professional and natural. Give them the non-verbal message: “welcome friends, we are going to be getting to know each other better shortly. “ Keep table neat and uncluttered—YOU ARE PREPARED!

You go first. You get to frame your theme and provide the jury with what the case is really about. If the jury accepts your version of the story this first impression is what she will use to process all of the evidence. She will reject the parts that don’t fit or give them less weight. Jurors may not decide the case based on opening, but they do decide what the case is about: a fraud that will raise their insurance rates or compensating someone with money for their lost health.

Acknowledge the problems in your case—own them so that you can use them to your advantage.

In some situations, it may not even be your client’s story. It may be the client’s parent or spouse (where the injury is significant and disabling). It may be the defendant’s story (where the liability is inflammatory or tenuous).
Start dropping anchor words, phrases and statements in your opening that you will come back to throughout the trial: “Objective v. subjective”, “permanent injury”, “preponderance of the credible evidence”, “permanent loss of body function”. Take ownership over these terms. Do not run away from them. Use them in your opening, direct, cross and closing. When they are mentioned by the judge in his jury charge, they are your words and arguments, not the defense’s.

Honesty. Be brutally honest with the jury. This is the first chance they get to calibrate their B.S. detectors. If they do not think you are being honest from the get go, they will not listen to a word you say the rest of the trial.

How to get around the “golden rule” (which prohibits you from asking jury to award damages that they would want for their own injury).

Ask, “what would a healthy 16 year old accept in return for giving up their health, their unlimited enjoyment of life?”

Be honest:

“They say there are too many lawsuits. Guess what, I agree. Frivolous lawsuits make it far more difficult for me to prove the real cases, the cases with real loss. Cases like the one we are here for today.” “People get upset because someone sues when they spill coffee on themselves. I agree. That is not this case. This case involves a 16 year old who had two tons of steel smash into the back of her car while she was in the middle of an ordinary school day, on her way to SAT prep classes.”

After the “story” explain what the law is in New Jersey—what you are looking for. Money. Cut to the chase. Get that out of the way. Be honest.

Give the jury two stories they must evaluate: 1. Ptf is hurt and still hurting or 2. Ptf is a liar, cheat and fraud.

Let the jury know that as they listen to the testimony, they have to develop in their mind what amount of money will “fairly and reasonably compensate the plaintiff” (again, drop anchor words that will be in the charge and jury verdict sheet).

Know your jury—you have just completed voir-dire. You know which have kids, which golf, which have desk jobs, which are unemployed. You can carefully (and I mean CAREFULLY) cater your statements/arguments to these individual jurors. If a juror has a 16 year old child, play up how overscheduled kids are at that age—and how difficult it would be to try to jam in physical therapy appointments to that schedule (the time it takes to driver there, to wait in the waiting room, to get undressed, to set up the therapy, to get dressed, to drive back). Nobody goes through that unless they are actually hurt and seeking relief.

85% of jurors think there are too many lawsuits. Show the jury you recognize the problem, it bothers you too, it makes your job more difficult, but your case is different.

Rehearse the rough spots. We lose eye contact when we do not know quickly how to respond to a problem (think of tough oral argument) Maintaining eye contact during an assault makes you look invulnerable.
At some point in the opening, give a brief overview of what is going to happen at trial. The jury is nervous, they do not know what to expect. Tell them what your job is and what their job is—you are their guide. Put them at ease. “My job is to prove the case and I do that introducing evidence. Most of the evidence in this case, other than some car crash photos and diagnostic films will come in the form of testimony. I will call Ms. Bae and her treating doctors. Your job is to listen to the evidence, always thinking of what amount of money will fairly and reasonably compensate her for her loss of health.”

Don’t assume that the jury knows what is happening. Don’t get lazy and forget the fundamentals. There are trials where juries have come back with “not guilty” in a civil case. There are trials where juries have come back with questions as to how are they supposed to figure out how much money they should award. Do not assume jurors know what a herniated, bulging or normal disc represents. Do not assume jurors all know what MRIs are, what prior or subsequent mean, what diagnostic testing represents, etc. Permanent means permanent. If you are dead in 2007, you are still dead in 2014.

Own the following terms: Preponderance of the evidence/Proximate cause/ your damages. These are the issues jurors get tripped up on, ask questions on. These are the strongest weapons that the defense has against your case. Take them away from the defendant. Own them. Make them yours. Make them your by defining them, sprinkle the terms throughout your opening, your direct, your cross and your closing...that way the jurors ears perk up and they stare your way when they are being mentioned by the judge during the jury charge.

Make clear to the jury that the standard is “preponderance of the credible evidence” and NOT “beyond a reasonable doubt”. USE THE SCALES OF JUSTICE example (the judge will usually use this example also). What is the one term that the defense avoids at all cost—an explanation of preponderance of the credible evidence—all they say is “The plaintiff has the burden”.

**Direct Examination of lay witness/Expert- Rule 611(a)**

Procedure and practice for introducing diagnostic testing and non-testifying expert witnesses.

Evidence Rule 802. Rule 808. Expert opinion included in a hearsay statement admissible under an exception: Expert opinion which is included in an admissible hearsay statement shall be excluded if the declarant has not been produced as a witness unless the trial judge finds that the circumstances involved in rendering the opinion, including the motive, duty, and interest of the declarant, whether litigation was contemplated by the declarant, the complexity of the subject matter, and the likelihood of accuracy of the opinion, tend to establish its trustworthiness.

Rule 703. Basis of opinion testimony by experts
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by
experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

James v. Ruiz Holding: “We hold that a civil trial attorney may not pose such consistency/inconsistency questions to a testifying expert, where the manifest purpose of those questions is to have the jury consider for their truth the absent expert's hearsay opinions about complex and disputed matters. Even where the questioner's claimed purpose is solely restricted to impeaching the credibility of an adversary's testifying expert, spotlighting that opposing expert's disregard or rejection of the non-testifying expert's complex and disputed opinions, we hold that such questioning ordinarily should be disallowed under N.J.R.E. 403.”

Cross examination of lay witness- Rule 611 (b)
Cross examination of Defendant is different from cross examination of a defense expert. The expert is a well trained, well paid assassin whose job it is to kill your case. The defendant is produced, usually, only to generate sympathy and compassion for defense. Do not play into defense hand by reflexively attacking this witness...unless he deserves it.

Take it down a notch—25%.

In doing your cross, just like in doing your opening, direct and close, be your “authentic” self. Do it in your style. Do NOT try to be someone else. Steal from Ed Cappozzi and Andy Fraser and Mike Maggiano and Gerry Baker—but do not try to be them.

Keep in mind that cross examination is your chance to testify about the case in front of the jury through your questions.

“It usually takes 3 weeks of preparation to make an impromptu speech.” Mark Twain. It actually takes a lifetime. Your lifetime.

You have to brainstorm the facts while preparing for defendant’s cross exam: What do you really need, if anything, from this witness—what must the witness concede or face having his answer labeled a lie, a mistake or preposterous.

You have to be yourself. If you are aggressive or combative by nature, go at the witness this way...I have seen that work—but rarely. I have won many cases where I truly believe the jury punished my adversary for treating the plaintiff with disrespect (there is one lawyer I have beaten 6 consecutive times based on this). If you are more low key use that approach. You have to be comfortable.

CLASSIC QUESTION: Prepared questions or a General Outline? BOTH. You type out the cross exam so you have it. Then you use it of you need it. But the cross should flow. Leave a killer last questions to end and then maybe take a minute to go over notes toward the end to make sure you do not miss anything.

Surprise the Defendant by knowing things they do not expect you to know. This sets the tone early and dissuades them from being evasive or deceptive. Google them, look up facebook, run a DMV search on
them. I recently discovered that DEF witness/former boyfriend was convicted of child murder in Georgia.

At deposition, as at trial, it is only when the witness senses that you know what you are talking about that you inspire fear and contradiction—this is especially true of expert witnesses. They know when they are in for a battle. ASIDE: During voir dire of expert, I always bring out facts that let them know I have the book on them—this tempers their testimony on direct.

Look at Facebook or twitter posts RIGHT after accident—treasure trove of brutally honest information.

CLASSIC: At trial, never ask a question you do not know the answer to. Unless you have no choice. Then play it safe. Or play it safely reckless (See James McComas, Dynamic Cross Examination).

CLASSIC: Exceptions when you CAN ask a question you do not know the answer to:
1. Low risk/likely good returns
2. No matter what the answer is, it helps your case
3. Honest witness—will give you an honest answer
4. The need to know outweighs the danger of a harmful answer
5. Where the answer does not matter
6. Where you ask the witness to elaborate on a complete lie

CLASSIC: Mark all your cross examination exhibits before you begin. Question laid out with answer and indexed document ready to confront the witness. UNLESS you have some that you want to “spring on DEF”. In that case, wait until direct is done.

You want to start quick with a lethal first blow, but you may want to put the witness at ease by lulling him into a full sense of security: 1. You were not on your phone correct? 2. The weather did not affect your visibility, correct? 3. You did not observe my client do anything that contributed to the happening of the accident, correct? Take advantage of the initial anxiety.

What happens when the witness fights you back in a combative way? Climbing into the gutter with them rarely works. Even when it feels good, you come out looking muddy to the jury. That may help you, especially with an expert—not so much with a lay witness. Jurors identify with lay witnesses. Always keep your authentic tone.

Don’t attack a hostile witness right away—it is what they want and expect. When dealing with a bad dog, try to soothe and pet the hound first. Gets his tail wagging. If you attack a bad dog, you are likely going to get bit.

CLASSIC ADVICE: Avoid adjectives and adverbs that can be denied, dodged or evaded by a clever witness: “complete stop” v. “stop”; “Fully understand police report” v. “understand the police report narrative description”

Never ask “how” or “why”

Be fair and courteous even as you do damage to the witness—your continuing goal is to show the jury that you are trustworthy and you represent the truth—which you do. HOWEVER: You must call out the witness on outrageous statements.
Often, your adversary simply calls a liable defendant to the stand to gain sympathy from the jury. On cross, ask the questions you need to ask in order to move for a directed verdict and sit down. Don’t help build sympathy for the defense by attacking a likeable defendant.

When you barrage a helpless witness, you are really attacking the jury—you force them to take the side of the witness.

If the witness is conceding the case to you, there is NO NEED TO IMPEACH!! Why damage the credibility of someone who is helping you? SIT DOWN.-- common judicial observation.

PRACTICE TIP: Do NOT Get perturbed by objections.

BE CAREFUL: As lawyers, we often tend to hear only what is helpful. Sometime you think you have made a point but the answer was unclear, mumbled or your question was unclear—jury may not have gotten it. At a dep, when you have made a good point, repeat it the question clearly and get a solid answer—don’t run away because you think you snuck in a good punch. At trial, its always good to have an assistant (a lawyer, paralegal or law clerk) to hand you notes in case you missed something.

CLASSIC CROSS EXAM: “The picture cannot be painted if the significant and insignificant are given equal prominence. One must know how to select” Benjamin Cardozo. DO NOT overwhelm the jury with every inconsistent fact (Tues. v. Wed.; 3:00 v. 4:00)

DAMAGE WITNESS EARLY (primary)
QUIT WHILE AHEAD (recency)
GO OUT WITH A BANG NOT A WHIMPER

Summation- Rule 1:7-1 (b)
Jury Charge- See Model Jury Charge on NJ Courts Website

Rule 1:1-2 Construction and Relaxation. “The rules ...shall be construed to secure a just determination, simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay. Unless otherwise stated, any rule may be relaxed or dispensed with by the court in which the action is pending if adherence to it would result in an injustice.”

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FORDHAM LAW SCHOOL
BRIDGE THE GAP- CIVIL TRIAL PREPARATION
Sunday, January 16, 2022 at 9:05 -9:55 a.m.
Fordham Law School, New York, New York (REMOTE)
SUPPLEMENTAL MATERIALS
SPOLIATION LAW IN NEW JERSEY

OVERVIEW OF SPOLIATION LAW IN NJ

Spoliation is used to describe the hiding or destroying of evidence by an adverse party, resulting in the interference with the court’s proper administration and disposition of the action.

In New Jersey, a duty to preserve evidence arises when there is:
(1) pending or probable litigation;
(2) knowledge by the party of the existence or likelihood of litigation;
(3) foreseeability of harm or prejudice to another party if evidence were discarded; and
(4) evidence must be relevant to the litigation.


At a minimum, when litigation is likely, a prospective party is obligated to preserve material evidence. Whether that duty is breached requires a fact-specific inquiry based upon a standard of what is reasonable under the circumstances.

If this duty is breached, the plaintiff can seek three potential remedies:
(1) the “adverse inference” charge;
(2) the “discovery sanction”; and/or
(3) the tort of “Fraudulent Concealment.”

The applicable remedy is often dependent upon the nature of the spoliation, when the spoliation occurred and when the spoliation was discovered. Generally speaking, these remedies are intended to punish the wrongdoer, deter others from such conduct, to level the playing field and to make whole, as nearly as possible, the party whose action has been impaired by the absence of material evidence. Rosenblit v. Zimmerman, 766 A.2d 749, 754-755 (N.J. 2001).

The party who destroys such evidence, commonly referred to as the “spoliator,” can be held liable regardless of whether he or she intentionally or merely negligently destroyed the evidence. Various civil remedies are available to rectify the spoliation. One such remedy is that the Court infers that the evidence the spoliator destroyed would have been unfavorable to him or her, as if it were a fact established at trial. A second remedy is a discovery sanction in which the Court designates that certain facts be taken as established, or refuses to permit the spoliator to support or oppose designated claims or defenses. Finally, Courts may prohibit the introduction of designated matters into evidence, dismiss an action, enter judgment by default, or may order the delinquent party to pay reasonable expenses resulting from his or her conduct, including attorney’s fees.
In addition to the above remedies, the New Jersey Supreme Court held that if spoliation of evidence is discovered during the course of litigation, the offended party can receive an adverse inference jury charge in its case in chief and still assert a completely separate cause of action for fraudulent concealment of evidence. Tartaglia v. UBS PaineWebber, Inc., et al., 197 N.J. 81 (2008)

THE ADVERSE INFERENCE

The adverse inference is a jury charge that may be invoked by the court in situations where a litigant becomes aware of the destruction or concealment of evidence during the underlying litigation. It permits the jury to “presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her.” If the duty to preserve evidence is violated, this instruction can be used regardless of whether the spoliation was intentional or merely negligent.

Consider the impact such an inference would have upon the jury: video surveillance captured a slip-and-fall incident; the recording was destroyed/is missing/was altered; and the jury is instructed to assume that the recording, had it been available, would have been unfavorable to the defendant and, by inference, would have assisted the plaintiff. Put differently, the adverse inference instruction permits the jury to imagine in their own minds the condition of the defendant’s premises in a light most favorable to the plaintiff. See Jerista v. Murray, 883 A.2d 350 (N.J. 2005).

THE DISCOVERY SANCTION

The duty to preserve evidence arises even without a court order. The negligent loss of evidence has been equated with a failure to comply with a party’s discovery obligations. When a party fails to comply with a discovery demand or request, the New Jersey Court Rules provide for a number of potential consequences:

1. For designated facts to be taken as established;
2. To refuse to permit the disobedient party to support or oppose designated claims or defenses;
3. To prohibit the introduction of designated matters into evidence; and/or
4. To dismiss an action; or to enter judgment by default.

The Court Rules also allow the court to order the spoliating party to pay reasonable expenses resulting from his conduct, including attorney fees. See Aetna Life and Cas. Co. v. Imet Mason Contractors, 707 A.2d 180 (App. Div. 1998). In the worst-case scenario, if material evidence goes missing, the defendant may seek a dismissal with prejudice or the plaintiff can seek a summary judgment on liability, which will be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party.

However, a party will not be penalized for a loss of evidence for which it was not responsible where the adversary is not unduly prejudiced by the loss. Absent exceptional circumstances, the court may not impose sanctions on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system. Of course, if litigation is reasonably expected, and video surveillance capturing an incident is stored electronically, a duty upon a business or property owner to preserve such evidence remains.
TORT OF FRAUDULENT CONCEALMENT

New Jersey courts have held that “spoliation” is not a separate cause of action. Rather, the adverse inference and the discovery sanction are remedies sought during discovery and/or trial. However, if the spoliation is intentional, a plaintiff may pursue a separate cause of action known as “fraudulent concealment.”

The tort of fraudulent concealment requires the plaintiff to show that:
(1) the defendant had a legal obligation to disclose the evidence to the plaintiff;
(2) the evidence was material to the plaintiff’s case;
(3) the plaintiff could not have readily learned of the concealed information from another source;
(4) the defendant intentionally withheld, altered or destroyed the evidence with the purpose to disrupt the litigation; and
(5) the plaintiff was harmed by the nondisclosure by having to rely upon an evidential record void of the evidence that the defendant concealed.


If the spoliation is discovered while the underlying action is ongoing, a party can amend the complaint to add a count for fraudulent concealment. If the loss or alteration of material evidence is not discovered until after the underlying action has been resolved, the plaintiff may file a separate action for fraudulent concealment.

In the scenario where a fraudulent concealment count is brought by way of amended complaint, bifurcation is required because the fraudulent concealment remedy necessarily depends upon the jury’s assessment of the underlying case of action. After the jury has returned a verdict in the underlying action, it will be required to determine whether the elements of fraudulent concealment have been established and, if so, whether damages are warranted. The bifurcated claim will focus on the damages, both compensatory and punitive, incurred in having to proceed without the destroyed evidence.

If a plaintiff has already prevailed on the substantive claim with the benefit of the adverse inference, the fraudulent concealment bifurcated action does not permit the jury to consider anew whether its substantive verdict would have been different had the missing evidence been considered. Rather, it only permits the plaintiff to recover additional compensatory damages limited to the further costs of proceeding without the spoliated evidence, or costs incurred in an effort to replace that evidence, together with, if appropriate, punitive damages.

If, however, the act of spoliation is discovered after a verdict is reached in the case-in-chief, the cause of action for fraudulent concealment will be entirely separate and, depending upon the outcome of the original trial, may include both consideration of substantive counts as well as the spoliation-based damages.

Consider a plaintiff who is deprived of a video surveillance recording due to intentional destruction and is subsequently required to hire additional experts or to create a model based on photographs or verbal descriptions. Such a plaintiff may be entitled to those costs as an element of damages.
GENERAL OVERVIEW ON THE LAW OF SPOILATION

Spoliation “is the term that is used to describe the hiding or destroying of litigation evidence, generally by an adverse party.” Rosenblit v. Zimmerman, 166 N.J. 391, 400-01 (2001) (citing Bart S. Wilhoit, Comment, Spoliation of Evidence: The Viability of Four Emerging Torts, 46 UCLA L. REV. 631, 633 (1998)). Not all destruction of evidence will qualify as spoliation, there must be a duty to preserve under the circumstances.

A duty arises when there is “(1) pending or probable litigation involving the defendants; (2) knowledge by the plaintiff of the existence or likelihood of litigation; (3) foreseeability of harm to the defendants, or in other words, discarding the evidence would be prejudicial to defendants; and (4) evidence relevant to the litigation.” Aetna Life and Cas. Co. v. Imet Mason Contractors, 309 N.J. Super. 358, 366 (App. Div. 1998).

Despite this factor test articulated by the Appellate Division, it has been found that a duty to preserve evidence may arise in other ways, such as “through an agreement, a contract, a statute . . . [and] affirmative conduct.” Gilleski v Community Medical Center, 336 N.J. Super. 646, 653 (App. Div. 2001).

Exemplifying this distinction are the Cockerline and Davis cases. In Cockerline a spoliation inference was properly raised when UPS deleted in vehicle information system data, following a truck accident, despite an internal policy that would review the data under the circumstances and a general awareness of potential litigation arising from the accident. Cockerline v. Menendez, 411 N.J. Super. 596, 621 (App. Div. 2010).

In contrast, a spoliation finding was not appropriate in a dram shop action wherein the establishment routinely recorded over their security footage on a weekly basis, no circumstances arose which would internally cause the preservation of footage, and no knowledge of a potential claim against the establishment was known for over a year. Gilleski v. Community Medical Center, 336 N.J. Super. 646, 652 (App. Div. 2001).

What remedies may arise for spoliation of evidence depends in large part on when the spoliation is discovered. The purpose of spoliation remedies are “to make whole, as nearly as possible, the litigant whose cause of action has been impaired by the absence of crucial evidence; to punish the wrongdoer; and to deter others from such conduct.” Rosenblit, 166 N.J. at 401.

If spoliation is “revealed in time for the underlying litigation, the spoliation inference may be invoked.” Id. at 407. “The spoliation inference permits the jury to infer that the evidence destroyed or concealed would not have been favorable to the spoliator . . . The jury is free, however, to accept or reject the inference.” Davis, 424 N.J. Super. at 148 (quoting from Cockerline, 411 N.J. Super. at 621).

The plaintiff may also amend their complaint to “add a count for fraudulent concealment.” Rosenblit, 166 N.J. at 407. Under this scenario, the counts will be bifurcated, with the underlying claim being decided first, followed by the fraudulent concealment claim. Id. Discovery sanctions may also be imposed. Id. at 408.

If spoliation is not uncovered until after the underlying claim has been lost or otherwise severely stunted, a separate tort action may be filed for fraudulent concealment. Id. The N.J. Supreme Court in Rosenblit, clarified that this tort action that may be filed was not a “new tort of intentional spoliation” but rather “an invocation of the previously recognized tort of fraudulent concealment, adapted to address concealment or destruction during or in anticipation of litigation.” Id. at 406.
The Rosenblit court also set forth the elements that must be satisfied for a fraudulent concealment count within a litigation setting. The elements are:
(1) That defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation;
(2) That the evidence was material to the litigation;
(3) That plaintiff could not reasonably have obtained access to the evidence from another source;
(4) That defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation;
(5) That plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed.
Id. at 407-08.

As is apparent from the above language, a fraudulent concealment action as a remedy for spoliation of evidence requires intent on the part of the spoliator.


Different circumstances may arise when the spoliator is a plaintiff, rather than a defendant. The N.J. Supreme Court noted that when “the spoliator is a plaintiff, the remedy of a separate cause of action for fraudulent concealment would not necessarily serve any purpose.” Robertet Flavors, Inc. v. Tri-Form Const., Inc., 203 N.J. 252, 272 (2010).

It was noted that in circumstances when the spoliator is a plaintiff a common remedy is “preclusion of plaintiff’s evidence that had been, or could have been, derived from the spoliated material or item.” Id. In this context, the court also emphasized that a court, when selecting an appropriate remedy must be guided by the three goals of spoliation sanctions “to make whole, as nearly as possible, the litigant whose cause of action has been impaired by the absence of crucial evidence; to punish the wrongdoer; and to deter others from such conduct.” Id. at 273 (quoting from Rosenblit, 166 N.J. at 401). The court stressed that achieving these goals calls for careful evaluation of the particular facts and circumstances of the litigation, in order that the true impact of the spoliated items can be assessed and an appropriate sanction imposed.” Id. at 273-74.

Also of note from the Robertet case is the courts discussion of dismissal as a remedy. The court referred to dismissal as a “draconian remedy” and noting that they have instructed lower courts to “impose [it] only sparingly”. Id. at 274.

**VIDEO SURVEILLANCE**

In today’s world (with Ring Doorbells, etc.), businesses and residential property owners increasingly have surveillance in place. It can often be a double-edged sword as it can reveal that a defendant had notice of a condition or, on the other hand, it can demonstrate evidence of comparative negligence or an orchestrated event on the part of a plaintiff. A surveillance recording is frequently the most accurate piece of evidence relating to the occurrence of an accident on one’s property. Therefore, after a slip and fall takes place, steps should be taken to actively seek out and preserve any type of surveillance recording because, before long, a preservation letter from an attorney may be received or a summary proceeding to
preserve the evidence may be filed.

The failure to secure and preserve a surveillance recording can result in significant consequences, which can include monetary sanctions, adverse inferences at trial and even punitive damages. Opening letters of representation should go out to defendant businesses and property owners demanding that they take steps for surveillance preservation, exportation and transfer.

Businesses, property owners, insurers and defense counsel should notified to take appropriate measures to preserve video surveillance any time the potential for litigation exists.

Surveillance recordings can support a plaintiff’s argument that a defendant had “notice” of a condition or, alternatively, can support a defendant’s argument that a condition was “open and obvious.” To the benefit of a plaintiff, surveillance can capture an employee failing to completely remove a liquid or substance from a floor or, to the benefit of a defendant, can capture an orchestrated event by a plaintiff. Surveillance can also reveal the exact time a snow removal contractor arrived at a property and the condition of a sidewalk thereafter. The potential uses of surveillance recordings are endless.

Video surveillance recordings have a tendency to go “missing.” Many times videos are lost unintentionally. For instance, the recording may have been accidently erased, the hard-drive reset itself or the recording simply cannot be accessed for a myriad of other legitimate reasons. On other occasions, the cause for the “disappearance” is more deliberate, such as where a recording has actually been altered or destroyed by a client.

NJ COURT RULE 4:11-1

Rule 4:11-1 provides that a person who desires to perpetuate his or her own testimony or that of another person or preserve any evidence or to inspect documents or property or copy documents may file a verified petition in the Superior Court, seeking an appropriate order. The petitioner must show 1) that the petitioner expects to be a party to an action cognizable in a court of this State but is presently unable to bring it or cause it to be brought; 2) the subject matter of such action and the petitioner's interest therein; 3) the facts which the petitioner desires to establish by the proposed testimony or evidence and the reasons for desiring to perpetuate or inspect it; 4) the names or a description of the persons the petitioner expects will be opposing parties and their addresses so far as known; 5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each; and 6) the names and addresses of the persons having control or custody of the documents or property to be inspected and a description thereof.

Even before filing a complaint, parties have the right to file a verified petition seeking to “preserve any evidence or to inspect documents or property or copy documents pursuant to [Rule ] 4:18–1”; upon an appropriate showing, a court order could have been entered compelling the Board to preserve evidence. R. 4:11–1(a), (c); See Gilleski v. Cmty. Med. Ctr., 336 N.J. Super. 646, 655, 765 A. 2d 1103 (App. Div.2001) (holding that “any person desiring to preserve evidence prior to institution of an action may seek such relief by verified petition pursuant to [Rule ] 4:11–1(a)”). The rule is “intended for cases in which there exist[s] a genuine risk that testimony w[ill] be lost or evidence destroyed before suit c[an] be filed and in which an obstacle beyond the litigant's control prevents suit from being filed immediately.” In re Hall ex rel. Hall, 147 N.J. 379, 385, 688 A. 2d 81 (1997).

See Liberty Mutual Insurance Co. v. Borgata Hotel Casino & Spa, 456 N.J. Super 471 (Law Division 2017). The Court held that Liberty Mutual failed to establish that there was any risk that the surveillance footage and security reports it sought would be destroyed before suit. Pursuant to the Supreme Court’s
decision in Petition of Hall By and Through Hall, 147 N.J. 379 (1997), pre-suit discovery may only be sought pursuant to a R. 4:11-1 petition where there exists a genuine risk that testimony would be lost or evidence destroyed before suit could be filed and in which an obstacle beyond the litigant’s control prevents suit from being filed immediately. Accordingly, Liberty Mutual’s petition was denied.

**CASE LAW**


FACTS: In July of 2014, Plaintiff Betty Promise was reportedly seated in a chair in the basement of the laundry room of her apartment building for approximately 30 minutes before a leg on the chair gave way. The building was owned by Defendant Khubani and the chairs in the laundry room were installed and maintained by Defendant Mac Gray Services.

The chair in question was part of a set of chairs that were connected to each other. Plaintiff had reportedly been seated on an end chair. She alleged that the leg of the chair “collapsed,” causing Plaintiff to become caught between the chair upon which she had been sitting and the chair connected to it, on her right, before she fell all the way to the floor. Plaintiff was reportedly alone in the laundry room at the time of this incident, and could not free herself, so she called out for help. Two employees of Defendant Khubani came to Plaintiff’s aid. One of those employees, named Osuva, was responsible for maintenance work in the building.

Plaintiff claimed injuries to her shoulder, arm, neck, back and knees. Members of Plaintiff’s family reportedly took photographs of the chair shortly after the incident and gave those photographs to Plaintiff’s attorney. Thereafter, on August 6, 2014, Plaintiff’s counsel wrote to Defendant Khubani advising of his representation and requesting that Khubani “kindly preserve the chair in question as it is evidence in this case.”

Thereafter, on September 16, 2014, while the chair was still in the possession of Khubani, an individual who identified himself as an attorney for Defendant Khubani reportedly photographed the chair. Mr. Osuva reportedly stated he did not remember seeing the chair after the photographs were taken in September 2014, and said that he did not know to where the chair had been moved.

At some point in 2016, the laundry room chairs were replaced with new ones by Defendant Mac Gray. Thereafter, the parties realized that the chair was missing, though Defendant Khubani acknowledged that the chair went missing while in its possession.

Plaintiff originally filed a Complaint against Defendant Khubani and the manufacturer of the chair, Caco Manufacturing Corp., and subsequently filed an Amended Complaint including Defendant Mac Gray. At his subsequent deposition, Mr. Osuva confirmed that a photograph presented to him depicted the chair upon which she found Plaintiff, acknowledging that the left leg of the chair was “a little bent.” He identified another Khubani employee named Sean as an individual who cleaned the chairs and table in the laundry room every morning. Mr. Osuva said that he had never noticed any problems with the chair, and the Plaintiff had apparently not noticed any, either, while she had been seated on the chair. Plaintiff said she had never sat in the chairs before herself, but had seen other people sitting in them.

HOLD: The Appellate Division stated it was not clear from the record if or when Plaintiff attempted to examine the chair or have an expert do so. Caco, Khubani and Mac Gray all moved for Summary Judgment. Plaintiff opposed Khubani’s Motion on the grounds that the chair was “destroyed or otherwise
disposed of” by Khubani, which required an adverse inference due to spoliation, requiring the same to be left to the jury.

The Trial Judge granted Summary Judgment to Khubani and Mac Gray, finding that while Plaintiff presented a sufficient argument for spoliation, the destruction of the chair was only relevant to a product liability claim on the part of the manufacturer, and neither Khubani or Mac Gray were the designer or manufacturer of the chair. As such, Plaintiff was required to provide evidence that either Khubani or Mac Gray knew or constructively knew or should have known that the chair was defective. The Court found that Plaintiff produced no such evidence.

Plaintiff thereafter appealed only as to Defendant Khubani, arguing that the spoliation of the chair that allegedly caused the injury raises an inference sufficient to preclude Summary Judgment. The Appellate Division disagreed and accordingly affirmed.

The Appellate Division noted that there are different remedies for spoliation of evidence which are dependent in part on the timing of the discovery of the spoliation. Robertet Flavors, Inc. v. Tri-Form Const., Inc., 203 N.J. 252, 273-74 (2010). When the alleged spoliation is discovered in time for the underlying litigation, remedies include a “spoliation inference,” which “allows a jury in the underlying case to presume that the evidence the spoliator destroyed or otherwise concealed would have been unfavorable to him or her.” Rosenblit v. Zimmerman, 166 N.J. 391, 401-02 (2001)

Further, a Plaintiff may be permitted to file an Amended Complaint to add a fraudulent concealment Count. If added, bifurcation is required because the fraudulent concealment remedy depends on the jury’s assessment of the underlying cause of action. In that instance, after the jury has returned a verdict in the bifurcated underlying action, the jury is then required to determine whether the elements of the tort of fraudulent concealment have been established, and, if so, whether damages are warranted.

Conversely, in circumstances where the spoliation is not discovered in time for the underlying action, Plaintiff may file a separate tort action where he or she is required to establish the elements of fraudulent concealment, and “[t]o do so, the fundamentals of the underlying litigation will also require exposition.” Id. at 408. Specifically, to make a claim of fraudulent concealment, a plaintiff must show:  (1) [t]hat the Defendant in the fraudulent concealment action had a legal obligation to disclose evidence in connection with an existing or pending litigation; (2) [t]hat the evidence was material to the litigation; (3) [t]hat plaintiff could not reasonably have obtained access to the evidence from another source; (4) [t]hat defendant intentionally withheld, altered or destroyed the evidence with purpose to disrupt the litigation; [and] (5) [t]hat plaintiff was damaged in the underlying action by having to rely on an evidential record that did not contain the evidence defendant concealed. Tartaglia v. UBS PaineWebber, Inc., 197 N.J. 81, 118 (2008) (citing Rosenblit, 197 N.J. at 406-07).

In Promise, the alleged spoliation of the missing chair was discovered during the underlying litigation. But, because Plaintiff only appealed the Summary Judgment Order as to Khubani, the property owner, any adverse inference about the chair had to be considered in the context of a premises liability/negligence claim.

In a negligence claim, “the landlord of a multiple-family dwelling is subject to the same basic duty as an owner or occupant of commercial property. …” Drazen, N.J. Premises Liability, § 5:2-2 (2019) (citations omitted). An owner of a business property has a duty of care to “discover and eliminate dangerous conditions, to maintain the premises in safe condition, and to avoid creating conditions that would render the premises unsafe.” Arroyo v. Durling Realty, LLC, 433 N.J. Super. 238, 243 (App. Div. 2013) (quoting Butler v. Acme Mkts., Inc., 89 N.J. 270, 275 (1982)). If a Plaintiff cannot show that an owner of a business property had actual or constructive notice of a dangerous condition, “[t]he absence of such
notice is fatal to Plaintiff’s claims of premises liability.” Ibid. (citations omitted).

Accordingly, in this matter the Appellate Division held that the record revealed no evidence Khubani had actual or constructive notice of a defective chair in the laundry room. Rather, to the contrary, there was evidence that the chairs were cleaned every morning by a Khubani employee, and nothing in the record indicated the employee ever noticed a problem with the chairs or reported a problem with the chairs to Khubani. Further, Plaintiff herself had seen others sitting in the chairs with no issues, and did not notice anything out of the ordinary during the thirty minutes she sat in the chairs.

Therefore, the Court held that any factual dispute that could arise out of any possible adverse inferences regarding the chair, when considered in the light most favorable to Plaintiff, still could not alter the conclusion that Plaintiff did not demonstrate Khubani had actual or constructive notice of a prior problem with the chair. Therefore, Summary Judgment was appropriate as a matter of law.

Thus, this Opinion is an instructive reminder from the Appellate Division on the applicability of the various aspects of a potential spoliation claim, and what a Plaintiff is required to prove in order to pursue the same.

Tartaglia v. UBS PaineWebber, Inc., et al., 2008 WL 5274869 (N.J. Supreme Court, December 16, 2008)

In this decision, the New Jersey Supreme Court also clarified the remedies available for spoliation (i.e., destruction) of evidence. The court held that if the spoliation of evidence is discovered during the course of litigation, the offended party can receive an adverse inference jury charge in its case in chief and still assert a separate cause of action for fraudulent concealment of evidence. Obviously, if a party’s spoliation is discovered after the litigation, the only available remedy would be a separate claim for fraudulent concealment. In a footnote, the New Jersey Supreme Court made the important observation that, although previously courts had presumed only plaintiffs were entitled to bring a separate cause of action for spoliation, there is nothing to preclude a defendant from doing the same in an appropriate case.


New Jersey District Court Approves Spoliation Sanction for Plaintiff's Deactivation of Facebook Account. The court held that the plaintiff had spoliated, i.e., destroyed and/or failed to preserve, potentially relevant electronic information by deactivating his Facebook account. The district court’s holding is significant because it found spoliation even where the plaintiff claimed that the electronic information had been deleted through no fault of his own.

In Gatto, plaintiff Frank Gatto alleged that he suffered permanently disabling injuries while employed as a ground operations supervisor with JetBlue Airways Corp. He claimed that his injuries prevented him from working and limited his physical and social activities. In July 2011, during discovery, the defendants sought the plaintiff’s social media information, asking for all records of “wall posts, comments, status updates or personal information posted or made by Plaintiff on Facebook and/or any social media website from 2008 through the present.”

The defendants also requested that Gatto sign release authorization forms for his Facebook, MySpace, eBay, and PayPal accounts. Plaintiff returned the signed authorizations, except for the one directed to Facebook. During a December 1, 2011 conference, the magistrate judge ordered Gatto to execute the
Facebook authorization and he agreed to enable access by changing his password to one disclosed to the defendants.

Gatto later claimed that he inadvertently deactivated his account after receiving a notice that someone was trying to access it. Facebook, according to its policy, automatically deleted Gatto’s account after 14 days without reactivation. Defendants moved for sanctions, arguing that Gatto intentionally deleted his account because the postings on his page related to his trips, social activities, and an eBay business would have refuted his damage claims. Gatto argued that there was nothing intentional or actually suppressed from the page and that his actions were reasonable. He also stated that the permanent deletion was accidental and due to Facebook’s automatic deletion policy, and through no fault of his own.

Upon defendants’ motion, the key question the court faced was whether Gatto had destroyed evidence. In New Jersey, there are four elements to spoliation: (1) the evidence must be within a party’s control; (2) an actual suppression or withholding; (3) of relevant evidence; (4) where it was reasonably foreseeable that the evidence would be discoverable. The court focused on whether there was an “actual suppression or withholding.”

The court opined that even “if plaintiff did not intend to permanently deprive the defendants of the information associated with his Facebook account, there is no dispute that plaintiff intentionally deactivated the account.” It further noted that the plaintiff effectively “caused the account to be permanently deleted” and as such, the “plaintiff failed to preserve the relevant evidence,” causing permanent loss of evidence potentially relevant to his damages and credibility.

Thus, the court held that the plaintiff engaged in spoliation, thereby entitling the defendants to the adverse inference instruction, but not to legal fees because “destruction of evidence does not appear to be motivated by fraudulent purposes or diversionary tactics, and the loss of evidence will not cause unnecessary delay.” The adverse inference instruction was the appropriate remedy, the court noted, because the plaintiff had failed to preserve relevant evidence, “had a duty to preserve his Facebook account at the time it was deactivated and deleted,” and the defense would not be prejudiced in any way by this loss of the evidence.

With the prevalence of Facebook, LinkedIn, and other social media outlets, this scenario could easily arise in any type of litigation. Gatto holds that the deletion of electronic information, even when not done directly by a party, can be considered spoliation of evidence. Therefore, this holding could have an immediate effect on document retention policies and attorney instructions to clients regarding their various social media pages.

Gatto holds that a plaintiff who, despite knowing that defense counsel had requested the plaintiff’s Facebook records, deleted his Facebook page, was subject to sanctions for spoliation. Practitioners should warn clients about the dangers of altering social media pages that are subject to discovery requests in litigation.

The Gatto court granted the defendants' request for spoliation sanctions, finding that the plaintiff's deletion of his Facebook page was a failure to preserve evidence. In this personal injury action, the plaintiff alleged that he became permanently disabled, which limited his ability to perform physical and social activities. The defendants sought discovery of the plaintiff's social media activity, including his Facebook page. After initially objecting to this request, the plaintiff gave the defense the password to his Facebook account after the magistrate judge ordered the plaintiff to execute a release of documents and information from Facebook. Less than a week later, defense counsel accessed the plaintiff's Facebook account with the provided password to authenticate its validity.
After defense counsel accessed the plaintiff's Facebook account, the plaintiff stated that he received a message from Facebook informing him that his account had been accessed by an unauthorized IP address in New Jersey. The plaintiff later contacted his attorney to see if defense counsel accessed the page. Defense counsel confirmed to the plaintiff's attorney that the page was accessed, but before the plaintiff was informed that defense counsel accessed his page, the plaintiff permanently deleted his Facebook page. The plaintiff unsuccessfully attempted to reactivate his account. The defendants contended that the plaintiff's Facebook page contained material that would contradict plaintiff's personal injury claims and moved for spoliation sanctions, including an adverse jury instruction and costs.

In its ruling on the defendants' motion, the court found that the defendants were prejudiced by the plaintiff's deletion of his Facebook account because they lost access to evidence potentially relevant to plaintiff's damages and credibility. In granting the defendants' request for an adverse inference, the court found that the deletion of the plaintiff's Facebook account satisfied the four factors courts consider when giving an adverse inference instruction to the jury:
- The evidence was within the plaintiff's control.
- There was an actual suppression or withholding of evidence on the part of the plaintiff.
- The evidence that was destroyed or withheld was relevant to the claims or defenses presented.
- It was reasonably foreseeable that the evidence would be discoverable.


Robertet Flavors, Inc. v. Tri-Form Construction, Inc.

The New Jersey Supreme Court issued a unanimous opinion that impacts anyone who eliminates evidence of alleged construction defects before providing an opportunity for contractors or design professionals to inspect those defects, even where such “elimination” occurs accidentally. In Robertet Flavors, Inc. v. Tri-Form Construction, Inc., the Court clarified the New Jersey standard for spoliation with a comprehensive and lengthy opinion that affects owners, contractors and design professionals operating in the state. Spoliation is when a party repairs or makes a material alteration to the work, destroying evidence of the defect.

Disputes often arise regarding the quality of work on construction projects. When these disagreements happen, the normal process is for the owner and contractor to meet to inspect the allegedly defective work. Next, some type of plan is typically agreed upon to correct the defect. Before responsibility for the cost of repair is determined, both parties are entitled to inspect any defects before they are repaired.

The lesson of the Robertet case is that severe penalties – such as a court blocking all of the evidence relating to the removal, inspection, and remediation of the defect – can result when an entity is deprived of the right to investigate allegedly defective work.

Background of the Case

This case involved the construction of a new commercial building that included curtainwall and strip window systems. Once the owner occupied the building, it noticed that substantial leaking occurred around the strip windows, and contacted the glass company that installed them. The glass company investigated and attempted to repair the problems but the leaks continued. After two years, the owner hired a private consultant who recommended that the windows, inside walls, insulation, and carpeting be replaced. The owner agreed with this assessment but unfortunately did not share its plans with the glass company.

The owner filed suit in January 2002, and the glass company served its answer two months later. Even
though the suit was underway, the owner’s counsel failed to notify the glass company’s counsel about the consultant’s investigations, mold discovery, or the owner’s plan to replace the strip windows. The owner began the remediation process on December 13, 2002, but did not notify the glass company until three weeks before it was finished. The glass company demanded that the remediation stop and that they be given an opportunity to inspect the allegedly defective work. The owner denied the glass company’s request, claiming that halting the process would be impractical.

During litigation, the glass company filed a motion to stop the owner from testifying about the installation of the strip windows. The glass company claimed it had been unfairly prejudiced because it had no opportunity to inspect the condition that resulted from the leaky windows. In reviewing the case, the Court provided a thorough discussion of the construction industry and spoliation of evidence before concluding that the owner could proceed with its claim, but only in a limited capacity, making its case much more difficult to prove. As a result, the owner was barred from presenting any evidence relating to the removal of the windows, discovery of the mold, and installation of the replacement windows, and was only permitted to present evidence relating to the condition and inspection of the windows prior to remediation.

Outcome of the Robertet Case

This decision serves as a cautionary tale for all parties in construction projects. Owners must make sure that all affected parties are given notice of any alleged defects and/or plans to remediate such defects. Contractors also have an obligation to be proactive during the evidence gathering stages. This case makes it clear that when spoliation occurs, a party may not automatically be blocked from recovering for, or defending against, alleged construction defects; however harsh penalties may apply.


In this case, the Superior Court of New Jersey, Appellate Division (Appellate Division) considered whether the lower court properly granted the defendant’s summary judgment motion. In its motion, the defendant argued that the plaintiff could not establish proximate cause between the defendant’s alleged conduct of destroying or losing evidence and the plaintiff’s inability to prove liability against other responsible third parties. The Appellate Division affirmed the lower court’s ruling, finding that the plaintiff failed to provide sufficient evidence of a viable liability claim against potentially responsible third parties in the underlying claim.

In 27-35 Jackson Ave., LLC, the plaintiff incurred water damage to its commercial property located in Long Island City, New York in January 2015. The water damage was the result of a sprinkler head on the second floor discharging. The plaintiff reported the claim to its property insurance carrier, Samsung Fire & Marine Inc. Co. (Samsung). Upon receiving the claim, Samsung retained a forensic engineer to inspect the loss site and evidence. Samsung also retained subrogation counsel to assist with the origin and cause investigation. The engineer conducted his site inspection and took possession of the sprinkler head. He eliminated the possibility that the sprinkler discharge was due to fire or freezing. Although he noted some discoloration on the sprinkler head, he attributed that to the age of the sprinkler head. He also noted that the internal components of the sprinkler head were pushed out from the water release and that the remnants of the head did not display any evidence of distortion. The engineer ultimately opined that the cause of the sprinkler discharge could not be determined. Samsung’s subrogation counsel advised that based on the engineer’s analysis, there was no responsible third party available for subrogation.

About three weeks after the loss, plaintiff’s counsel sent Samsung a written notice requesting that all
items removed from the loss site be preserved in their original condition. The notice expressed the plaintiff’s intention to seek recovery of any portions of their loss not covered by insurance. In late May 2015, Samsung informed plaintiff’s counsel that the sprinkler head was retained by the adjuster and that no destructive testing was completed. It was not until March 2016 that Samsung notified the plaintiff that the evidence had not been preserved. As a result, the plaintiff instituted a lawsuit against Samsung, alleging that Samsung intentionally or negligently lost or destroyed the sprinkler head and that the plaintiff suffered damages as a result.

In discovery, the plaintiff produced an expert engineer who opined that the cause of the sprinkler discharge was probably related to a manufacturing defect, improper installation or improper maintenance. After discovery, Samsung filed a motion for summary judgment. The plaintiff filed a cross-motion seeking an inference based on Samsung’s alleged spoliation of evidence. The lower court granted Samsung’s summary judgment motion, holding that since the plaintiff’s expert could not identify any likely cause of the sprinkler activation, the plaintiff failed to demonstrate a “reasonable probability of succeeding in an underlying suit against the alleged responsible third-parties.” The lower court chose not to review the plaintiff’s cross-motion and denied the plaintiff’s motion for reconsideration. The plaintiff filed an appeal with the Appellate Division.

The Appellate Division affirmed the lower court’s decision, but partly for different reasons. The court first addressed whether the lower court should have considered the plaintiff’s cross-motion, which sought a negative inference for the alleged spoliation. The Appellate Division acknowledged that New Jersey courts have issued negative inferences as remedies for spoliation by the alleged responsible party. However, the court held that a negative inference would only be available as a remedy against the third party alleged to be responsible for the underlying cause of action. Since Samsung played no role in causing the underlying water loss, the court held that Samsung could not be subjected to a negative inference.

With respect to Samsung’s summary judgment motion, the Appellate Court acknowledged that New Jersey courts have recognized an independent cause of action for negligent destruction of evidence if the alleged spoliator is not a party to the underlying claim. The plaintiff’s prima facie elements of proof are similar to an ordinary negligence claim; requiring a showing that the defendant had a duty of care, breached that duty and that said breach proximately caused the plaintiff’s damages. The court considered the requisite proof needed for the plaintiff to establish the prima facie proximate cause element of a claim for negligent destruction of evidence. The court noted that some jurisdictions, such as Illinois, require the plaintiff to demonstrate that it would likely succeed in the underlying case, which the court referred to as requiring “a-suit-within-a-suit.” Other jurisdictions, such as Alabama, create a rebuttable presumption that but for the spoliation of evidence, the plaintiff would have recovered against the responsible third parties.

Here, the court refused to go as far as adopting a rebuttable presumption or a-suit-within-a-suit requirement. Thus, the court did not agree with the lower court’s holding that the plaintiff was required to make a prima facie showing that it would have likely succeeded in the underlying action. However, the court agreed that the plaintiff did not meet its prima facie burden of establishing that Samsung’s destruction of the evidence proximately caused the plaintiff’s damages. The court simply held that the plaintiff needed to do more than merely identify three possible causes of the underlying claim and three possible targets. The court found that since the plaintiff was unable to establish a more defined theory of liability in the underlying claim, the plaintiff was unable to establish damages. The Appellate Division affirmed the lower court’s decision granting Samsung’s motion for summary judgment.

The 27-35 Jackson Ave., LLC decision does not provide much clarity as to how much a plaintiff needs to prove to meet the prima facie element of proximate cause. However, the decision establishes that a plaintiff’s inability to initiate a lawsuit against potentially responsible parties is not a sufficient injury to
establish damages. The decision also indicates that a plaintiff needs to do more than merely point fingers at possible responsible parties. This case suggests that a plaintiff asserting a negligent destruction of evidence claim needs to have a more developed theory of liability against the potentially responsible party(ies) in the underlying claim in order to establish the proximate cause element. While the plaintiff is not required to prove that it would have likely succeeded in the underlying claim, it needs to do more than merely speculate as to the possible causes of the claim.

While Samsung prevailed on summary judgment, this case serves as a cautionary tale to all subrogation professionals regarding proper evidence handling and preservation. Had the plaintiff been able to better establish a potential theory of liability in the underlying claim, Samsung may have been held liable for failing to preserve the subject evidence. It is important for subrogation professionals to make every effort to determine if the insured or any other potentially interested party wishes to have the evidence preserved before any evidence is discarded. It is also important to maintain a chain of custody of the evidence and require written approval before it is discarded. Failing to do so could subject the carrier to a claim for negligent destruction of evidence in those jurisdictions that recognize such claims.

27-35 Jackson Avenue, LLC v. Samsung Fire & Marine Ins. Co., Ltd., arose from unusual circumstances. Plaintiff owned a commercial building in which the United States General Services Administration ("GSA") was a tenant. "For no apparent reason," a sprinkler head in the building discharged water, in such amounts that that floor and the one below were damaged. Due to that occurrence, the GSA terminated its lease because its premises were “untenantable.” Plaintiff sued the GSA in the United States Court of Claims, and separately sued the defendant insurance company on a commercial liability policy.

Plaintiff had preserved the sprinkler head, but later turned it over to defendant for analysis by a professional engineer. The engineer advised defendant that there was “no third party available for subrogation.” Plaintiff then demanded that defendant retain the sprinkler head and not perform any destructive testing on it. Defendant agreed, but months later, after plaintiff had made a claim under the policy and demanded the sprinkler head for analysis by plaintiff’s own expert, defendant stated that it had no longer had the sprinkler head.

Plaintiff then sued, asserting that defendant’s failure to preserve the sprinkler head caused plaintiff damage, in that plaintiff lost the chance to pursue potentially responsible parties, such as the manufacturer of the sprinkler head, the installer, or the company that plaintiff hired to inspect and maintain the sprinkler system.

Defendant moved for summary judgment, and plaintiff cross-moved for an adverse inference against defendant based on the spoliation of the sprinkler head. Plaintiff demanded that its cross-motion be decided first, so that plaintiff could have the benefit of the adverse inference in opposing defendant’s motion for summary judgment. The Law Division declined to do that and granted defendant’s motion, based largely on the finding that the opinion of plaintiff’s own expert was an inadmissible net opinion. Today, the Appellate Division affirmed, applying de novo review, but on grounds different than those of the Law Division.

Judge Messano first rejected plaintiff’s argument that the Law Division should have taken up plaintiff’s cross-motion first and then applied an adverse inference in considering defendant’s motion for summary judgment. Citing prior cases, he said that “the factfinder is permitted to presume that the evidence the spoliator destroyed or concealed would have been unfavorable to him or her” (emphases by Judge Messano).

Here, however, “[w]hatever an inspection of the sprinkler head may have shown would not have been
‘unfavorable’ to defendant, because defendant played no role in the happening of the flood. Moreover, the loss of the sprinkler head was irrelevant to plaintiff’s declaratory judgment suit in which it sought coverage from defendant.” There was no authority for an adverse inference in such circumstances, and Judge Messano found that the inference “had no place in this litigation.”

Applying the abuse of discretion standard applicable to decisions about expert testimony, Judge Messano differed with the Law Division’s net opinion ruling. As he explained in detail, the expert had reviewed the report and deposition of defendant’s expert who had examined the sprinkler head, and the expert had “explained the mechanism and operation of the sprinkler head.” His was not a net opinion.

The bulk of Judge Messano’s opinion addressed the issue of whether plaintiff had shown proximate cause. Damages, Judge Messano said, were not the issue, since the law allows “considerable speculation” as to the amount of damages. But plaintiff had not shown proximate cause. All that plaintiff had done was to point to the three potential culprits regarding the sprinkler head. That did not suffice, since plaintiff’s expert had not “explained why any one of those defendants’ product, installation, or maintenance caused plaintiff’s damages.”

In reaching that decision, the Appellate Division canvassed cases from other jurisdictions that had employed varying tests for proximate cause in a spoliation context. But Judge Messano noted that the Supreme Court of New Jersey had “yet to speak directly to the proximate cause issue in negligence cases based on spoliated evidence, for purposes of avoiding summary judgment,” and the Appellate Division, as an intermediate court, would not import a test from elsewhere into New Jersey law for the first time.

Based on that, plaintiff might be able to interest the Supreme Court in the issue. Time may tell.

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COVID-19 – A Year Later: The Evolution of Compliance in an Expanding Universe of Know Your Know Yours!

by William Jannace, GFMI Instructor
COVID-19 – A Year Later: The Evolution of Compliance in an Expanding Universe of Know Your Know Yours!

Background

A former U.S. Defense Secretary responded to a U.S. Department of Defense news briefing question in 2002 about the lack of evidence linking the government of Iraq with the supply of weapons of mass destruction to terrorist groups about known knowns; “there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don’t know we don’t know.”¹ One thing we do know; the financial services industry is highly regulated and oversighted; is highly automated and interconnected – making it increasingly vulnerable to cybersecurity threats,² and is operating in a world of expanded digitalization, data, and innovation. This perfect storm has and will continue to impact the role of compliance in firms and has changed in many jurisdictions the focus of regulation from prescriptive and reactive to proactive and interactive (i.e., the significant increase post-2008 Credit Crisis in “Sandboxes”³ and similarly related regulatory innovation hubs).⁴

As discussed in more detail below, this “Regulatory Détente” may be a path forward for the increasingly complex market-regulatory ecosystem to work in a concerted manner to maintain customer protection and market integrity.

While it is still too early to predict how the financial services industry will fully emerge post COVID-19 Pandemic (“the pandemic”) one thing is certain-the remit of compliance has expanded from a rules and compliance-based discipline to an evolving hybrid model of Know Your Rules


³ https://dfsobservatory.com/content/regulatory-sandboxes

⁴ According to the World Bank (“WBG”), regulators globally have embraced the regulatory sandbox as a “means of providing a dynamic, evidence-based regulatory environment to test emerging technologies.” The WBG collated the total sandboxes currently in existence both announced and operational and highlighted some metrics on their design and operations. It noted that there are currently 73 Sandboxes operating globally in 57 jurisdictions. https://www.worldbank.org/en/topic/fintech/brief/key-data-from-regulatory-sandboxes-across-the-globe.
and Know Your Substance with a panoply of “Know Yours” iterations in between -some standalone and some subsets of the traditional ones. The pandemic added an additional dimension of complexity to a broker-dealer’s supervisory requirements under FINRA and SEC rules and regulations, but evolving trends in which it operates present increasingly more permanent challenges - the necessity to establish and maintain policies and procedures to comply with rules and regulations in an ever more complex and challenging environment-driven by technological change (e.g., artificial intelligence) and technological challenges (e.g., cybersecurity risks). With the continued use of artificial intelligence and machine learning in conjunction with algorithmic trading strategies, i.e., “Know Your Model” is an emerging regulatory issue as algorithmic trading presents for example the “Black Box problem” for firm’s compliance staffs. While human beings can input data into a model and can examine the outputs, the process between the start and finish can be opaque. The lack of model transparency coupled with an algorithm’s levels of “explainability,” will potentially affect firms, and their compliance officer’s ability to understand how a model affects operational risk management. While regulators have issued guidance and promulgated rules with respect to algorithmic trading and the supervision and control practices for firms engaging in algorithmic trading strategies, the guidance was focused more on process, technology, and compliance.


6 For example, GPT-3, is a natural-language computer model that learns to write and speak. It is an example of AI that can better understand and interact with the world. While it can mimic human text, it does not understand what it is writing as it has been trained on internet text-misinformation and biases and produces such misinformation and biases. https://openai.com/blog/gpt-3-apps/.

7 FINRA Rule 1220(b)(4)(A) requires each person associated with a member to register as a Securities Trader if such person is: (i) primarily responsible for the design, development or significant modification of an algorithmic trading strategy relating to equity, preferred or convertible debt securities; or (ii) responsible for the day-to-day supervision or direction of such activities. For purposes of this Rule an “algorithmic trading strategy” is an automated system that generates or routes orders (or order-related messages) but shall not include an automated system that solely routes orders received in their entirety to a market center. https://www.finra.org/rules-guidance/rulebooks/fnra-rules/1220. See also https://www.finra.org/sites/default/files/Regulatory-Notice-16-21.pdf.

8 FINRA provided guidance on effective supervision and control practices for brokerage firms and market participants that use algorithmic strategies. The practices are focused on five general areas: General Risk Assessment and Response; Software/Code Development and Implementation; Software Testing and System Validation; Trading Systems; and Compliance.
Similarly, Environmental Social and Governance ("ESG") investing and attendant concerns about greenwashing,9 compliance10 is being challenged not only to apply the rules and regulations to a firm’s supervisory structure but is being tasked with a better understanding of the underlying business product, i.e., “Know Your Substance. 11 ESG regulatory concerns are not limited to financial services firms’ customer relationships, but in fact are concerns to these firms’ own Enterprise Risk Management ("ERM"),12 with the “greening” of ERM being driven by shareholder

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10 Under the Investment Adviser Compliance Rule, it is unlawful for an investment adviser registered with the SEC to provide investment advice unless the adviser has adopted and implemented written policies and procedures reasonably designed to prevent violation of the Advisers Act and the rules thereunder by the adviser or any of its supervised persons. The Compliance Rule requires advisers to consider their fiduciary and regulatory obligations under the Advisers Act and to formalize policies and procedures to address them. Release No. IA-2204, Compliance Programs of Investment Companies and Investment Advisers (Dec 17, 2003). https://www.sec.gov/rules/final/ia-2204.htm.

11 Compliance personnel that are knowledgeable about the firms’ specific ESG-related practices. The SEC observed that, where compliance personnel were integrated into firms’ ESG-related processes and more knowledgeable about firms’ ESG approaches and practices, firms were more likely to avoid materially misleading claims in their ESG-related marketing materials and other client/investor-facing documents. The compliance personnel in these firms appeared to: provide more meaningful reviews of firms’ public disclosures and marketing materials; test the adequacy and specificity of existing ESG-related policies and procedures, if any (or assess whether enhanced or separate ESG-related policies and procedures were necessary); evaluate whether firms’ portfolio management processes aligned with their stated ESG investing approaches; and test the adequacy of documentation of ESG related investment decisions and adherence to clients’ investment preferences (ESG Risk Alert). https://www.sec.gov/files/esg-risk-alert.pdf.

12 Deloitte’s global risk management survey, 12th edition, noted the growing concern over climate risk and increasing attention on the social responsibility of business, with 47% of respondents indicating that it will be an extremely or very high priority for their institutions to improve their ability to manage ESG, including climate risk ("Deloitte Survey"). https://www2.deloitte.com/us/en/insights/industry/financial-services/global-risk-management-survey-financial-services.html.
stewardship initiatives and governance proposals\textsuperscript{13} and regulatory initiatives such as The Network for Greening the Financial System.\textsuperscript{14}

In May 2021, the Biden administration issued an executive order to strengthen the U.S. financial system against climate-related risks.\textsuperscript{15} The order instructs the U.S. Treasury Department to work with the other members of the Financial Stability Oversight Council ("FSOC") to report how they plan to reduce risks to financial stability, by improving climate-related financial disclosures to better measure their potential exposure. The order also provides for the development of a

\textsuperscript{13} The proxy advisory firm Institutional Shareholder Services recommends including reference to risk oversight as part of its criteria for choosing when to recommend withhold votes in uncontested director elections. Specifically, in cases where companies are targeted in connection with public “vote-no” campaigns, evaluate director nominees under the existing governance policies for voting on director nominees in uncontested elections. Take into consideration the arguments submitted by shareholders and other publicly available information. Examples of failure of risk oversight include but are not limited to bribery; large or serial fines or sanctions from regulatory bodies; demonstrably poor risk oversight of environmental and social issues, including climate change; significant adverse legal judgments or settlement; or hedging of company stock. https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf.

\textsuperscript{14} In December 2017, eight central banks and supervisors (now currently 83 members and 13 observers) established a Network of Central Banks and Supervisors for Greening the Financial System (NGFS), to help strengthen the global response required to meet the goals of the Paris agreement and to enhance the role of the financial system to manage risks and to mobilize capital for green and low-carbon investments in the broader context of environmentally sustainable development. https://www.banque-france.fr/en/financial-stability/international-role/network-greening-financial-system. The NGFS published an “Overview of Environmental Risk Analysis (ERA) by Financial Institutions,” which provides a list of examples of how environmental risks are transmitted to financial risks, and a review of the tools and methodologies for ERA used by financial institutions: including banks, asset managers and insurance companies. The NGFS also published an Occasional Paper, “Case Studies of Environmental Risk Analysis Methodologies,” to provide a comprehensive review of the tools and methodologies for ERA used by some financial institutions including banks, asset managers and insurance companies. https://www.ngfs.net/sites/default/files/medias/documents/case_studies_of_environmental_risk_analysis_methodologies.pdf.

“Whole-of-Government Approach”\textsuperscript{16} to mitigate climate-related financial risk, by requiring the National Climate Advisor and the Director of the National Economic Council to develop, within 120 days, a comprehensive government-wide climate-risk strategy to identify and disclose climate-related financial risk to government programs, assets, and liabilities. This strategy will identify the public and private financing needed to reach economy wide net-zero emissions by 2050.\textsuperscript{17}

While firms have viewed for example, legal, compliance, financial and operational risks as traditional components of their ERM utilizing Value at Risk (“VaR”)\textsuperscript{18} as a risk management tool,

\textsuperscript{16}In March 2021, the Federal Reserve Board (FRB) announced that it had created a Financial Stability Climate Committee (FSCC) to identify, assess, and address climate-related risks to financial stability. The FRB previously announced the establishment of a new Supervision Climate Committee (SCC) to strengthen the FRB’s capacity to identify and assess financial risks from climate change and to develop a program to ensure the resilience of supervised financial institutions to those risks. The SCC’s micro-prudential work is intended to ensure the safety and soundness of financial institutions and constitutes one core pillar of the FRB’s framework for addressing the economic and financial consequences of climate change. The FSCC, in contrast, will examine the macro-prudential aspects of climate change, including the potential for climate-generated economic shocks and how climate change could exacerbate these shocks and cause broader impacts that could harm households, businesses, and communities. The FSCC will also coordinate with the SCC and FSOC to develop an integrated approach to climate change risk. https://www.federalreserve.gov/newsevents/speech/brainard20210323a.htm. https://www.newyorkfed.org/newsevents/news/aboutthefed/2021/20210125. On March 17, 2021, the Commodity Futures Trading Commission (CFTC) announced the establishment of an interdivisional Climate Risk Unit (CRU) to assess the risks to US financial stability posed by climate change. https://www.cftc.gov/PressRoom/PressReleases/8368-21. On Mar 4, 2021, the SEC announced the creation of an Enforcement Task Force Focused on Climate and ESG Issues to proactively identify ESG-related misconduct, with an initial focus on identifying any material gaps or misstatements in issuers’ disclosure of climate risks under existing rules. The task force will also analyze disclosure and compliance issues relating to investment advisers’ and funds’ ESG strategies. https://www.sec.gov/news/press-release/2021-42.


\textsuperscript{18}Value at Risk measures the potential loss in value of a risky asset or portfolio over a defined period for a given confidence interval. It is sometimes defined more narrowly as the possible loss in value from “normal market risk” as opposed to all risk, requiring distinctions between normal and abnormal risk as well as between market and nonmarket risk. Value at Risk has been used most often by commercial and investment banks to capture the potential loss in value of their
today they are beginning to view (and potentially may be mandated) these traditional indica through a broader prism of ESG and climate risk. For example, the implementation of “Climate VaR”\(^\text{19}\) to address the potential to find “Green Swans” in the financial system has been recommended as a means of addressing climate related ERM risk. In addition, there has been increased focus on Data Privacy and Cybersecurity through regulatory guidance\(^\text{20}\) and by companies seeking to appoint data and cyber\(^\text{21}\) and climate competent boards through the establishment of more diverse boards driven in part by shareholder demands.\(^\text{22}\) Companies and

traded portfolios from adverse market movements over a specified period compared to their available capital and cash reserves to ensure that the losses can be covered without putting the firms at risk. [http://people.stern.nyu.edu/adamodar/pfiles/papers/VAR.pdf](http://people.stern.nyu.edu/adamodar/pfiles/papers/VAR.pdf).

\(^\text{19}\) Climate Value-at-Risk (Climate VaR) is designed to provide a forward-looking and return-based valuation assessment to measure climate related risks and opportunities in an investment portfolio. The fully quantitative model offers deep insights into how climate change could affect company valuations. [https://www.msci.com/documents/1296102/16985724/MSCI-ClimateVaR-Introduction-Feb2020.pdf/f0ff1d77-3278-e409-7a2a-bf1da9d53f30?_=1580472788213](https://www.msci.com/documents/1296102/16985724/MSCI-ClimateVaR-Introduction-Feb2020.pdf/f0ff1d77-3278-e409-7a2a-bf1da9d53f30?_=1580472788213).

\(^\text{20}\) In 2018, the SEC published new guidance regarding public company disclosures about cybersecurity risks and incidents. The guidance consolidated and expanded upon the SEC’s prior guidance on disclosure obligations relating to cybersecurity. The guidance provided additional insights instructive to public companies regarding: (1) the materiality of a cybersecurity risk or incident, (2) the timing of disclosures relating to a cybersecurity incident, (3) disclosures about board oversight, (4) insider trading, (5) cybersecurity policies and procedures, (6) cybersecurity assessments, and (7) regulatory and litigation risk. [https://www.sec.gov/rules/interp/2018/33-10459.pdf](https://www.sec.gov/rules/interp/2018/33-10459.pdf).

\(^\text{21}\) According to the [Gartner 2020 Board of Directors Survey](https://www.gartner.com/en/newsroom/press-releases/2021-01-28-gartner-predicts-40--of-boards-will-have-a-dedicated), cybersecurity-related risk is rated as the second-highest source of risk for the enterprise, following regulatory compliance risk. However, relatively few directors feel confident that their company is properly secured against a cyberattack. To ensure that cyber risk receives the attention it deserves, many boards of directors are forming dedicated committees that allow for discussion of cybersecurity matters in a confidential environment, led by someone deemed suitably qualified. According to the survey, by 2025, 40% of boards of directors will have a dedicated cybersecurity committee overseen by a qualified board member, up from less than 10% today, and that by 2025, 50% of asset-intensive organizations will converge their cyber, physical and supply chain security teams under one chief security officer role that reports directly to the CEO. [https://www.gartner.com/en/newsroom/press-releases/2021-01-28-gartner-predicts-40--of-boards-will-have-a-dedicated](https://www.gartner.com/en/newsroom/press-releases/2021-01-28-gartner-predicts-40--of-boards-will-have-a-dedicated).

\(^\text{22}\) CalPERS has raised the need for climate change competence in the boardroom. Hedge funds such as TCI Fund Management have indicated its expectations for the Boards of the companies it invests in as well. [https://www.calpers.ca.gov/docs/forms-publications/governance-and-](https://www.calpers.ca.gov/docs/forms-publications/governance-and-).
boards are recognizing the need to embrace the benefits of diversity at the board level particularly when change is required such as the need to address climate change, and cyber risk. For example, The National Association of Corporate Directors (NACD), commissioned a Blue-Ribbon Commission to explore building and maintaining a strategic-asset board, focusing on issues such as board composition and diversity, succession planning, board-evaluation processes, and ongoing director-skills development. Despite demands for more climate competent boards, progress has been slow and there remains work to be done.

The Convergence of Data and Cybersecurity Risk

The exponential use of data, vendors that generate and sort data, and the increased automation of financial services firms’ business and compliance processes, highlights two important and interrelated concerns: cybersecurity and data governance, quality and integrity. The more


23 Why the focus is shifting to boards on cybersecurity. https://www.ft.com/content/c70ca94-2d88-3ebe-b802-79e9bacf32c.


25 According to a study by New York University’s Stern Center for Sustainable Business, only 7 per cent of board members were “climate competent.” The study analyzed the biographies of 1,188 board members at the 100 largest U.S. companies, and three (0.2%) directors had specific climate expertise, and only 6 per cent had broader environmental experience. This dearth of climate competent board members is concerning because since the beginning of 2020, the number of the largest companies with a net-zero emissions target has tripled to at least 1,500—with few firms having a detailed plan for reaching those targets. https://www.ft.com/content/611522b7-8cf6-4340-bc8a-f4e92782567c. See also U.S. Corporate Boards Suffer from Inadequate Expertise in Financially Material ESG Matters, NYU Stern School of Business Forthcoming, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3758584.

26 The Deloitte Survey noted that while institutions have faced cyberattacks for several years, the threat has grown with many employees working at home. Only 61% of respondents considered their institutions to be extremely or very effective at managing cybersecurity risk, and 87% said that improving their ability to manage cybersecurity risk will be an extremely or very high priority over the next two years. https://www2.deloitte.com/us/en/insights/industry/financial-services/global-risk-management-survey-financial-services.html.

27 In it 2016 Annual Exam Priorities Letter, FINRA noted that it would be examining firms’ data governance, quality controls and reporting practices to ensure the accuracy, completeness,
that data is automated, the more it is susceptible to cyber hacking\textsuperscript{28} and cyber ransom. The more data firms are awash in it, the more concerns there are about its integrity. e.g., false positives on money laundering transaction monitoring.\textsuperscript{29}

**Regulatory Guidance During the Pandemic**

With certain limited exceptions,\textsuperscript{30} a broker-dealer is generally provided with some flexibility to design and implement a supervisory system appropriately tailored to and necessary for its businesses and structures.\textsuperscript{31} During the pandemic, brokerage firms implemented teleworking consistency, and timeliness of data reported to firm management and to firms’ surveillance and supervisory systems. FINRA has observed that operational problems firms experience can originate from data quality and integrity issues, which can undermine a firm’s ability to monitor or report key information that is needed to effectively manage its risk and business activities. For example, FINRA has observed problems with firms’ automated AML surveillance systems not capturing complete and accurate data, which can result in missed or poor-quality alerts. https://www.finra.org/rules-guidance/communications-firms/2016-exam-priorities.

\textsuperscript{28} In February 2016, hackers targeted the central bank of Bangladesh and exploited vulnerabilities in The Society for Worldwide Interbank Financial Telecommunication (SWIFT) attempting to steal $1 billion. While most transactions were blocked, $101 million still disappeared. This incident was a wake-up call that systemic cyber risks in the financial system had been underestimated. https://www.imf.org/external/pubs/ft/fandd/2021/03/pdf/global-cyber-threat-to-financial-systems-maurer.pdf.

\textsuperscript{29} This has also placed an added emphasis on Know Your Employee and Know Your Data, which some believe have overtaken KYC as potentially greater risk to corporations, particularly regarding AML Compliance. Increasingly financial institutions desire to improve their data quality and availability through better data governance is often driven by regulations to implement such program to ensure compliance with the requirements for example of NYDFS Superintendent’s Regulations Part 504 (NYDFS Part 504). https://www.dfs.ny.gov/docs/legal/regulations/adoptions/dfsp504t.pdf.


arrangements for their staffs. In addition to the added complexity of this situation, the issue of data integrity and cybersecurity – due to the more disaggregated way firms are operating – is also a continuing risk for firms which predate the pandemic.\textsuperscript{32} In 2020, FINRA published guidance that addressed, among other things, the supervisory obligations of member firms that used remote offices or telework arrangements” in response to the pandemic.\textsuperscript{33} These arrangements may have resulted in registered representatives working in a different environment (e.g., at their homes instead of in their office), and supervising many remote locations may have presented significant challenges or unique considerations that do not exist when supervising non-remote locations. As a result, the use of remote offices or telework arrangements during a pandemic may necessitate a member firm to implement other ways to supervise its associated persons who changed their work locations or arrangements for the duration of the pandemic.\textsuperscript{34}

Regulatory guidance also focused on firms assessing whether their remote supervision procedures appropriately address concerns that may be exacerbated when employees are working remotely, such as those involving cybersecurity.\textsuperscript{35} Cybersecurity has and continues to be an issue for all financial services firms and their defenses – while being assessed and augmented may still

\footnotesize

\textsuperscript{32} \url{https://www.finra.org/sites/default/files/2019_Risk_Monitoring_and_Examination_Priorities_Letter.pdf}


\textsuperscript{34} This guidance is similar to that which FINRA issued in 2009 following the H1N1 (swine flu) pandemic. FINRA Notice 09-59, Business Continuity Planning: FINRA Provides Guidance on Pandemic Preparedness (Oct. 12, 2009). \url{https://www.finra.org/rules-guidance/notices/09-59}.

\textsuperscript{35} \url{https://www.finra.org/sites/default/files/Cybersecurity_Report_2018.pdf}. 
need further funding prioritization. In addition, the 2021 Report on FINRA’s Examination and Risk Monitoring Program highlights, among other priorities, cybersecurity.

Further, in 2020, the SEC published a COVID-19 Risk Alert to share observations from its work and provided observations and recommendations to assist firms’ pandemic responses. In addition to the cybersecurity recommendations in the COVID-19 Risk Alert, it published two cyber-specific risk alerts in conjunction with its heightened focus in this area since the onset of the pandemic. Its 2020 Ransomware Risk Alert highlighted the risk and provided observations regarding ransomware attacks, which occur when perpetrators hack into a victim’s computer system, seizing control and encrypting data, then demand compensation (a ransom) in exchange for maintaining the integrity and/or confidentiality of customer data, or for the return of control over the firm’s system(s).

In addition, in 2020, the SEC issued its Credential Compromise Risk Alert highlighting observations and responses to credential stuffing attacks, which exploit the tendency for people to reuse their passwords across multiple websites and systems, by cyber attackers who obtain lists of previously compromised usernames, email addresses, and corresponding passwords from the dark web in an attempt to log in and gain unauthorized access to a customer account. These risk alerts built on a special report published in 2020 on Cybersecurity and Resiliency Observations that highlighted the importance of strong cyber-hygiene and protections. Cybersecurity and related issues continue to be an SEC priority in 2021 as it advised that it would work with firms to identify and address

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36 Esther Shein, 80% of senior IT leaders see cybersecurity protection deficits, TechRepublic.com, March 5, 2021. https://www.techrepublic.com/article/80-of-senior-it-leaders-see-cybersecurity-protection-deficits/. The article notes that a lack of confidence in companies’ defenses is prompting 91% of organizations to boost 2021 budgets, according to a new IDG/Insight Enterprises study.


information security risks, including cyber-attack related risks, and encourages market participants to actively and effectively engage regulators and law enforcement in this effort.\textsuperscript{42}

The FINRA 2019 Risk Monitoring and Examination Priorities Letter \textsuperscript{43} identified topics that FINRA would continue to review the adequacy of firms’ cybersecurity programs to protect sensitive information, including personally identifiable information. FINRA had the prior year published its \textit{Report on Selected Cybersecurity Practices – 2018},\textsuperscript{44} providing additional information on practices that may help firms strengthen their cybersecurity programs to make their compliance efforts more efficient, effective and risk-based. FINRA also noted that it would engage with firms to understand how they are using RegTech tools and addressing related risks, challenges, or regulatory concerns – including those relating to supervision and governance systems, third-party vendor management, safeguarding customer data and cybersecurity. FINRA published its 2021 \textit{Report on FINRA’s Examination and Risk Monitoring Program} highlighting it focus on, among other things, cybersecurity, and Anti-Money Laundering (“AML”).\textsuperscript{45}

\section*{Trends in Data}

Today data has grown exponentially. The International Data Corporation (“IDC”) forecasts that by 2025 the global datasphere will grow to 163 zettabytes (a trillion gigabytes), which is 10 times the data generated in 2016. This necessitates adequate data governance procedures and policies.\textsuperscript{46} Data can be a source of significant competitive advantage; if it is timely, relevant, 

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\textsuperscript{42} In its 2021 Examination Priorities it noted that the SEC will review whether firms have taken appropriate measures to: (1) safeguard customer accounts and prevent account intrusions, including verifying an investor’s identity to prevent unauthorized account access; (2) oversee vendors and service providers; (3) address malicious email activities, such as phishing or account intrusions; (4) respond to incidents, including those related to ransomware attacks; and (5) manage operational risk as a result of dispersed employees in a work-from-home environment. Its division of Examinations will also focus on controls surrounding online and mobile application access to investor account information, the controls surrounding the electronic storage of books and records and personally identifiable information maintained with third-party cloud service providers, and firms’ policies and procedures to protect investor records and information. \url{https://www.sec.gov/files/2021-exam-priorities.pdf}.
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\textsuperscript{43} \url{https://www.finra.org/rules-guidance/guidance/exam-priority-letters}.
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\textsuperscript{44} \url{https://www.finra.org/media-center/news-releases/2018/finra-publishes-report-selected-cybersecurity-practices-2018}.
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\textsuperscript{46} IDC, Data Age 2025: The Evolution of Data to Life-Critical: Don’t Focus on Big Data; Focus on the Data That’s Big. \url{https://assets.ey.com/content/dam/ey/sites/ey-}
\end{flushleft}
verifiable, and personalized to meet a variety of stakeholder requirements. However, it is easy for firms to become overwhelmed by the volume and complexity of unstructured data, and the inability to understand and interpret it.47

Data Integrity

Evolving compliance and operational risk management challenges for financial services firms are related to the governance and control environments specific to the data that is relied upon to ensure that they continue to meet an expanding list of ongoing regulatory and compliance requirements aimed at customer protection, market integrity and increasingly climate risk in the future. More transactions equal more data. As transaction volumes have increased exponentially over the last several years, the amount of data being created and stored by broker-dealers has increased accordingly. This data often exists and cuts across many platforms — some sophisticated, some not so much. These can include antiquated proprietary systems, third party vendor systems, End User Computing ("EUC") platforms and spreadsheets, emails, word documents, etc. 48

Data Governance

Proper data governance is vital for banks and financial services companies, due to increasing frequency of data breaches and increasing regulatory oversight.49 Data governance also helps


48 EUC is a system in which individuals can create working applications beyond the divided development process of design, build, test, and release that is generally followed by professional software engineering teams. Microsoft Excel is one of the most common examples of EUC. EUCs are essential to many financial operations, allowing users to manage and manipulate data quickly and efficiently making EUC appealing and critical to business structures, but also difficult to manage/control. EUC applications are not subject to the same monitoring as traditional applications, and frequently management does not have visibility over how integral the use of EUCs is within the company. Because of this, many of the advantages of EUCs have begun presenting risks to the businesses that rely so much on them. https://www.clusterseven.com/end-user-computing-risk-management/.

49 In FINRA’s 2016 Regulatory and Examination Priorities Letter it noted that areas of focus included: firms’ supervision and risk management practices related to their technology infrastructure, including the hardware, software and personnel who develop and maintain a firm’s information technology systems. FINRA’s focus was on firms’ supervision and risk management related to cybersecurity, technology management, and data quality and governance. In addition, it remains focused on firms’ cybersecurity preparedness given the persistence of threats and our observations on the continued need for firms to improve their cybersecurity defenses. FINRA’s
financial services organizations understand their data; is essential to protecting that data and to helping comply with government and industry regulations. Financial service companies have a need for robust data governance due to the nature and volume of the data held. Data governance is also an important aspect of corporate governance and compliance today with KYD as equally important to firms as KYC, with several iterations in between.

Data governance and loss prevention protocols can be used to protect customer and firm information privacy. If a financial institution has strict controls over who can access and use reviews focused on firms’ approaches to cybersecurity risk management and depending on a firm’s business and risk profile: governance, risk assessment, technical controls, incident response, vendor management, data loss prevention and staff training. As part of these reviews, FINRA considered firms’ abilities to protect the confidentiality, integrity and availability of sensitive customer and other information, including compliance with SEC Regulation S-P and Securities Exchange Act (SEA) Rule 17a-4(f), the latter of which requires electronically stored records to be preserved in a non-rewriteable, non-erasable format. [https://www.finra.org/rules-guidance/communications-firms/2016-exam-priorities.](https://www.finra.org/rules-guidance/communications-firms/2016-exam-priorities)

50 For example, the aggregation of data from multiple sources for sanctions screening creates the possibility that data integrity issues may arise. A financial service organization should for example, consider establishing processes to ensure source and list data used in the screening process is both accurate and complete. See Wolfsberg 2019 Guidance 3.5 Data Integrity. [https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/Wolfsberg%20Guidance%20on%20Sanctions%20Screening.pdf](https://www.wolfsberg-principles.com/sites/default/files/wb/pdfs/Wolfsberg%20Guidance%20on%20Sanctions%20Screening.pdf)


52 The SEC has noted the following practices, among others, with respect to data management: Vulnerability Scanning-establishing a vulnerability management program that includes routine scans of software code, web applications, servers and databases, workstations, and endpoints both within the organization and applicable third party providers; Perimeter Security-Implementing capabilities that are able to control, monitor, and inspect all incoming and outgoing network traffic to prevent unauthorized or harmful traffic; Detective Security. Implementing capabilities that can detect threats on endpoints; Patch Management-establishing a patch management program covering all software and hardware, including anti-virus and anti-malware installation; Inventory Hardware and Software-maintaining an inventory of hardware and software assets, including identification of critical assets and information; Encryption and Network Segmentation-using tools and processes to secure data and systems; Insider Threat Monitoring-
sensitive data, it can better ensure that it not lost, misused, or accessed by unauthorized users or that its’ integrity is compromised. This is particularly important with personal data that is used in AML/KYC reviews.\textsuperscript{53} Data governance frameworks should help to make data more consistent, accurate and complete – thereby improving data quality- a vitally important requirement for further integration and acceptability of ESG investing-a source of complaints by various stakeholders in this area. \textsuperscript{54} Implemented correctly, a better approach to data management should also lower compliance risk, including the risk of regulatory fines and sanctions.

To promote consistency and uniformity in ESG practices, the Open-Source Climate Initiative (OSCI) was established with the goal of creating an open-source data common, providing easier access for anyone seeking information on companies’ environmental performance. It is planning to develop a repository of tools that investors and regulators can use to perform climate risk “scenario analyses” and to help companies establish a path to net-zero emissions.\textsuperscript{55} This may be helpful to firms in complying with their Regulation Best Interest (Regulation BI)\textsuperscript{56} requirements in connection with the recommendation of ESG products and to regulators in their examinations of firms for compliance with Regulation BI.

\begin{itemize}
\item Creating an insider threat program to identify suspicious behaviors, including escalating issues to senior leadership as appropriate; and increasing the depth and frequency of testing of business systems and conducting penetration tests.
\end{itemize}


\textsuperscript{56} [https://www.sec.gov/regulation-best-interest](https://www.sec.gov/regulation-best-interest).
There can be a variety of sources of “Bad Data”\(^57\) such as: mergers & acquisitions,\(^58\) additional new databases, EUC risks, new product launches, siloed data sources across an enterprise, legacy systems that don’t talk to new systems, a lack of budget to clean up inaccurate data entry, IT transformation and migration, and human error. Proper data governance practices can improve performance, alleviate internal issues pertaining to data, prevent potential data breaches, and mitigate compliance and regulatory exposure.\(^59\) Alternatively, weak data governance can make it difficult to get consistent data for screening for example for OFAC/AML\(^60\) compliance purposes,\(^61\) resulting in duplicate records and duplicate alerts - diverting compliance resources;


\(^58\) Deloitte’s 2018 Banking and Securities M&A Outlook noted that there is reason to believe the Mergers and Acquisitions (M and A) market would increase for financial technology (i.e., fintech) firms. Such transactions result in more data, new applications and processes that must be harmonized with existing systems in some cases all resulting in complexity. The report noted that integrations can be difficult, and there is an increased likelihood of “data sprawl and data silos.” Data governance helps organizations better understand the data, and to discern gaps and redundancies. [https://www2.deloitte.com/br/en/pages/financial-services/articles/banking-securities-mergers-acquisitions-outlook-trends1.html](https://www2.deloitte.com/br/en/pages/financial-services/articles/banking-securities-mergers-acquisitions-outlook-trends1.html)

\(^59\) According to research by IBM, 45 percent of bankers say partnerships and alliances help improve their agility and competitiveness. Financial services data governance can better enable: The personalized, self-service, applications customers want; The machine learning solutions that automate decision-making and create more efficient business processes; Faster and more accurate identification of cross-sell and upsell opportunities; Better decision-making about the application portfolio, M&A targets, M&A success and more. [https://www.ibm.com/downloads/cas/DAZBRZLM](https://www.ibm.com/downloads/cas/DAZBRZLM)

\(^60\) Without proper data governance, firms cannot focus on real risk or identify hidden risk. Since 2009, OFAC has issued 181 penalties; each penalty has averaged over $20 million. Penalties and settlement amounts per OFAC enforcement case in 2018 ranged from $88k to $54 million. Source: Fin GMC. Challenges and Best Practices of PEP & Sanctions Screening Part 1: Importance of Data. [www.innovativesystems.com](http://www.innovativesystems.com)

\(^61\) In its 2018 Annual Exam Priorities Letter, FINRA noted that FINRA will assess firms’ compliance with FinCEN’s Customer Due Diligence (CDD) rule, which became effective on May 11, 2018. The CDD rule requires that firms identify beneficial owners of legal entity customers, understand the nature and purpose of customer accounts, conduct ongoing monitoring of customer accounts to identify and report suspicious transactions and, on a risk basis, update customer information. According to its letter, FINRA focused on the data integrity of those suspicious activity monitoring
or, for merged companies, each database was built for its own business purpose and not for compliance, therefore, creating issues when brought together for compliance purposes. The holistic view of data that results from a strong data governance initiative is becoming essential to regulatory compliance. According to a 2017 survey by Erwin Inc. and UBM, 60% of organizations said compliance drives their data governance initiatives.\(^\text{62}\) Remember, a firm’s compliance and supervisory systems are only as good as the integrity of the data it receives and reviews.

**Trends in Surveillance**

Increasingly Web and social media data, (including Facebook, Twitter, LinkedIn), and blogs are increasingly the focus of financial services compliance and technology efforts.\(^\text{63}\) In this regard, financial services companies now try to integrate this data with other information such as outside business activities\(^\text{64}\) and private securities transactions\(^\text{65}\) to obtain a more holistic profile of their employees; and it is part of a trend towards more integrated surveillance. This is part of the evolving trend in the *three lines of defense*\(^\text{66}\) of supervision.\(^\text{67}\) To the extent that the three lines of

 systems, as well as the decisions associated with changes to those systems.


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Many FINRA firms rely on Smarsh to help them comply with books and records rules (SEC 17a-3 and 17a-4), the FINRA Communications Rules (2210, 2212–2216), supervision guidelines and ongoing guidance around websites, blogs, and social media.


\(^\text{66}\) The traditional three lines of defense consisted of: (1)-Supervision by Business Personnel-Risk Owners; (2) Independent Risk Management by Compliance and (3) and Independent Audit. https://www.bis.org/publ/bcbs292.pdf. https://www.bis.org/publ/bcbs195.pdf.

\(^\text{67}\) The original Three Lines of Defense model consisted of the first line (risk owners/managers), the second line (risk control and compliance), and the third line (risk assurance). Each line reported up to senior management, with the third line of internal audit representing the last wall before external audit and regulators. The updated model adopts a six-step, principles-based approach. It encourages the governing body to provide delegation and direction to each line, with the lines
defense support ERM, (as noted above there has been a focus on viewing risk through a broader prism of ESG and climate related risk)—perhaps we will soon have the “Green Lines of Defense” or add sustainability to the traditional three lines of defense and have a fourth line, to reflect specific governance features of regulated financial institutions, \(^{68}\) (which as noted above is becoming more ESG and climate-centric in its focus).

**Trends in Alternative Data**

In addition, as regulatory requirements and market developments have commoditized aspects of traditional sell-side research, investment firms are repurposing aspects of their business to function as data aggregators and distributors for their hedge fund clients using drones, spatial recognition and mapping tools formulated to take advantage of temporal and price arbitrage opportunities in volatile markets.\(^{69}\) For example, a hedge fund may use this capability to process information relating to weather and commodity prices. This real-time data needs to be governed. Other examples include following “meme” stocks\(^{70}\) and trading patterns on social media, such as Twitter and Instagram feeds, commercial market indicia such as “web luminosity” (the number of citations a company receives on its products and brands in reviews, social media and other web content; and its relationship with that company’s fundamentals and stock performance).\(^{71}\) It is worth noting that “meme” stocks have already received their own “Know Your” designation – Know Your Meme providing accountability and reporting in return. The roles of the first line (“provision of products/services to clients; managing risk) and second line (“expertise, support, monitoring and challenge on risk-related matters”) both fall under management, while the third line (“independent and objective assurance and advice on all matters related to the achievement of objectives”) still lives under internal audit. The model encourages management and internal audit to coordinate response. [https://www.complianceweek.com/risk-management/jias-three-lines-of-defense-updated-to-stress-collaboration/29212.article](https://www.complianceweek.com/risk-management/jias-three-lines-of-defense-updated-to-stress-collaboration/29212.article)

\(^{68}\) For a detailed discussion of expanding the three-lines-of-defense model further to reflect specific governance features of regulated financial institutions. See Isabella Arndorfer, Bank for International Settlements and Andrea Minto, Utrecht University, Occasional Paper No 11 The “four lines of defense model” for financial institutions, Financial Stability Institute, [https://www.bis.org/fsi/fsipapers11.pdf](https://www.bis.org/fsi/fsipapers11.pdf).


\(^{70}\) Recurring volatility in some “meme” stocks highlight the tension between individual investors and short sellers, months after the volatility in GameStop. [https://www.reuters.com/business/new-meme-stocks-swing-shorts-retail-investors-face-off-again-2021-04-30/](https://www.reuters.com/business/new-meme-stocks-swing-shorts-retail-investors-face-off-again-2021-04-30/).

\(^{71}\) [https://www.msci.com/www/blog-posts/more-than-a-feeling-quantifying/01541639111](https://www.msci.com/www/blog-posts/more-than-a-feeling-quantifying/01541639111).
Stock (“KYMe”) in guidance issued about regulatory trends in this area. It has been reported that the SEC is reviewing existing rules and considering new rules for “Apps” that “Gamify” trading, in addition to actions it has already taken.

While providing benefits to certain market participants, alternative data also poses potential legal and regulatory risks for firms that utilize it including: anti-hacking issues; breach of contract and terms of use; copyright infringement; misappropriation; potentially inappropriate use of nonpublic personally identifiable information; inadequate policies and procedures to prevent violations in connection with the potential use of material non-public information (“MNPI”); and reputational risk associated with inappropriate sourcing, vetting, or use of the data. Given such risk, firms should implement third-party due diligence procedures that include due diligence


75 In February 2021, as part of its efforts to respond to potential attempts to exploit investors during recent stock market volatility, the SEC suspended trading in the securities of 15 companies because of questionable trading and social media activity.

76 In its 2020 Examination Priorities, the SEC highlighted alternative data issues, stating that examinations will focus on firms’ use of these data sets and technologies and that the SEC would assess the effectiveness of related compliance and control functions. Third party vendor management was also another priority, https://www.sec.gov/news/press-release/2020-4. https://www.sec.gov/news/press-release/2021-35.

77 Under Section 204A of the Investment Advisers Act of 1940, all investment advisers, are required to “establish, maintain, and enforce written policies and procedures reasonably designed, taking into consideration the nature of such investment adviser’s business, to prevent the misuse of MNPI. https://www.law.cornell.edu/uscode/text/15/80b-4a. See also Section 15(g) of the Securities Exchange Act of 1934. https://www.law.cornell.edu/uscode/text/15/78o.

78 In Regulatory Notice 05-48, FINRA advised that outsourcing an activity or function to a third party does not relieve firms of their ultimate responsibility for compliance with all applicable federal securities laws and regulations and FINRA and MSRB rules regarding the outsourced activity or function. Accordingly, firms may need to adjust their supervisory structure to ensure that an appropriately qualified person monitors the arrangement. This includes conducting a due diligence analysis of the third-party service provider. https://www.finra.org/rules-guidance/notices/05-48. See also FINRA Regulatory Notice 18-31 which provides guidance
Evolving Data-Market Trading Ecosystem

The capital markets ecosystem is comprised of several groups: issuers, buy-side and sell-side firms, high-frequency traders (“HFTs”) and hedge funds, among others. Increasingly, hedge funds and HFTs utilize machine learning and AI\textsuperscript{79} to improve investment results, i.e., generate alpha. AI generates data. Approximately 20 billion Internet of Things (IOT) devices are online currently and by 2025, is expected to reach 75 billion devices. In addition, there are expected to be 4.8 billion internet users by 2022, up from 3.4 billion in 2017. It is estimated that 80\% of data will be unstructured-text centric: dates, numbers, and facts, not in a pre-defined manner.\textsuperscript{80} In addition, such funds also utilize alternative data in their investment decision process;\textsuperscript{81} and in some

\textsuperscript{79} Approximately, one-third of Bloomberg News content is generated by some form of automated technology, which can dissect a financial report the moment it appears and generate news story with pertinent facts. Source: NIRI IR Update, Fall 2020 referencing Think Tank Report: “The Disruption Opportunity,” December 2019. \url{https://www.niri.org/NIRI/media/NIRI/IRUpdates/2019%20IR%20Update/001157_NIRI_Fall2019_FINAL.pdf}.


\textsuperscript{81} There are approximately 400 percent more alternative data analysts over the last 5 years; 77\% of buy-side firms are seeking to or are already using alternative data to inform investment process and strategies; and approximately $901 million was spent on alternative data sets by 2021 – a growth of 19.2\% every year. \url{https://services.google.com/fh/files/misc/generating_alpha_with_google_cloud.pdf}. 
instances, this alternative data can be obtained without contacting an issuer — presenting investment ideas for market participants but challenges for the issuers.\textsuperscript{82}

**Compliance Requirements and Trends**

Today, many post-crisis prudential policies have been implemented, and banks for example are better capitalized with more liquidity than they were pre-crisis. Banks and other financial services companies have been increasingly more focused on:

- culture and governance;
- the challenges and opportunities from new technology and innovation generally;\textsuperscript{83} and
- emerging economic, market, and operational risks.

They are addressing the above concerns through an expanded universe of Know Your requirements. The Know Yous have evolved from the traditional ones to many that are an

\textsuperscript{82} For example, Aquantix (an AI Vendor) utilizes satellite imagery, weather-station data and regulatory documents scraped from the internet and it can estimate: How much water a business uses at its various sites; the chances of drought or flooding in surrounding areas; and the financial impact such disasters could have—all without contacting the company. Its tool is useful to investors assessing water risk. It notes that at current rates of consumption, demand for water worldwide will be 40% greater than its supply by 2030, with resulting physical, reputational, and regulatory water risk potentially impacting investment returns especially in industries such as food, mining, textiles, and utilities. https://www.f6s.com/aquantix.ai.

\textsuperscript{83} While blockchain technology has been embraced by the financial services industry as the technology permits secure transactions to be made without the involvement of intermediaries, making payment systems more efficient and less costly and thereby supporting financial inclusion as a result, it is not however, an unqualified innovative breakthrough. In this regard, there are several issues pertaining to it which firms may have to increasingly address as cryptocurrencies become more integrated into the traditional investment thesis. First, is its nexus to illicit finance. A Wall Street Journal article cited data from Chainalysis, a crypto security company, indicating that in 2020 illicit entities revived approximately $4.9 billion in crypto payments, with the fats growing category being ransomware payments. https://www.wsj.com/articles/cryptocurrency-has-yet-to-make-the-world-a-better-place-11621519381. See also FinCen guidance and proposed rulemaking on crypto currencies. https://www.fincen.gov/news/news-releases/new-fincen-guidance-affirms-its-longstanding-regulatory-framework-virtual and https://www.fincen.gov/news/news-releases/fincen-extends-comment-period-rule-aimed-closing-anti-money-laundering. Secondly, certain cryptocurrencies consume a significant amount of electricity (in some instances as much as a medium size country) raising issues with respect to the environmental impact of such currencies. https://www.ft.com/content/1aeb2db-8f61-427c-8841-3b929291c8ac.
outgrowth of technological and financial innovation. The traditional Know Yous have been impacted by the financialization of the world economy and the increased flow of illicit finance.\(^{84}\)

For example:

- Know Your Customer ("KYC"); and related suitability requirements\(^ {85}\);
- Know Your Country ("KY Country")\(^ {86}\);
- Know Your Product ("KYP")\(^ {88}\)

\(^{84}\) The estimated annual values of illicit financial flows include approximately a minimum of $2.6 trillion from money laundering; between $1.6 trillion to $2.2 trillion from transnational crime; and approximately $1 trillion from corruption and bribery. The Shadowy World of Illicit Finance, ACAMS, December 2020, [https://www.acamstoday.org/the-shadowy-world-of-illicit-finance/](https://www.acamstoday.org/the-shadowy-world-of-illicit-finance/).


\(^{88}\) FINRA provided guidance to firms about the supervision of complex products, which may include a security or investment strategy with novel, complicated or intricate derivative-like features, such as structured notes, inverse or leveraged exchange-traded funds, hedge funds and securitized products, such as asset-backed securities. These features may make it difficult for a retail investor to understand the essential characteristics of the product and its risks. FINRA identified characteristics that may render a product “complex” for purposes of determining whether the product should be subject to heightened supervisory and compliance procedures and provided examples of heightened procedures that may be appropriate. [https://www.finra.org/rules-guidance/notices/12-03](https://www.finra.org/rules-guidance/notices/12-03). It also recommended best practices for reviewing new products. FINRA urged firms to take a proactive approach to reviewing and improving their procedures for developing and vetting new products. At a minimum, those procedures should include clear, specific, and practical guidelines for determining what constitutes a new product, ensure that the right questions are asked and answered before a new product is offered for sale, and, when appropriate, provide for post-approval follow-up and review, particularly for products that are complex or are approved only for limited distribution. [https://www.finra.org/rules-guidance/notices/05-26](https://www.finra.org/rules-guidance/notices/05-26).
○ Know Your Entity ("KYEn"); and related AML concerns⁹⁰

Other traditional ones such as Know Your Rules have been impacted by the expansion of rules and regulations requiring more interaction with regulators, hence:

- Know Your Rules ("KYR");
  ○ Know Your Regulator ("KYRr");⁹¹
  ○ Know Your Needs ("KYN");⁹²

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⁹⁰ On January 1, 2021, the U.S. Congress passed the Corporate Transparency Act (CTA) as part of the 2021 National Defense Authorization Act and under the scope of the Anti-Money Laundering Act of 2020 (AMLA). The passage of the CTA represents a sweeping change to efforts to combat money laundering, terrorism financing, organized crime, and other financial crimes since the passage of the USA PATRIOT Act in 2001. The AMLA establishes a database to facilitate a voluntary public-private information-sharing partnership among law enforcement agencies, national security agencies, financial institutions, and the Financial Crimes Enforcement Network (FinCEN) for such purposes. The AMLA requires the Secretary of the Treasury to promulgate regulations that establish procedures for the protection of information shared and exchanged between FinCEN and the private sector, including information permitted to be given to financial institutions pursuant to the AMLA in connection with the AMLA’s purposes. The CTA requires: the establishment of new federal beneficial ownership reporting requirements for certain U.S. domiciled or active entities, including foreign entities that operate in the U.S.: and FinCEN’s maintenance of a federal database for the beneficial ownership information collected. [https://www.congress.gov/bill/116th-congress/house-bill/6395](https://www.congress.gov/bill/116th-congress/house-bill/6395).

⁹¹ Although suspended in 2019, FINRA’s Risk Control Assessment asked firm to provide information on the following: does the AML function have the opportunity to approve new business opportunities, such as new products, customers, channels; does AML function have Individual veto power over the decision to undertake the new business opportunity; does the AML function participate on a committee to approve new business opportunities. [https://www.finra.org/sites/default/files/2017_RCA_PDF.pdf](https://www.finra.org/sites/default/files/2017_RCA_PDF.pdf).

⁹² The SEC has advised that a CCO can be a “value-add” to the business and by keeping up with regulatory expectations and new rules, CCOs can assist in positioning their firms to avoid costly compliance failures and provide pro-active compliance guidance on new or amended rules. [https://www.sec.gov/news/speech/driscoll-role-cco-2020-11-19](https://www.sec.gov/news/speech/driscoll-role-cco-2020-11-19).

⁹³ The SEC also noted last year that CCOs should be provided with adequate resources, including training, automated systems, and adequate staff, and that some Investment Advisers expect the CCO to create policies and procedures but fail to give them the resources to hire personnel or
Data and technological driven changes have shifted some of the emphasis from the traditional Know Yours to the below subset:

- Know Your Employee (“KYE”);
  - Which also has implication for addressing cybersecurity and other related regulatory issues such as insider trading;
- Know Your Data (“KYD”);
  - Data Governance\(^{93}\);
- Know Your Vendor (“KYV”);\(^{94}\)
- Know Your Auditor (“KYA”);
- Know Your Model (“KYM”);
- Know Your Substance (“KYS”);\(^{95}\)

Lastly, given the depth and breadth of the recent executive order issued to address climate risk, perhaps the next iteration of Know Yours will include:

- Know Your Climate (“KYCe”);
- Know Your Environment (“KYEt”);
- Know Your Emissions (“KYE\(_e\)”);

engage vendors to provide systems to implement those policies and procedures.  

\(^{93}\) This is more vital than ever as the prolific use of alternative data has changed the investing and trading landscape. Examples of alternative data include flight trackers, social media posts, credit card transactions, satellite images (crops, slag piles at mines, etc.), Shopping center traffic, foot traffic coordinates, online communities, product pricing, and geospatial data.  
https://services.google.com/fh/files/misc/generating_alpha_with_google_cloud.pdf

\(^{94}\) The SEC has noted that practices and controls related to vendor management generally include policies and procedures related to: conducting due diligence for vendor selection; monitoring and overseeing vendors, and contract terms; assessing how vendor relationships are considered as part of the organization’s ongoing risk assessment process as well as how the organization determines the appropriate level of due diligence to conduct on a vendor; and assessing how vendors protect any accessible client information.  

Regulatory Détente

As the saying goes, “if you cannot beat them, join them.” As the fintech industry continues growing globally, issues continue to come to the forefront of regulation. To address regulatory barriers to the fintech industry - and to take a more proactive approach to regulation - innovation hubs and regulatory sandboxes have been established. By way of background, the first regulatory sandbox was set up in the UK in 2016. Since then, the Financial Conduct Authority (FCA), has interfaced with groups of firms and supported them in reducing the time and cost of getting to market while learning about their technology-driven conduct.

A sandbox is a tool that allows developers to test a technological proof of concept prior to a full-scale public release. This enables a firm the ability to amend and improve a product iteratively based on feedback before significant resources are invested in a project. In a regulated sector such as financial services, this iterative approach can be difficult for firms to replicate, particularly for startups which typically lack the regulatory approvals and capital needed to conduct real-world tests. By allowing new firms to experiment with real customers in a regulatory sandbox, regulators expect to disincentivize the tendency of firms to engage in regulatory arbitrage by relying on gaps in rules and regulations or permissive regulatory structures and/or jurisdictions to conduct their business. The sandbox enables firms to enter the financial services market and to experiment with new ideas with a degree of regulatory oversight and support. They also have potential benefits for more established firms that are looking to launch new products that do not fit easily within the structure of existing financial services regulation.

Regulatory Sandboxes are increasingly common since first established by the FCA. The Global Financial Innovation Network (GFIN) was formally launched in January 2019 by an international

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97 The FCA, in 2015, announced the establishment of the ‘Regulatory Sandbox,’ with references to innovation, preserving regulatory competitiveness globally, and the need to learn about the new technological innovations by regulators. Specifically, it noted that the sandbox was open to authorized firms, unauthorized firms that require authorization and technology businesses that are looking to deliver innovation in the UK financial services market.

The sandbox seeks to provide firms with: the ability to test products and services in a controlled environment; reduced time-to-market at potentially lower cost; support in identifying appropriate consumer protection safeguards to build into new products and services; better access to finance; [https://www.fca.org.uk/firms/innovation/regulatory-sandbox](https://www.fca.org.uk/firms/innovation/regulatory-sandbox).


group of financial regulators and related organizations, including the FCA. Its focus is to discuss and develop policies regarding financial technologies; and to help develop a “global sandbox” that will offer firms an environment in which to trial cross-border solutions. This built upon the FCA’s 2018 proposal to create a global sandbox.\textsuperscript{100} The US SEC, CFTC, OCC, and FDIC have signed onto the GFIN.\textsuperscript{101}

During the Saudi Arabian Presidency of the G20, the Bank for International Settlements (BIS) Innovation Hub launched the G20 TechSprint Initiative to highlight the potential for new technologies to resolve regulatory compliance (RegTech) and supervision (SupTech) challenges. The BIS Innovation Hub - through its Singapore Centre, and the Saudi Arabian G20 Presidency had published high-priority RegTech/SupTech operational problems and invited private firms to develop innovative technological solutions.\textsuperscript{102}

In December 2020, the SEC announced that its Strategic Hub for Innovation and Financial Technology, commonly referred to as FinHub, would become a stand-alone office. It was initially established within the Division of Corporation Finance in 2018, and it had spearheaded SEC efforts to encourage responsible innovation in the financial sector, including in evolving areas such as distributed ledger technology and digital assets, automated investment advice, digital marketplace financing, and artificial intelligence and machine learning. Through FinHub, market and technology innovators as well as domestic and international regulators have been able to engage with SEC staff on new approaches to capital formation, trading, and other financial services within the parameters of the federal securities laws.\textsuperscript{103}

FINRA’s Office of Financial Innovation (OFI) is the central point of coordination for issues related to significant financial innovations by FINRA member firms, particularly new uses of financial technology. To achieve this, OFI initiates outreach with various stakeholders, disseminates research and publications, and collaborates with other regulators on matters related to financial technology by identifying and analyzing emerging trends in the securities industry.\textsuperscript{104}

The Financial Crimes Enforcement Network (FinCEN) in 2020 began hosting “Innovation Hours” enabling financial technology/regulatory technology companies, and financial institutions to have the have opportunity to present innovative product, services, and approaches to enhance

\textsuperscript{100} https://www.fca.org.uk/firms/innovation/global-financial-innovation-network.


\textsuperscript{102} https://www.bis.org/hub/g20_techsprint.htm.


\textsuperscript{104} https://www.finra.org/rules-guidance/key-topics/fintech.
AML/CFT efforts. The FinCEN Innovation Hours Program is an element of FinCEN’s Innovation Initiative, which it is using to enhance national security through the promotion of responsible financial services innovation that furthers the purposes of the Bank Secrecy Act (“BSA”). It is intended that private sector innovation-new ways of using existing tools or by adopting new technologies- can help provide new and more efficient means of providing financial services to consumers and businesses, help financial institutions enhance their AML compliance programs and contribute to more effective and efficient record keeping and reporting under the BSA framework. 105

What Has Changed and Why Now is the Time to Rethink the Regulatory-Industry Dynamic

Leading up to the financial crisis of 2008 (the “Crisis”) to some degree, systemic risk emanated from the interconnectivity of individual firm’s idiosyncratic risks arising from the degree of counter party transactions and related extensions of credit between firms and their customers. These customers with other firms-were overlapping risk without any individual firm able to see the entire profile of their customers’ transactions and risk exposure- with their industry competitors. While these firms had in place risk management processes and tools such as VaR, they were, with exceptions, unable to truly gauge potential systemic risk building in the system leading up to the Crisis. Prior to the Crisis, a focus on regulation had been on front-office/sales practice issues, i.e., KYC and suitability. The post-Crisis focus was to a greater extent more concentrated on financial and operational risk, funding and liquidity risk, market structure and operational integrity, continuity, and resiliency, with an acknowledgement to the limits of disclosure to protect investors. 108

So, what has changed? One can say that the traditional risk paradigm of the financial services industry engaging in overreach and lax ERM poses systemic risk, but today the risk to the industry appears to be more exogenous than endogenous. Unlike the Crisis of 2008, which started in the U.S. financial system and spread globally, the next crisis to the financial system may be the result

105 https://www.fincen.gov/resources/fincens-innovation-hours-program.


of an external and unforeseeable shock(s) to system.\textsuperscript{109} Climate change, stranded assets,\textsuperscript{110} environmental losses, cybersecurity, cyber hacking,\textsuperscript{111} and ransomware are threats not solely

\textsuperscript{109} Some have cautioned that due to the degradation to the world’s biosphere, the world could be vulnerable to similar outbreaks. https://en.unesco.org/courier/news-views-online/pandemics-humans-are-culprits. In its 2021 ESG Trends to Watch, MSCI noted among other things, that: policymakers and investors will heed the alarm on biodiversity loss, adapting methodologies established for measuring and managing climate risk; and institutional investors may need to report on new ESG metrics for their portfolio companies (e.g., the European Union’s (“EU”) Sustainable Finance Disclosure Regulation (SFDR)). https://www.msci.com/www/blog-posts/2021-esg-trends-to-watch/02227813256.

\textsuperscript{110} It is estimated that approximately $900bn (one-third of the current value of big oil and gas companies) would disappear if governments more aggressively attempted to restrict the rise in temperatures to 1.5C above pre-industrial levels for the rest of this century, in accordance with the 2015 Paris Climate Accord. This will certainly impact investment banking firms that do business with oil companies and insurance companies for example, that own some of their debt. https://www.ft.com/content/95efca74-4299-11ea-a43a-c4b328d9061c.

\textsuperscript{111} It was reported North Korea stole approximately $2 billion from at least 38 countries across five continents over the last five years—greater than 3-times the amount of money it was able to generate through counterfeit activity over the previous four 40 years. The Cybersecurity and Infrastructure Security Agency (CISA), Treasury, FBI and U.S. Cyber Command identified malware and indicators of compromise used by the North Korean government in an ATM cash-out scheme—referred to as “FASTCash 2.0. https://us-cert.cisa.gov/ncas/alerts/aa20-239a. https://carnegieeurope.eu/strategiceurope/81599.
attributable to the industry’s own doing and cannot be addressed without working with industry competitors,\textsuperscript{112} regulators,\textsuperscript{113} and other stakeholders.\textsuperscript{114}

Within firms, the compliance function may be forced to expand its remit by functioning through a more ESG-Sustainability centric prism, whether by regulation or out of necessity. While numerous iterations of potential Know Yous have been discussed there is potentially some issue or risk that may slip through the various apertures of even the most comprehensive ERM program. While expanding the universe of Know Yous in a compliance program may be seen as a granular accretive approach to ensure compliance there are other means to address the burgeoning growth of risk, and regulatory responses to such risks. In addition to climate competent boards and related board committees, the idea of conflating climate risk and compliance into a single role or department may be worthy of further discussion. Today’s Chief Compliance Officer (“CCO”), with its stature and visibility is an outgrowth of regulatory issues arising a few decades ago whereby regulators addressed those issues by, among other things, imposing new registration and qualification requirements\textsuperscript{115} on CCOs and requiring them to participate in meaningful interactions with their Chief Executive Officers (“CEOs”) in connections with certifications they are required to make to regulators. A Chief Climate- Compliance Officer (CCCO) or Chief Sustainably and Compliance Officer (CSCO) designation may be worthy of further discussion by

\textsuperscript{112} Sheltered Harbor was created to protect customers, financial institutions, and public confidence in the financial system if a catastrophic event like a cyberattack causes critical systems—including backups—to fail. The Sheltered Harbor standard prepares institutions to provide customers timely access to balances and funds in such a worst-case scenario. Sheltered Harbor is a not-for-profit, industry-led initiative comprising financial institutions, core service providers, national trade associations, alliance partners, and solution providers dedicated to enhancing financial sector stability and resiliency. \url{https://www.shelteredharbor.org/}.

\textsuperscript{113} The Bank for International Settlements has established its Cyber Resilience Coordination Centre (CRCC) which has published a report, identifying, and comparing the range of observed bank, regulatory and supervisory cyber-resilience practices across jurisdictions. \url{https://www.bis.org/bcbs/publ/d454.htm}.

\textsuperscript{114} In March 2017, the G20 Finance Ministers and Central Bank Governors outlined an initial road map to increase the cyber resilience of the international financial system. In 2019, the Carnegie Institute partnership with the IMF, SWIFT, FS-ISAC, Standard Chartered, the Global Cyber Alliance, and the Cyber Readiness Institute introduced a cyber resilience capacity-building toolbox for financial institutions. \url{https://carnegieendowment.org/specialprojects/fincyber/}.

\textsuperscript{115} \url{https://www.finra.org/sites/default/files/NoticeDocument/p003809.pdf}.

\textsuperscript{116} \url{https://www.finra.org/rules-guidance/rulebooks/finra-rules/3130}. 

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regulators and the financial services industry.\textsuperscript{117} This COVID pandemic raised parallel issues of data integrity to support reasonable supervision and compliance particularly during this period. The exponential rise of data has, and will, continue to pose compliance risks and challenges on an ongoing basis – which is the known known. The degree of industry-regulatory cooperation is also to a large extent a known known. The extent that it will continue to grow is a known unknown. While not “joining them” the burgeoning growth of Sandboxes and Innovation Hubs does indicate that both stakeholders in the financial services ecosystem realize there is more to be gained by cooperating with each other than on working at cross purposes. While this form of “Regulatory Détente” - a known known- may not be the perfect path forward in an increasingly complex market-regulatory ecosystem that is vulnerable to shocks both sides cannot fully predict nor combat, it is a way to work synergistically rather than antagonistically. Perhaps, with the benefit of time and experience, the next and best Know Yours may be “Know Your Sandbox” and (Really) “Know Your Regulator”- with both responding to industry challenges by firms staffed with more cross-disciplined compliance-climate staffs. Without that, we default to a situation of unknown unknowns—where all stakeholders will be at a disadvantage and unable to even address known knowns, to detriment of our markets and the investing public.

\textsuperscript{117} The investment advisory industry is more focused on ESG and may be subject to more requirements (see Financial Factors in Selecting Retirement Plan Investment Act, whereby plans would have to consider ESG factors in a prudent manner consistent with their fiduciary obligations, the same legal standard that ERISA already applies to non-ESG investment factors. \url{https://www.federalregister.gov/documents/2020/11/13/2020-24515/financial-factors-in-selecting-plan-investments}. See also the Sustainable Investment Policies Act of 2020, that would amend the Investment Advisers Act of 1940 to require large asset managers to establish Sustainable Investment Policies, \url{https://www.govtrack.us/congress/bills/116/hr8960}. While the broker-dealer industry operates under a “suitability” standard (see FINRA Rule 2111), where the integration of ESG factors is not yet required in making suitable recommendations, the potential threat posed by climate change to all securities investments, may necessitate revisiting this standard at some point. It is also worth noting that The Long Term Stock Exchange in the U.S. has principles-based listing standards for its issuers which asks long-term focused companies to consider a broader group of stakeholders and the critical role they play in one another’s success, including a policy explaining how the company operates its business to consider all of the stakeholders critical to its long-term success, including: the company’s impact on the environment and its community. \url{https://longtermstockexchange.com/listings/principles/}
About the Author: William Jannace

William “Bill” Jannace has over 30 years of professional experience in the securities industry, having held positions at the American and New York Stock Exchanges and FINRA as well as being an adjunct professor, instructor and lecturer at various schools of higher learning, both domestically and abroad. This article represents the views and opinions of the author and does not reflect the views of any organization he is associated with or any banking or securities regulator.

He is an adjunct professor at Fordham School of Law, Baruch College-CUNY, Georgetown Global Education Institute, Wharton Business School, U.S. Army War College, and Metropolitan College. He has delivered courses to 11 schools over the past 20 years. His main areas of expertise include Broker-Dealer, Investment Company, and Adviser Regulation; Efficient Market Theory; Proxy Rules; M & A and Tender Offers; Corporate Governance; Environmental, Social, Governance (ESG) and Impact Investing Sovereign Wealth Funds; State Capitalism, and Geopolitics/Geo-Economics.

Bill was the Director and Counsel of FINRA’s (f/k/a NYSE Regulation) Sales Practice Policy department responding to interpretive, policy and disposition requests. He supervised a staff of professionals responsible for writing rules and amendments to rules and providing interpretive guidance to NYSE and FINRA staff and members regarding sales practice rules. Bill also coordinated policy responses to new products and services (e.g., Private IPO market, bank sweeps) and business models (crowd funding). In his FINRA career, Bill participated in the Regulatory Expert program regarding Research, AML, MSRB and Internal Controls violations as well as participated in FINRA-industry committee meetings and industry outreach programs and supporting FINRA-IOSCO initiatives and its MOUs with foreign regulators.

Before joining FINRA, Bill was an Enforcement Attorney with the American Stock Exchange, where he concentrated on broker-dealer regulatory and compliance issues, and options and equity sales practice and trading violations.

Previously, he worked with the Legal-Compliance Departments of TD Securities and Smith Barney providing legal advice on Regulation D/S offerings/144A/144 resales/10b-18 share buybacks; Offering Memorandums/Underwriting and Prime Brokerage Agreements; and ensuring trade reporting/Control Room/employee/firm trading compliance.

When Bill was an account executive at Georgeson & Co. and D.F. King & Co., Inc. – proxy-solicitation firms – he liaised for corporations and institutional shareholders regarding corporate governance issues and proxy fights; and liaised with trading floor and arbitrageurs to provide market color to listed companies.

In addition to his work in the US, Bill has participated in several training programs for foreign stock exchanges and lectured abroad, including seminars for the Russian Securities Commission.
and Stock Exchange; Kenyan Capital Markets Authority; East African Securities Regulatory Authority; Saudi Arabian Capital Markets Authority; Taiwan Stock Exchange; and several other international authorities and securities commissions. He is also involved in the social-philanthropy/impact investment market in the Balkans, Caucasus and other countries in East Africa and the Middle East.

**Instructional Experience**

New York Law School: Adjunct Professor of Law
Securities Training Corporation
NYU: School of Continuing & Professional Studies: Lecturer
Baruch College: Division of Continuing Studies: Instructor
Adelphi University School of Continuing Education: Instructor
New York Society of Security Analysts: Instructor
Pace University: Adjunct Professor

**Professional Designations**

LL.M Corporate, Banking and Securities Law: Fordham University School of Law - New York
JD: New York Law School
BA, Economics: New York University

**Bar Admissions**

New York and Connecticut bars

**Professional Affiliations**

ACAMS - Certified Anti-Money Laundering Specialists
FINRA Certified Arbitrator
Fellow, Charted Institute of Arbitrators

**Speaking Engagements**

Bill has delivered numerous speaking engagement, covering topics on: Securities Regulation, Market Structure, Clearance and Settlement and Corporate Governance, to these groups:

- Chinese Securities Regulatory Commission
- China Construction Bank
- Iraq Stock Exchange
- Securities and Exchange Bureau of India
- Tokyo Stock Exchange
• Hawkamah Institute for Corporate Governance
• Kenyan Capital Markets Authority
• El Salvador Securities and Exchange Commission
• Ghana Stock Exchange
• Mexican Banking and Securities Commission
• Sarajevo Stock Exchange/Securities Commission
• Saudi Arabian Capital Markets Authority
• Central Bank of Kosovo
• Malaysian Securities Commission
• SEC Annual Institute for Securities Market
• US State Department Foreign Delegation
• Hong Kong Securities Commission
• Philippine Dealing System Holdings
• Treasury Department of Argentina
• Ontario Securities Commission
• Securities Operations Forum
• ALI-ABA Compliance and Enforcement Conference
• ABA Conference

Publications

“A New World Order: The Rule of Law, or the Law of Rulers?” William Jannace and Paul Tiffany, 42 Fordham Int’l L.J. 1379 (2019). Available at: https://ir.lawnet.fordham.edu/ilj/vol42/iss5/2


“Cautionary Notes for Supply Chain Managers and Others Involved in Global Sourcing & Partnerships (Human Trafficking & Modern Slavery Conditions Raise Reputational Risks),” Governance & Accountability Institute, January 2018.


In closing arguments, defense counters that jury doesn’t have ‘the full story’

Elizabeth Holmes has testified that she never intentionally misled anyone about the blood-testing company she founded.

PHOTO: PETER DASILVA/REUTERS

By Heather Somerville  [Follow]
Updated Dec. 16, 2021 7:33 pm ET

SAN JOSE, Calif.—Prosecutors in Elizabeth Holmes’s criminal-fraud trial made their case one more time in closing arguments Thursday as jurors move closer to deciding the fate of the Theranos Inc. founder.

Assistant U.S. Attorney Jeffrey Schenk gave jurors a summation of the government’s case against Ms. Holmes, arguing she knowingly and willfully lied about Theranos’s technology to salvage her startup as it quickly ran low on money.

“She chose to be dishonest,” Mr. Schenk said. “That choice was not only callous, it was criminal.”
The closing arguments offer a bookend to the closely watched trial that began Sept. 8, in which Ms. Holmes faces 11 counts of wire fraud and conspiracy to commit wire fraud. In his hourslong conclusion, Mr. Schenk sought to erase any doubt in jurors’ minds about Ms. Holmes’s guilt. He characterized her alleged fraud as deliberate, delineating numerous lies that were repeated to investors and business partners. Mr. Schenk said the lies were so convincing they resulted in a financial windfall and business deals for Ms. Holmes’s company.

Ms. Holmes could have told the truth, said Mr. Schenk, but honesty wouldn’t have brought in hundreds of millions of dollars in investment that Theranos needed, nor would it have brought in revenue from patients.

“Imagine for a moment what an honest pitch would have sounded like to investors in 2013,” Mr. Schenk told the jury. After 10 years of working on its technology, the company could perform only 12 types of patient blood tests on its proprietary devices, and even those were unreliable. And, contrary to claims Ms. Holmes made, Theranos didn’t have contracts with the military and its technology hadn’t been validated by major pharmaceutical companies, Mr. Schenk said.

“Ms. Holmes knew that these honest statements would not have led to revenue and she chose a different path,” he said.

After the government finished Thursday afternoon, one of Ms. Holmes’s defense attorneys began presenting closing arguments.
“The picture can change quite a good deal as a result of waiting for the full story,” defense lawyer Kevin Downey told the jury as he delved into his arguments.

The case could go to the jury as soon as Friday, after prosecutors get to have the last word. Deliberations are expected to stretch into next week.

Mr. Schenk reminded the jury of the 29 witnesses the prosecution called to testify—former Theranos employees, a former board member, investors, patients and doctors—and listed the categories of lies Ms. Holmes allegedly told that helped her raise money and become a Silicon Valley superstar.

He said Ms. Holmes overstated Theranos’s technological capabilities, including that it could run tests for a full range of health conditions using a finger prick of blood; projected financial stability by inflating revenue projections; and gave misleading technology demonstrations. She misrepresented Theranos’s relationship with Walgreens Boots Alliance Inc., Mr. Schenk said, and concealed Theranos’s use of third-party commercial analyzers. She claimed Theranos had been validated by pharmaceutical companies, including by forging the logos of pharmaceutical giants onto Theranos reports, and touted contracts with the military, he said. She lied to the media and then shared the articles that contained her misstatements with investors, he said.

Mr. Schenk attempted to knock down an excuse Ms. Holmes often gave to investors and business partners during her time leading Theranos, one she repeated in her testimony during trial: She couldn’t share certain things about the company because they were trade secrets.

“The trade-secrets excuse is a red herring,” Mr. Schenk told the jury. “I don’t think you should accept the fact that trade secrets give her permission to make false statements.”

The prosecution must prove that Ms. Holmes intended to lie and knew she was acting unlawfully to secure a conviction. Mr. Schenk told the jury that Ms. Holmes’s alleged lies were intentional because of the depth of knowledge she had about her own company. She controlled the company’s most vital functions, he said: communications with investors, business development, public relations, financial projections, business partnerships, the company’s website and what was said to doctors and regulators.

Mr. Schenk showed the jury emails conveying customer complaints about inaccurate test results that were sent to Ms. Holmes, as well as text messages from Ramesh “Sunny”
Balwani, Ms. Holmes’s former boyfriend and Theranos’s chief operating officer, alerting her to the terrible state of the company’s lab.

In one email to Ms. Holmes, an attorney hired by Theranos raised questions about the truthfulness of claims on the company’s website. Mr. Schenk displayed internal financial projections the company controller shared with Ms. Holmes that show a much more modest financial outlook than the numbers Ms. Holmes gave investors.

“They are not just false statements, they are knowingly false statements,” Mr. Schenk said, in what became a refrain during his closing arguments.

Another element of the crime, Mr. Schenk said, is materiality, or showing the alleged misstatements could have impacted a victim’s decision-making. Mr. Schenk argued that what Ms. Holmes said to investors mattered to them when they chose to give Theranos millions of dollars, and that what patients were told informed their decision to get their lab tests done with Theranos.

Mr. Schenk said Ms. Holmes knew how to “catch flies with honey”—what to say to investors and how to treat them to get their money.

The defense countered that Ms. Holmes was earnest in her exchanges with investors. She conveyed to them only the feedback she got from the scientists and engineers who worked for her and that of medical experts at institutions such as Johns Hopkins University who told her Theranos’s technology worked, Mr. Downey told jurors.

A medical expert at Johns Hopkins who reviewed Theranos’s technology reported that it was “novel and sound,” according to earlier testimony.

“What does it say about Ms. Holmes?” Mr. Downey asked the jury. “She wasn’t afraid to have this technology validated.” He said Ms. Holmes’s willingness to have outside experts scrutinize her technology and that she welcomed feedback showed she didn’t have an intent to defraud.
He questioned the plausibility of Theranos deceiving Walgreens, as prosecutors have alleged. At the time of the first meeting between the companies, in 2010, Theranos was a 6-year-old startup with a 26-year-old CEO and no public presence. Walgreens was a major national retailer and publicly traded company, Mr. Downey said.

“It’s hard to see how Walgreens was defrauded,” Mr. Downey said.

Ms. Holmes’s testimony about the alleged emotional and sexual abuse she suffered from Mr. Balwani became the centerpiece of her time on the witness stand, although it didn’t directly address the charges against her. Mr. Balwani has denied all allegations of abuse.

Jurors were told by Mr. Schenk they shouldn’t let these allegations become an obstacle in their deliberations. He said that if jurors return a verdict of guilty, they aren’t saying they don’t believe her claims of abuse; or conversely, a not-guilty verdict doesn’t mean they believe her abuse allegations.

Mr. Schenk also cautioned the jury not to give weight to the defense’s portrayal of Ms. Holmes as an inexperienced and naive entrepreneur, because she dropped out of college at age 19 to start Theranos. By the time of the alleged fraud, he said, she had had many years of experience as CEO.

“Theranos didn’t need more experience to avoid the fraud,” he said. “They needed a CEO and a COO who interacted with people honestly.”

—Sara Randazzo contributed to this article.

Write to Heather Somerville at Heather.Somerville@wsj.com

Appeared in the December 17, 2021, print edition as ‘Holmes Trial Moves to Closings.’
Justice in Aging is a national organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources.

Since 1972 we’ve focused our efforts primarily on populations that have traditionally lacked legal protection such as women, people of color, LGBT individuals, and people with limited English proficiency.
Overview of Social Security and SSI Benefits
### Social Security (RSDI)
- Administered by Social Security Administration (SSA)
- Disability standard used to determine eligibility for Social Security Disability Insurance (SSDI)
- Employment-based social insurance program
- Funded through payroll (FICA) taxes, paid into Social Security trust funds
- Title II of the Social Security Act

### Supplemental Security Income (SSI)
- Administered by Social Security Administration (SSA)
- Disability standard used to determine eligibility for SSI disability
- Strictly need-based, “means-tested” program
- Funded by general fund taxes
- Title XVI of the Social Security Act
Social Security (RSDI)

Social Security Beneficiaries (65 Million)

- Retirement: 77%
- Survivor: 9%
- Disability: 14%

*JUSTICE IN AGING: FIGHTING SENIOR POVERTY THROUGH LAW*
Supplemental Security Income (SSI)

SSI Recipients (7.7 million)

- Under Age 18: 13.6%
- Age 18 - 64: 56.7%
- Age 65+: 29.7%
Who is Eligible for Social Security Benefits?
Social Security Retirement Benefits for Wage Earners

- Calculation based on person’s lifetime earnings, age at retirement
  - Primary Insurance Amount (PIA)
  - Average monthly benefit (Nov 2021): $1,519

- Quarters of Coverage
  - Fully insured = 40 quarters of coverage
    - (20 out of last 40 to be “disability insured”)
  - 2022: $1,510 = one quarter of coverage
  - Only 4 quarters can be earned per year
# Full Retirement Age

Age To Receive Full Social Security Benefits (Called "full retirement age" or "normal retirement age.")

<table>
<thead>
<tr>
<th>Year of Birth*</th>
<th>Full Retirement Age</th>
</tr>
</thead>
<tbody>
<tr>
<td>1937 or earlier</td>
<td>65</td>
</tr>
<tr>
<td>1938</td>
<td>65 and 2 months</td>
</tr>
<tr>
<td>1939</td>
<td>65 and 4 months</td>
</tr>
<tr>
<td>1940</td>
<td>65 and 6 months</td>
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<tr>
<td>1941</td>
<td>65 and 8 months</td>
</tr>
<tr>
<td>1942</td>
<td>65 and 10 months</td>
</tr>
<tr>
<td>1943--1954</td>
<td>66</td>
</tr>
<tr>
<td>1955</td>
<td>66 and 2 months</td>
</tr>
<tr>
<td>1956</td>
<td>66 and 4 months</td>
</tr>
<tr>
<td>1957</td>
<td>66 and 6 months</td>
</tr>
<tr>
<td>1958</td>
<td>66 and 8 months</td>
</tr>
<tr>
<td>1959</td>
<td>66 and 10 months</td>
</tr>
<tr>
<td>1960 and later</td>
<td>67</td>
</tr>
</tbody>
</table>

Note: Medicare eligibility still begins at 65
Retirement Age

• **Early Retirement**
  ▪ Age 62 to FRA = reduced benefits (20-30%)

• **Full Retirement Age (FRA)**
  ▪ 65 to 67 = regular benefits

• **Delayed retirement**
  ▪ FRA to 70 = increased benefits (up to 32% more)

• **Effect of early or late retirement:**
  ▪ ssa.gov/oact/quickcalc/early_late.html
Social Security Benefits for People with Disabilities

- **Social Security Disability Insurance (SSDI)**
  - “Unable to engage in substantial gainful activity because of a medically determinable impairment which is expected to last twelve months or result in death”
  - Physical, mental, or combination of impairments
Auxiliary Benefits for Relatives of Retired/Disabled Workers

• **Spouses**
  - Age 62 or older
  - At least 12 months of marriage
  - Divorced spouse married at least 10 years to wage earner

• **Children/Stepchildren/Grandchildren**
  - Unmarried
  - Under age 18 (or 19 if still in high school)
  - Adult with disability that began before age 22, no substantial earnings
Survivor Beneficiaries

• **Widow(er)s**
  - Married for at least 9 months
  - Age 60+; over age 50 if disabled
  - Including divorced spouses, if married for 10 years and currently unmarried

• **Children**
  - Unmarried
  - Under age 18 (or 19 if still in high school)
  - Adult with disability that began before age 22, no substantial earnings

• **Mothers/Fathers**

• **Dependent Parents**
Where are these rules?

- **Code of Federal Regulations**
  - 20 C.F.R. §§ 404.310 - 404.384
  - 20 C.F.R. §§ 404.1505 - 404.1511

- **POMS**
  - RS § 00201.000 et seq. (retirement)
  - DI § 10100.000 et seq. (disability)
  - RS § 00202.000 et seq. (spouses)
  - RS § 00203.000 et seq. (child)
  - RS § 00207.000 et seq. (widow(er)s)
  - RS § 00208.000 et seq. (mothers/fathers)
  - RS § 00209.000 et seq. (parents)
Who is Eligible for SSI Benefits?
Basic Eligibility

• **Specific Category**
  - Blind or disabled, or
  - Aged 65 or older

• **Income/Resources**
  - Limited income, and
  - Limited resources ($2,000/$3,000)

• **Status**
  - U.S. citizen, or in one of certain categories of immigrants
Benefit of SSI Eligibility: Medicaid Coverage

• In most states, SSI recipients are automatically eligible for Medicaid as soon as they are eligible for SSI

• 9 exceptions:
  ▪ Connecticut, Hawaii, Illinois, Minnesota, Missouri, New Hampshire, North Dakota, Oklahoma, and Virginia
Where are these rules?

- **Code of Federal Regulations**
  - 20 C.F.R. §§ 416.101 - 2227

- **POMS**
  - SI § 00500.000 et seq. (eligibility)
  - SI § 00800.000 et seq. (income)
  - SI § 01100.000 et seq. (resources)
  - SI § 01300.000 et seq. (deeming)
  - SI § NY01415.025 (New Jersey state supplement)
  - SI § NY01415.026 (New York state supplement)
SSDI/SSI Disability Standard
Definition of Disability

• **For an adult (18 – 64 years old):**
  ▪ **Medically determinable** physical or mental impairment(s)
  ▪ Prevents from working
  ▪ Expected to last at least 12 months / to result in death

• **Substantial Gainful Activity (2022):**
  $1,350 monthly

• **Parallel process for children, except focused on functional limitations, not ability to work**
Disability Determination Process (For Adults)

1. Is claimant working?
2. Is claimant’s medical condition “severe”?
3. Is claimant’s medical condition found in the Listings?
4. Can claimant do any previous job?
5. Can claimant do any other job?
Appeals Process

1. Reconsideration
2. Administrative Law Judge hearing
3. Review by the Appeals Council
4. Federal court review

• Learn More: NCLER Social Security Reconsideration Appeals
Questions?

klang@justiceinaging.org
The Supplemental CLE Reading Material for my section of the session are:


Legal Basics- Social Security (acl.gov)

Supplemental Security Income (SSI) Basics (acl.gov)